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RIGHTS OF PERSONS COMPELLED TO APPEAR IN FEDERAL AGENCY INVESTIGATIONAL HEARINGS

David C. Murchison*

By statutes designed to protect the public interest, many federal administrative agencies—such as the Interstate Commerce Commission, the Federal Communications Commission, the Securities and Exchange Commission, the Federal Trade Commission, and the Civil Aeronautics Board—are granted authority to conduct investigations dealing with substantive matters committed to their respective jurisdictions.¹ In an increasing number of instances, these agencies are empowered to utilize compulsory process; persons may be ordered to appear and give testimony or to produce documents in so-called investigational hearings, subject to criminal sanctions for noncompliance.² The use of investigational hearings by these agencies as an ancillary law enforcement tool would appear to be more widespread than at any previous time in the history of the “fourth branch of government.”

In recent decades, much has been written by the press, and a great deal has been heard from the courts about agency personnel security risks who should not be dismissed from employment without being accorded procedural rights, aliens who should not be de-

* Member of the District of Columbia Bar.—Ed. This article is adapted from the remarks of the author before the Administrative Law Committee of the Federal Bar Association in Philadelphia, Pennsylvania on September 24, 1963. Appreciation is expressed for the assistance of Robert W. Steele of the Bar of the District of Columbia.

¹ Interstate Commerce Commission, 24 Stat. 383 (1887), as amended, 49 U.S.C. § 12 (1958); 49 Stat. 548, 550 (1935), as amended, 49 U.S.C. § 305(d) (1958); 49 Stat. 543 (1935), 49 U.S.C. § 901 (1958). The Water Carrier Act changed the short title to “part III of the Interstate Commerce Act.” 54 Stat. 919 (1940), 49 U.S.C. § 301 (1958); 54 Stat. 946 (1940), 49 U.S.C. § 916 (1958); 56 Stat. 746 (1942), 49 U.S.C. § 1017 (1958). Federal Communications Commission, 48 Stat. 1073, 1094 (1934), 47 U.S.C. §§ 208, 403 (1958). Securities & Exchange Commission, 48 Stat. 85, 86 (1934), 15 U.S.C. §§ 77s, 77v (1958); 48 Stat. 899 (1934), 15 U.S.C. § 78u (1958); 49 Stat. 831 (1935), 15 U.S.C. § 79r (1958); 53 Stat. 1174 (1939), 15 U.S.C. § 77uuu (1958); 54 Stat. 842 (1940), 15 U.S.C. § 80a-41 (1958); 54 Stat. 853 (1940), 15 U.S.C. § 80b-9 (1958); *Jones v. SEC*, 298 U.S. 1 (1936). Federal Trade Commission, 38 Stat. 722, 723 (1914), 15 U.S.C. §§ 49, 50 (1958). Civil Aeronautics Board, 72 Stat. 792 (1958), 49 U.S.C. §§ 1484(a)-(d)(i) (1958). Some sixty federal acts, half of them passed since 1933, have given investigative subpoena powers to executive and administrative officers. For a comprehensive study of these specific enactments, see Rogge, *Inquisitions by Officials*, 47 MINN. L. REV. 939 (1963).

² Illustrative criminal provisions are contained in the statutes of the following agencies: Federal Power Commission, 49 Stat. 856 (1935), 16 U.S.C. § 825f (1958); Federal Trade Commission, 38 Stat. 722, 723 (1914), 15 U.S.C. §§ 49, 50 (1958); Internal Revenue Service, INT. REV. CODE OF 1954, §§ 7604, 7210; Labor Department, 39 Stat. 748 (1916), 5 U.S.C. § 780 (1958); 49 Stat. 2038 (1936), 41 U.S.C. § 39 (1958); 52 Stat. 1065, 29 U.S.C. § 209 (1958); 72 Stat. 835, 33 U.S.C. § 941(b) (1958); 73 Stat. 539, 29 U.S.C. § 521 (Supp. IV, 1963); 76 Stat. 37, 29 U.S.C. § 308 (Supp. IV, 1963).

ported without being given their rights, and alleged Communists who should not be deprived of their rights in agency actions.³ But it is not an over-generalization to say that surprisingly little attention has been focused on the rights of individuals in the business community who are compelled to submit to interrogation on matters which may be the subject of subsequent agency trial proceedings. The public at large seems generally unaware of the collision which occurs between the alleged rights of these persons and the stated procedures of administrative agencies whose activities are mainly concerned with regulation of industry and commerce.

The basic problem is simply stated: What rights does the private businessman have when an agency decides to investigate his conduct and invokes compulsory process, enforceable by criminal penalties, to compel him to appear and give sworn testimony on a record?

In 1936, in *Jones v. SEC*,⁴ the Supreme Court rather strongly circumscribed the investigative process in these terms:

"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."⁵

These words have a traditional ring. Few lawyers would question their accuracy. Certainly they correctly sum up the views of Anglo-Saxon lawmakers who dissolved the courts of Star Chamber in 1640.

Yet commentators in the administrative law field have generally concurred in the view that the judicial attitude expressed in *Jones v. SEC* has become "utterly exhausted."⁶ Indeed, text writers during the 1930's and early 1940's often appeared to take the position that procedural improprieties in investigatory hearings were

³ See *Greene v. McElroy*, 360 U.S. 474 (1959); *Watkins v. United States*, 354 U.S. 178 (1956); *United States v. Minker*, 350 U.S. 179 (1956); *Marcello v. Bonds*, 349 U.S. 302 (1955); *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950).

⁴ 298 U.S. 1 (1936).

⁵ The language quoted is from the concurring opinion of Mr. Justice Sawyer in *In re Pacific Ry. Comm'n*, 32 Fed. 241, 263 (N.D. Cal. 1887).

⁶ See 1 DAVIS, *ADMINISTRATIVE LAW* § 3.01, at 162 (1951); FORKOSCH, *ADMINISTRATIVE LAW* § 139, at 226-27 (1956); Newman, *Federal Agency Investigations: Procedural Rights of Subpoenaed Witnesses*, 60 MICH. L. REV. 169 (1961).

simply of no consequence. For instance, one commentator stated: "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."⁷ Of course, this view ignores the realities of many types of investigational hearings now conducted.

While some administrative agencies are merely authorized to conduct general fact-finding or economic investigations which cannot lead to an adverse final order against persons interrogated, many agencies conducting investigatory hearings are authorized and required to institute adjudicatory or trial proceedings to determine and halt violations of the laws which they administer.⁸ In instances where agencies compel the attendance of potential respondents or officials of potential respondent corporations for the purpose of investigating suspected violations of law, it is superficial at best to conclude that the citizen cannot be harmed or that substantial rights are not involved. In practice, agency investigators often conduct these hearings with all the crusading spirit of prosecutors. The record made during investigational hearings may constitute the primary evidence relied upon at trial. In many instances, investigational hearings are little more than one part of a continued procedural sequence looking toward the adjudicative stage and the ultimate entry of a final order against the person investigated or some business entity with which he is affiliated.⁹

While the courts have not had an opportunity to develop a definitive body of decisional law fully delineating constitutional safeguards, there are a number of statutory provisions, sometimes overlooked, which directly protect the person compelled to appear in investigational hearings. The principal source of these statutory rights is the Administrative Procedure Act.¹⁰ Drafted in response

⁷ Note, 54 HARV. L. REV. 1214, 1216 (1941).

⁸ The Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board are typical of such agencies.

⁹ In some agencies, investigations are conducted as one part of a comprehensive procedure under which a single attorney is in charge of a case at all phases. For instance, the Federal Trade Commission's reorganization plan, announced on June 25, 1961, reveals the discontinuance of the Commission's separate investigatory unit and the combination of investigatory and prosecuting functions in a single office. The attorney-in-charge is responsible for pre-complaint investigation, prosecution, and post-adjudication investigations and proceedings directed at enforcement of cease-and-desist orders. The Commission's announcement of June 25, 1961 stated: "A major innovation of the new organization will be the centering of responsibility on individual attorneys assigned to the Restraint of Trade and Deceptive Practice Bureaus for the forward progress of each case from the time it is entered for investigation until the case is completed, including checks on compliance with any cease and desist order that might be issued against the respondent." U.S. Federal Trade Commission—Rules, Policy, Organization, and Acts, June 25, 1961.

¹⁰ 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-12 (1958).

to widespread criticism of increasing agency powers in the 1930's and early 1940's,¹¹ the act set up procedural safeguards in three types of agency proceedings: (1) rule-making or quasi-legislative proceedings, (2) trial or quasi-adjudicative proceedings, and (3) investigatory proceedings. Some of the provisions of the act, by their terms, govern only adjudicative or rule-making proceedings. Other provisions, such as sections 1, 3, 6, 9, and 12, have general application and apply to all types of proceedings, including investigations.¹²

Of course, equally important sources of statutory guarantees may be found in the basic statutes which authorize particular agencies to carry on investigative hearings. It is axiomatic that an agency cannot act in excess of the authority which it has been granted by Congress. Moreover, where the statute is silent on matters of traditional rights, the Supreme Court teaches us that, when an agency purports to limit or deny these rights, it may exceed its statutory authority.

This latter principle was enunciated in the landmark decision of *Greene v. McElroy*,¹³ where the Supreme Court ruled that, in the absence of express authorization, an agency could not revoke the security clearance of an employee of a defense contractor in an administrative action where he was denied the traditional safeguards of confrontation and cross-examination.¹⁴ The Court held

¹¹ See *Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 1, 2 (1941). In the House Judiciary Committee Report, the Administrative Procedure Act was labeled as "an outline of minimum essential rights and procedures." S. Doc. 248, 79th Cong., 2d Sess. 250 (1946). The Senate Judiciary Committee Report makes substantially the same comment. *Id.* at 205. The Supreme Court recognized this legislative history in *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950), where it commented: "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."

¹² The drafters of the Administrative Procedure Act in the House Judiciary Committee prepared an extensive chart graphically demonstrating the intended application of the various sections of the act. See S. Doc. No. 248, 79th Cong., 2d Sess. 266-67 (1946).

¹³ 360 U.S. 474 (1959).

¹⁴ The Supreme Court emphasized that drastic procedures will not be sanctioned unless they are expressly authorized. Thus, the argument that Congress and the President had impliedly authorized an inquisitorial procedure by inaction and acquiescence was flatly rejected. The Court said: "[I]t must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Cf. *Watkins v. United States*, 354 U.S. 178; *Scull v. Virginia*, 359 U.S. 344. Such decisions cannot be assumed by acquiescence or non-action. *Kent v. Dulles*, 357 U.S. 116; *Peters v. Hobby*, 349 U.S. 331; *Ex parte Endo*, 323 U.S. 283, 301-02. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see *Peters v. Hobby*, *supra*, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Id.* at 507.

that, where there is no statute or the statute is silent, "traditional safeguards" such as confrontation and cross-examination are "assumed" to be included in the operative provisions of the law.¹⁵ This aspect of the *Greene* decision was not limited to adjudicatory proceedings.¹⁶

Let us consider some of the more significant rights, statutory or otherwise, which may be asserted by a person compelled to submit to interrogation in an administrative investigational hearing.

The Rights of Cross-Examination, Confrontation, and Appraisal

No express provision of the Administrative Procedure Act deals with the rights of cross-examination, confrontation, and appraisal in investigatory hearings. Section 7 of the act, which deals with cross-examination and confrontation, is limited to adjudicatory and rule-making proceedings. The contention that this section and the Constitution affirmatively guarantee such rights in investigational hearings was rejected in the Supreme Court's decision in *Hannah v. Larche*,¹⁷ and in the decision of Judge Leon Yankwich in *FCC v. Schreiber*.¹⁸

The *Hannah* case arose under the Civil Rights Act,¹⁹ which created a temporary Civil Rights Commission and granted it the limited power to conduct fact-finding inquiries to determine whether state governments were depriving Negroes of their right to vote. The Commission had received sixty-seven secret complaints from Negro informants in Louisiana, alleging that they had been denied the right to vote. The Commission scheduled hearings to be held in Shreveport, Louisiana, and thereafter served subpoenas upon various voting registrars commanding them to appear at the hearings. The Commission notified the persons subpoenaed that, under its rules, persons compelled to appear *would not be told the identity of informants* and *would not be permitted to cross-examine such accuser informants*. Suits for injunction were then filed by the registrars in the United States district court on the sole ground that the deprivation of the rights of confrontation

¹⁵ The Court said: "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." *Id.* at 507-08.

¹⁶ The Court stressed the fact that it had in the past been zealous to protect these rights from erosion "not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Id.* at 497.

¹⁷ 363 U.S. 420 (1960).

¹⁸ 201 F. Supp. 421 (S.D. Cal. 1962), appeal pending in the Court of Appeals for the Ninth Circuit.

¹⁹ 71 Stat. 634 (1957), as amended, 42 U.S.C. §§ 1975-75e (1958 & Supp. IV, 1963).

and cross-examination was not authorized by the Civil Rights Act, and that if the deprivation was authorized the act was unconstitutional. The district court ruled that Congress had not authorized the Commission, within the meaning of *Greene v. McElroy*, to adopt rules which denied these rights; it therefore enjoined the holding of the hearings.²⁰

On review, the United States Supreme Court reversed, deciding three points: (1) Congress had expressly authorized the Civil Rights Commission to promulgate rules wherein confrontation, appraisal, and cross-examination were not accorded to subpoenaed persons.²¹ (2) Under the Constitution, it was not a denial of due process for Congress to extinguish the rights of confrontation, appraisal, and cross-examination in a purely investigatory hearing conducted by an agency that had no power to adjudicate.²² (3) Section 7 of the Administrative Procedure Act, which by its terms is limited to adjudicatory and rule-making procedures, did not grant the right to confront or cross-examine third-party accuser witnesses in a purely investigatory hearing.²³

The *Hannah* decision concerned only the rights of witnesses in general fact-finding hearings conducted by an agency having no adjudicative functions. The Court placed great emphasis on the fact that the Civil Rights Commission "does not and cannot take any affirmative action which will affect an individual's legal rights."²⁴ Manifestly, the decision does not hold that *all* agencies have the right to deprive subpoenaed witnesses of the rights of confrontation, cross-examination and appraisal in investigatory hearings. At the threshold, the key question, as recognized by the Court in *Greene* and reaffirmed in *Hannah*, is whether Congress or the President has authorized the agency to abrogate these rights.

In *Hannah* the district court had ruled that the doctrine of *Greene* applied to investigations as well as adjudications, and that an agency might not deprive plaintiffs of their rights of confrontation and cross-examination in the absence of express authorization

²⁰ *Larche v. Hannah*, 176 F. Supp. 791 (W.D. La. 1959); *Larche v. Hannah*, 177 F. Supp. 816, 824-25 (W.D. La. 1959), where the court said: "In accordance with the teachings of *Greene*, we decide only that in a hearing such as the one envisaged here, the Commission had no right to deny the accused Registrars the traditional rights of confrontation and cross-examination in the absence of explicit congressional authorization to do so."

²¹ *Hannah v. Larche*, 363 U.S. 420, 439 (1960).

²² *Id.* at 440. In *FCC v. Schreiber*, 201 F. Supp. 421 (S.D. Cal. 1962), Judge Yankwich relied upon the authority of *Hannah* in ruling that a witness subpoenaed to testify in a general fact-finding investigation of the FCC had no right to cross-examine third persons.

²³ *Hannah v. Larche*, *supra* note 21, at 452.

²⁴ *Id.* at 443.

for such action.²⁵ The Supreme Court did not disagree with this basic approach to the issue. Significantly, it expressly followed the district court approach and took pains to determine the threshold question of whether Congress had authorized the rules adopted by the Civil Rights Commission. The Court said:

"The considerations which prompted us in *Greene* to analyze the question of authorization before reaching the constitutional issues presented are no less pertinent in this case. Obviously, if the Civil Rights Commission was not authorized to adopt the procedures complained of by the respondents, the case could be disposed of without a premature determination of serious constitutional questions."²⁶

The Court then undertook an extensive analysis of the legislative history of the Civil Rights Act. Disagreeing with the district court, it concluded that Congress had expressly authorized the Civil Rights Commission to carry on investigatory hearings without according the rights of confrontation or cross-examination.²⁷

Having determined that the procedures adopted by the Civil Rights Commission had been expressly authorized, the Court turned to the separate constitutional question of whether due process required that the rights of cross-examination, confrontation, and appraisal be accorded in purely investigatory proceedings. In reaching a negative conclusion on this issue, the Court emphasized that the Commission was not empowered to "take any affirmative action which will affect an individual's legal rights."²⁸ One may ponder whether the constitutionality of a congressional enactment would be upheld which affirmatively authorized the denial of these rights by an agency empowered to prosecute and adjudicate as well as investigate.

Since *Hannah* did not overrule *Greene*, but merely found the existence of an authorization not present in *Greene*, the vitality of

²⁵ *Larche v. Hannah*, 177 F. Supp. 816, 825 (W.D. La. 1959).

²⁶ *Hannah v. Larche*, 363 U.S. 420, 430 (1960).

²⁷ The Supreme Court in *Hannah* distinguished the legislative authority for the procedures involved in the *Greene* case in the following words: "The facts of this case present a sharp contrast to those before the Court in *Greene*. Here, we have substantially more than the mere acquiescence upon which the Government relied in *Greene*. There was a conscious, intentional selection by Congress of one bill, providing for none of the procedures demanded by respondents, over another bill, which provided for all of those procedures. We have no doubt that Congress' consideration and rejection of the procedures here at issue constituted an authorization to the Commission to conduct its hearings according to the Rules of Procedure it has adopted, and to deny the witnesses the rights of appraisal, confrontation, and cross-examination." *Id.* at 439.

²⁸ *Id.* at 443.

the *Greene* doctrine would appear undiminished.²⁹ That doctrine explicitly holds that an agency may not curtail or extinguish traditional rights (such as cross-examination and confrontation) unless Congress authorizes it to do so—even though no constitutional inhibition has been violated by the agency. Frank C. Newman has correctly commented that *Hannah* “governs only those cases where the congressional intent to deny confrontation and cross-examination seems clear.”³⁰

The legal test governing the availability of cross-examination and confrontation thus would appear to be this: If Congress does not authorize the abrogation of these rights, the court will presume they are available, without reaching the further question of whether the abrogation has been shown to violate the due process clause. If Congress expressly authorizes the denial of these rights, then the question is whether the abrogation in investigational hearings constitutes a violation of the Constitution not found to be present in *Hannah*. The perplexing fact today is that the investigational procedures of many agencies have continued to ignore this test.

The Right To Be Represented by Counsel

While the Administrative Procedure Act is silent as to such rights as cross-examination in investigational hearings, it is specific in guaranteeing the right of legal representation. Section 6(a) expressly provides: “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 . . .”

The legislative history of section 6(a) makes it clear that the drafters of the act intended it to apply in investigatory hearings, whether public or private, as well as in adjudicatory matters. Thus, the report of the House Judiciary Committee expressly stated: “The section is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel

²⁹ This fact seems to have been obscured by undue emphasis on the Supreme Court's far-ranging discussion of the separate constitutional issue. In connection with that further question, the Supreme Court said that the *Greene* decision “lends little support to the respondents' position. The governmental action there reviewed was certainly of a judicial nature. The various Security Clearance Boards involved in *Greene* were not conducting an investigation; they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment. By contrast, the Civil Rights Commission does not make any binding orders or issue ‘clearances’ or licenses having legal effect.” *Id.* at 452. Of course, this statement was not made in connection with the critical question of authorization.

³⁰ Newman, *supra* note 6, at 178.

before any agency in connection with any function, matter, or process whether formal, informal, public or private.”³¹

In spite of this clear statutory mandate, the applicable rules of many administrative agencies as recently as 1963 precluded counsel from any function except accompanying and advising the witness. Section 1.40 of the Rules of Practice of the Federal Trade Commission, for example, until 1963 prohibited counsel from participating in any other fashion in non-public hearings.³² An earlier Federal Trade Commission rule limited counsel’s function to accompanying and advising the witness in all investigative hearings, both public and non-public.^{32a} Although litigation initiated by the Kroger Company in May of 1962³³ led the FTC to amend its rules to provide for representation in public hearings, the Commission continued to deny this right in non-public hearings. In part, this agency position appears to have been based upon the pre-Administrative Procedure Act decision of *Bowles v. Baer*,³⁴ which suggested that there is no *constitutional* requirement of representation in investigative hearings. The agency position also appears to have been based upon dicta in *Hannah v. Larche*, where the Supreme Court suggested that there was no constitutional objection to Federal Trade Commission Rule 1.40.³⁵

This position, of course, failed to take account of the simple fact that, in some instances, the Administrative Procedure Act

³¹ S. Doc. No. 248, 79th Cong., 2d Sess. 263 (1946).

³² Section 1.40 stated in part: “Any person compelled to testify or to produce documentary evidence in a non-public hearing may be accompanied and advised by counsel, but counsel may not, as a matter of right, otherwise participate in the investigational hearing. Any person compelled to testify or to produce documentary evidence in a public investigational hearing may be accompanied, represented, and advised by counsel: *Provided, however*, That such representation shall not include the right to call, examine or cross-examine witnesses, or adduce evidence.” 16 C.F.R. § 1.40 (Cum. Supp. 1963).

^{32a} 16 C.F.R. § 1.40 (Cum. Supp. 1958).

³³ *Hall v. Lemke*, 1962 Trade Cas. 76348 (N.D. Ill.). In the *Hall* case Judge Herbert L. Will entered a temporary restraining order halting hearings wherein plaintiffs were to be deprived of the right of representation. The plaintiffs claimed that the Commission had no statutory authority to conduct any public hearings and particularly that they had no authority to conduct such hearings without representation.

³⁴ 142 F.2d 787 (7th Cir. 1944).

³⁵ The Court referred to the Commission’s 1958 rule and said that it “had found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution. . . .” *Hannah v. Larche*, 363 U.S. 420, 446 (1960). See also *Anonymous v. Baker*, 360 U.S. 287 (1959); *In re Groban*, 352 U.S. 330 (1957). In both cases the Court approved the constitutionality of certain state proceedings (not subject to the Administrative Procedure Act) which did not provide for counsel. In each case four Justices dissented from this holding. However, the only judicial proceedings involving § 6(a) recognized that its provisions applied to investigations. See *Backer v. Commissioner*, 275 F.2d 141 (5th Cir. 1960); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949); *cf. Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952), involving an attempt by counsel to obstruct proceedings.

contains more stringent guarantees than do constitutional provisions, and that legal representation encompasses many functions besides advising and accompanying the person interrogated. This fact was underscored by the District Court for the District of Columbia when FTC Rule 1.40 was directly challenged by six witnesses subpoenaed to appear at a non-public hearing in September 1962. In *Wanderer v. Kaplan* District Judge McLaughlin granted injunctive relief to these six plaintiffs and held that section 6(a) of the Administrative Procedure Act applied to investigative as well as adjudicative hearings.³⁶ Distinguishing *Hannah v. Larche* on the ground that it did not deal with section 6(a), he held that the plaintiffs were entitled to the following: (a) the right to be accompanied by counsel, (b) the right to have counsel object to any question he deems improper, (c) the right to have counsel present on the record concise grounds for such objections, and (d) the right to have counsel, without interference from the Commission, its counsel, or the hearing examiner, initiate advice to the respondents with respect to the propriety or illegality of any question and advise respondents not to answer. In reaching this conclusion, Judge McLaughlin relied on unpublished conclusions of law in *FCC v. Schreiber*, where Judge Yankwich had ruled that these rights were guaranteed by section 6(a).³⁷

On January 3, 1963, with two commissioners dissenting, the FTC denied a motion by Mead Corporation (of Dayton, Ohio) for full representation of a company official subpoenaed to testify in a non-public investigatory hearing, but announced a relaxation on the restrictions that it would place on attorneys accompanying witnesses. The Commission stated that the respondent's official might be protected as follows: (a) The official could have counsel present with him. (b) The official could have counsel advise him, in confidence, upon either his own initiative or that of his counsel; and if the official refused to answer, his counsel might state on the record the legal grounds for refusal. (c) Respondent's counsel could object on the record and state the precise grounds therefor where claiming that the testimony is outside the scope of the investigation or that the witness is privileged (for reasons other than self-incrimination) to refuse to answer a question or produce other evidence. (d) Counsel could not otherwise interrupt the examination by making any objections or statements on the record.

³⁶ 1962 Trade Cas. 77159 (D.D.C.).

³⁷ Unpublished Findings of Fact and Conclusions of Law, *FCC v. Schreiber*, Civil No. 1258-61-Y, S.D. Cal., March 1, 1962.

Motions challenging the Commission's authority or the sufficiency of the subpoena would have to be submitted in advance of the hearing. (e) Following completion of the examination, counsel could request the officer conducting the hearing to permit, at his discretion, the witness to clarify, on the record, any answers which might be equivocal or incomplete.³⁸

The Commission also ordered that the officer conducting the investigation should take all necessary action to avoid undue delay, to restrain disorderly, dilatory, obstructionist or contumacious conduct of counsel and report same to the Commission. In the event of such conduct, counsel might thereafter be excluded from further participation in the investigation. These *Mead* rules have now been incorporated as a part of section 1.40 of the Federal Trade Commission's Rules of Practice, promulgated on August 1, 1963.³⁹

However, examination of the *Mead* rules discloses significant differences between the Commission's rules and the *Wanderer* rules of Judge McLaughlin. Indeed, the Commission opinion in *Mead* termed the decisions in *Wanderer* and *Schreiber* "inconclusive."⁴⁰ While the *Wanderer* and *Schreiber* rules allow counsel to object to any improper questions and "present on the record concise grounds for any such objection," the Commission continues to allow counsel to object only on the two grounds of relevancy and technical privilege. Except in these cases, counsel is relegated to silence. Thus, the right of representation guaranteed in *Wanderer* and *Schreiber*, and the representation that the FTC itself allows in public hearings, is still denied in non-public hearings. The Mead Company has now challenged these new rules,⁴¹ and the District Court for the Southern District of Ohio (Western Division) has entered a temporary stay preventing the Commission from holding the scheduled non-public hearings.

In June of 1963 the Commission filed a motion in the *Wanderer* case in the United States district court asking that an appeal from its decision in that case be dismissed and that the district court's restraining order be dissolved. The stated ground of the motion was mootness. Among other things, the district court was

³⁸ FTC File No. 5710656 Opinion of the Commission at 7-8 (Jan. 3, 1963).

³⁹ FTC Rules of Practice and Procedure, August 1, 1963.

⁴⁰ FTC File No. 5710656, Opinion of the Commission 2 n.1 (Jan. 3, 1963).

⁴¹ *Mead v. Mulville*, Civil No. 2850, S.D. Ohio, Complaint filed and stay granted Feb. 21, 1963.

faced with the question of whether the *Mead* rules complied with its own decision in the *Wanderer* case. On July 1, 1963, Judge McLaughlin denied the Government motions.⁴²

Casting further light on the remaining question of the scope of representation by counsel to be accorded in non-public hearings, the Administrative Conference of the United States concluded that section 6(a) guarantees "as a minimum that counsel for any person compelled to appear in person shall be permitted to make objections on the record and to argue briefly the basis for such objections in connection with any examination of his client."⁴³ The Administrative Conference did not deal with the outer limits of the scope of representation.

Similarly, a special task force of the Antitrust Section of the American Bar Association reported on December 11, 1962:

"The express language of the statute offers no sanction for the view that the mandatory grant of representation may be diluted by reference to policy considerations. At a minimum, the statutory grant allows counsel to speak on the record, object to improper questions, argue the grounds for such objections, make motions directed to the protection of the witness, and examine his own client. The performance of these functions is not subject to curtailment on administrative whim."⁴⁴

The effect of these recommendations remains to be seen.

The Right To Adduce Evidence

Section 7 of the Administrative Procedure Act, dealing with the right to adduce evidence, is limited to adjudicative matters. However, in public investigational hearings, the Federal Trade Commission has recognized that witnesses have the right to reappear and testify under oath to clarify statements of third-party witnesses.⁴⁵ In non-public hearings, the rules announced in the *Mead* decision merely provide that counsel might request the

⁴² Civil No. 2819-62, and including 2824-62, D.D.C., Order dated July 1, 1963.

⁴³ Report of the Fourth Plenary Session of the Administrative Conference, June 29, 1962. The Administrative Conference is an organization appointed by the President of the United States pursuant to Executive Order 10934, April 13, 1961, for the purpose of assisting " . . . the President, the Congress and the Administrative Agencies and Executive Departments in improving existing administrative procedures."

⁴⁴ FTC Investigational Hearings: Role of Witnesses' Counsel, Dec. 11, 1962, at 10.

⁴⁵ Commission Rule 1.40 does not expressly state this right. However, the Commission conceded that this right was available in connection with its defense of its public hearing procedures in *Hall v. Lemke*, 1962 Trade Cas. 76348 (N.D. Ill.). The concession is set forth at p. 32 of the Commission's memorandum in support of its motion to dismiss.

officer conducting the hearing to permit the witness to "clarify on the record, any answer which might be equivocal or incomplete."⁴⁶

Arguably, the right to counsel guaranteed by section 6(a) of the Administrative Procedure Act may include the right of a subpoenaed witness to be questioned by his own counsel and to provide additional evidence in this fashion.⁴⁷ Whether the Commission intends to allow the witness to be questioned by his own counsel is not clear.

A crucial question is whether Congress intended that the examination of witnesses customarily found in judicial proceedings should be permitted in investigational hearings. Referring to section 6(a), the drafters of the Administrative Procedure Act in the Senate Judiciary Committee stated: "The first sentence is a recognition that, in the administrative process, the benefit of counsel shall be accorded as of right *just as recognized by the Bill of Rights in connection with the judicial process*"⁴⁸

Significantly, the sponsors of the bill in the House of Representatives also recognized that the right to be represented by counsel was the right of representation granted in *judicial proceedings*. Thus, Congressman Walter said in the House debates on the proposed bill on May 24, 1946, "The representation of counsel contemplated by the bill means full representation as the term is understood in the courts of law."⁴⁹

The specific legislative intent was underscored in *Backer v. Commissioner*.⁵⁰ In dealing with the meaning of the word "represented" in its application to non-public investigations, the court flatly said, "When Congress used the terms 'right to be accompanied, represented, and advised by counsel' it must have used the language in the regularly accepted connotation, even though the language of the courts in using it was in connection with the right to counsel guaranteed by the Sixth Amendment to the Constitution."⁵¹

Under such circumstances, it appears that counsel for subpoenaed witnesses should be allowed to question their own clients.

⁴⁶ FTC File No. 5710656, Opinion of the Commission 8 (Jan. 3, 1963).

⁴⁷ Under § 6(a), it would appear that this right should be available in both public and private hearings if it is available at all. The section does not draw any distinction between the types of rights available to subpoenaed witnesses. Indeed, the House Judiciary Committee Report expressly states that the right of counsel applies in connection with "any function, matter, or process, whether formal, informal, public or private." S. Doc. No. 248, 79th Cong., 2d Sess. 263 (1946).

⁴⁸ S. Doc. No. 248, 79th Cong., 2d Sess. 26 (1946). (Emphasis added.)

⁴⁹ *Id.* at 362-63.

⁵⁰ 275 F.2d 141 (5th Cir. 1960).

⁵¹ *Id.* at 144.

The plaintiffs in the *Mead* case are presently requesting this right in their suit in Dayton, Ohio.⁵² The decision of the district court there will certainly prove of interest to the practicing bar.

The Right to an Impartial Hearing Examiner

One of the most frequent complaints of persons compelled to testify in agency investigations involves the absence of any right to an impartial presiding hearing officer.

In investigatory hearings, it has often been agency practice to appoint the employee in charge of prosecuting an investigation to preside. In fact, in a recent non-public hearing held by the Federal Trade Commission, one Commission employee acted as the hearing officer on the first day of the hearings, while a second employee served as investigator and interrogated the witness. The next day, with the same witness on the stand, the two employees changed places; the hearing officer became the interrogator and the previous interrogator was designated as the hearing officer.⁵³

Sections 5 and 7 of the Administrative Procedure Act guarantee that, in adjudicative proceedings, an impartial hearing examiner shall preside at the taking of evidence and that he shall not be engaged in investigative or prosecuting functions.⁵⁴ However, in *FTC v. Scientific Living, Inc.*,⁵⁵ *FTC v. Waltham Watch Co.*,⁵⁶ and *FTC v. Hallmark, Inc.*,⁵⁷ district courts have rejected the contention that these provisions apply to investigatory hearings. The composite effect of these three decisions has been to discourage further consideration of whether an impartial hearing

⁵² *Mead Corp. v. Mulville*, Civil No. 2850, S.D. Ohio, Feb. 21, 1963.

⁵³ In the *Matter of Warehouse Distributors, Inc.*, FTC Dkt. No. 6837. While the transcripts of record were confidential in that case, these facts were set forth in respondent's briefs to the Commission. This practice is sanctioned by the Federal Trade Commission's Rules of Practice, which provide: "Inquiries and investigations are conducted, under the various statutes administered by the Commission, by Commission representatives designated and duly authorized for the purpose. Such representatives [are examiners within the meaning of the Federal Trade Commission Act and] are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission, including the administration of oaths and affirmations, in any matter under investigation by the Commission." 16 C.F.R. § 1.32 (1960).

⁵⁴ Section 7 provides that "the functions of all presiding officers and of officers participating in decisions in conformity with § 1007 of this title shall be conducted in an impartial manner." 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958). Section 5 provides: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to § 1007 of this title except as a witness or counsel in public proceedings." 60 Stat. 240 (1946), 5 U.S.C. § 1004 (1958).

⁵⁵ 1957 Trade Cas. 72732 (D. Pa.).

⁵⁶ 1959 Trade Cas. 74904 (S.D.N.Y.).

⁵⁷ 1959 Trade Cas. 75199 (7th Cir.).

examiner should preside over investigational hearings. While the three decisions seem to be correct under sections 5 and 7 of the Administrative Procedure Act, which are undeniably limited to adjudicative proceedings, they do not take into consideration the possible effects of section 12 of the Administrative Procedure Act, which provides: "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons."

This provision seeks on its face to provide equal privileges to both the government and private citizens. Unlike sections 5 and 7 of the act, section 12 applies to all agency functions, whether adjudicative, investigative, or rule-making. To date, no subpoenaed witness has seen fit to raise the question of whether section 12 prohibits an agency from reserving to itself the procedural privilege of an examiner partial to its own investigating employees while denying this privilege to the person compelled to appear.

This double standard was apparently recognized in *FCC v. Schreiber*,⁵⁸ where Judge Yankwich stated:

"If respondents decline to answer any questions upon advice of counsel or otherwise, the propriety of all such questions shall be ruled upon by this Court upon appropriate motion by any of the parties hereto, and respondents shall not be deemed to be in contempt either of this Court or of the Commission or suffer or incur any penalty until and unless the Court has ruled in favor of the propriety of any such questions and respondents thereafter refuse or decline to answer the same."⁵⁹

In his oral comments during argument, Judge Yankwich commented that investigators who are appointed to act as examiners are "all too powerful."⁶⁰ In this connection he said, "I do not know where the examiners claim those rights. After all, examiners are persons of limited authority."⁶¹

Hence, recourse to the courts for determination of the propriety of the examiners' rulings on a case-by-case basis, as in *Schreiber*, may provide some protection for the rights of the citizen. A better course would be for agencies to designate Administrative Procedure Act hearing examiners to preside over investigational hearings. Certainly, their qualifications as impartial hearing

⁵⁸ Civil No. 1258-61-Y, S.D. Cal., March 1, 1962.

⁵⁹ *Id.* ¶ 3 of order.

⁶⁰ *Id.* Transcript of Argument 6, March 1, 1962.

⁶¹ *Ibid.*

officers would generate the confidence and respect of persons compelled to appear.

The Right of Expeditious Completion of the Investigation

Another complaint frequently heard from investigated persons is that investigations are unduly protracted. In the past, federal agencies have generally taken the position that investigations may be completed at their discretion and without regard to the inconvenience a lengthy investigation may cause the person investigated. However, section 6(a) of the Administrative Procedure Act provides: "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessities of the parties or their representatives."

There seems to be little doubt that this provision of section 6(a) applies to investigative hearings, just as the right of counsel provisions in section 6(a) apply to investigative hearings. The drafters of the Administrative Procedure Act dealt with all parts of section 6 when they expressly stated, "Section 6 deals with the investigative powers and other incidental matters of importance."⁶²

At least one government agency, however, takes the position that the prohibition against undue delay in section 6 does not apply to investigative matters. In *J. Weingarten, Inc. v. FTC*⁶³ the Commission denied the charge that it had unduly delayed completion of an adjudicative proceeding, on the ground that the plaintiff's claim of undue delay was based in part upon reference to three investigations which had been conducted during a five-year period prior to the issuance of complaint proceedings. The district court expressly noted the lengthy Commission investigation in rejecting the Commission argument and concluding that the latter had violated section 6(a).⁶⁴

The Right to Notice

No express provision of the Administrative Procedure Act deals with the right of a person compelled to appear in investigative hearings to notice of the matters about which he is to be ex-

⁶² S. Doc. No. 248, 79th Cong., 2d Sess. 353-54 (1946).

⁶³ 5 Trade Reg. Rep. (1963 Trade Cas.) ¶ 70790 (E.D. Tex. May 17, 1963). The Commission's appeal is now pending in the Court of Appeals for the Fifth Circuit.

⁶⁴ The court said: "It is true eleven months is not a lengthy time for the matter to remain before the Commission, but taken in connection with an investigation of five years, and a hearing before the Hearing Examiner of two years or better, it appears that the question of reasonable dispatch is completely ignored by the Commission." *Id.* at 78184.

amined. However, it seems clear that general principles dealing with the enforceability of subpoenas require that a federal agency give the witness a reasonably definitive statement of the subject matter of the inquiry. In *United States v. Morton Salt Co.*⁶⁵ the Supreme Court noted that Federal Trade Commission investigative demands must not be "too indefinite."

The Administrative Procedure Act makes it clear that a subpoenaed witness has a right to notice of the procedural rules which may be applied in investigative hearings wherein he is subpoenaed to testify. Section 3 of the Administrative Procedure Act requires that every agency separately state and currently publish in the *Federal Register* "statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available" This provision appears to require promulgation and publication of rules without regard to the nature of the proceeding.⁶⁶ Manifestly, it should apply to investigatory hearings as well as to adjudicatory hearings.

A related problem of notice arises when a person being investigated is subpoenaed to testify without being adequately informed as to whether the hearings are actually investigatory or adjudicatory. This issue was raised by respondents in a recent Federal Trade Commission proceeding involving the Nash-Finch Company.⁶⁷ Respondents, who were subject to an FTC cease-and-desist order, were served with a Commission order purportedly authorizing an "investigational hearing" to determine the extent of violations of the order. The order further directed the Chief Hearing Examiner to appoint and designate a hearing examiner with all of the powers and duties of an adjudicative examiner except filing an initial decision. It further directed that the hearings be conducted in accordance with "the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable."

⁶⁵ 338 U.S. 632, 652 (1950).

⁶⁶ Decision of Judge Yankwich in *FCC v. Schreiber*, 201 F. Supp. 421 (S.D. Cal. 1962), would appear to indicate that § 3 does not apply to purely investigative (fact finding) hearings where a respondent is not prejudiced. Judge Yankwich commented, "It is doubtful if the provisions of that Act [APA] apply to any but adjudicating agencies." *Id.* at 425. Nevertheless, the *Schreiber* conclusion seems at variance with the ruling of the Supreme Court in *United States v. Morton Salt Co.*, 338 U.S. 635 (1950), where the Court indicated that § 3(a) applied to all investigations, although ruling that it had not been violated in that particular case.

⁶⁷ In the Matter of C. H. Robinson Co., a corporation, and Nash-Finch Co., a corporation, FTC Dkt. No. 4589 (Opinion, Nov. 4, 1963).

Thus, the order did not specify whether an adjudicatory proceeding or a purely investigatory proceeding was to be conducted. Although the order provided that adjudicatory rules would govern "where applicable," it did not define the areas in which such rules were applicable. The respondents have now filed a motion requesting clarification of the order and promulgation of rules pursuant to section 3(a). No Commission ruling has been made on this motion.

The Right to Judicial Protection of Investigatory Rights

In past years, some federal agencies have taken the rather cynical position that, even if a person compelled to appear has some rights, the courts have no jurisdiction to protect these rights. This proposition finds its main thrust in the argument that plaintiffs cannot demonstrate irreparable injury sufficient to warrant equitable relief. While certain commentary of the Supreme Court in its 1927 decision in *FTC v. Claire Furnace Co.*⁶⁸ supports this argument, its validity seems to have been largely dispelled by the subsequent enactment of the Declaratory Judgment Act of 1934,⁶⁹ section 10 of the Administrative Procedure Act in 1946,⁷⁰ and the new Act of October 5, 1962,⁷¹ which provides that "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Indeed, it seems clear that the Declaratory Judgment Act should allow a person compelled to submit to interrogation to seek judicial relief prior to submitting to challenged procedures in investigative hearings, particularly where the agency's organic statute provides for criminal penalties against witnesses who refuse to testify pursuant to subpoena. To hold otherwise would mean that a subpoenaed witness might be forced to choose between submitting to challenged procedures and defying the subpoena at the risk of litigating the propriety of such defiance in a public criminal proceeding.

In *Evers v. Dwyer*⁷² the Supreme Court ruled that the district courts have jurisdiction under the Declaratory Judgment Act to determine cases where plaintiffs, threatened with improper ad-

⁶⁸ 274 U.S. 160 (1927).

⁶⁹ 28 U.S.C. § 400 (1958).

⁷⁰ 60 Stat. 237 (1946), 5 U.S.C. § 1004 (1958).

⁷¹ 28 U.S.C. §§ 1361, 1361(e) (1958).

⁷² 358 U.S. 202 (1958).

ministrative action, might be forced to forfeit their rights under fear of criminal penalties. In *St. Regis Paper Co. v. United States*⁷³ the Supreme Court made it clear that plaintiffs challenging agency investigative action need not await an attempt to collect monetary penalties.

Moreover, the Fourth Circuit has ruled in *Deering Milliken, Inc. v. Johnston*⁷⁴ that district courts have jurisdiction under section 10 of the Administrative Procedure Act when specific rights guaranteed by the Administrative Procedure Act might be abrogated in the absence of court action. The court noted that a purpose of the act was "to give a party injured by a violation of one of the terms of the bill, the right of enforcement by the extraordinary remedies of injunction, prohibition, and quo warranto."⁷⁵

The record of court proceedings in the past two years demonstrates that the courts have not been hesitant in exercising their jurisdiction to halt threatened violations of rights of citizens in investigatory hearings. Both the *Hall* and *Wanderer* cases are good examples of the exercise of this jurisdiction. In *Wanderer*, the district court summarily rejected the contention that a subpoenaed witness would not be irreparably injured if he was deprived of his statutory right to counsel.⁷⁶ Thus, the authorities confirm that the district courts are available to persons aggrieved by agency violations of the Administrative Procedure Act.

Conclusion

It is now a matter of history that, in three decades, the compulsory investigational processes of a host of administrative agencies have largely displaced the grand jury as the method of inquisition most frequently utilized in the enforcement of federal legislation. Paradoxically, the impact of these procedures, at least in quantitative terms, falls principally upon the business community rather than upon those persons and minority groups whose rights are most often championed by vigilant advocates of civil liberties.

That private rights have been violated by the procedures of some agencies cannot be disputed. Recent court decisions plainly suggest that a basic reappraisal of the investigational procedures of these agencies is desirable.

⁷³ 368 U.S. 208, 226-27 (1961).

⁷⁴ 295 F.2d 856 (4th Cir. 1961).

⁷⁵ *Id.* at 863.

⁷⁶ Accordingly, it granted both preliminary and permanent injunctive relief.

The tone for such a re-examination is found in the executive order of President Kennedy establishing the Administrative Conference of the United States.⁷⁷ That order recognizes that maximum government efficiency and fairness to private interests are coequal objectives. Neither is subordinate to the other.

On the basis of existing law, agency procedures governing investigational hearings should, at a minimum, give effect to the following principles:

First: Where Congress has not explicitly authorized a denial of confrontation and cross-examination in statutes authorizing investigational hearings, these rights presumptively are present and should be accorded the letter and spirit of the *Greene* and *Hannah* decisions.

Second: The right to be represented by counsel, as provided by section 6 of the Administrative Procedure Act, should be fully provided as intended by Congress. No party compelled to appear and give testimony should be forced to obtain a court order to assure this basic right.

Third: The objective of section 12 of the Administrative Procedure Act that the agency and the private party should have equal standing on matters of "evidence or procedure" should be implemented by designating impartial Administrative Procedure Act hearing officers to preside over investigational hearings.

Fourth: Any person who is compelled to appear and give testimony or to produce documents should be given notice in specific form of the nature and scope of the investigation.

The granting of these procedural rights need not hinder or prevent the orderly conduct of government business. The true challenge to the agencies and the bar lies in formulating procedures which protect the rights of the individual and at the same time assure the expeditious handling of government business. Decisions of the courts confirm that the point has been reached where no further time should be spent justifying the denial of rights in the name of efficiency.

⁷⁷ Executive Order 10934, April 13, 1961.