Michigan Law Review

Volume 60 | Issue 2

1961

Federal Agency Investigations: Requirements for the Production of Documents

Frank E. Cooper
University of Michigan Law School

FEDERAL AGENCY INVESTIGATIONS: REQUIREMENTS FOR THE PRODUCTION OF DOCUMENTS†

*Frank E. Cooper**

THE United States district courts are frequently called upon to decide whether an administrative agency is entitled to enforcement of a subpoena requesting production of documentary evidence which the person to whom the subpoena is addressed assails as an unnecessary and improper inquisitorial investigation.

In considering such requests for enforcement, the district courts have little to guide them except (1) the statement found in section 6 (c) of the Administrative Procedure Act that the court shall sustain the subpoena "to the extent that it is found to be in accordance with law";[1] and (2) the declaration of the Court in *Oklahoma Press Publishing Co. v. Walling*[2] (decided a few months before enactment of the act) that the three basic tests by which to determine whether the subpoena is "in accordance with law" are (a) whether the inquiry is one the demanding agency is authorized by law to make; (b) whether the materials specified are relevant to an authorized inquiry; (c) whether the disclosure sought is unreasonable.

Neither the statute nor the decision—landmarks though they both are—offers a convenient rule of thumb to guide the district courts in the intensely difficult problems posed by requests for enforcement of administrative subpoenas.

However, an examination of the decisions passing upon such requests does disclose the standards by which the courts apply the three classic tests, and suggests certain practical guides. This article reports the results of such an examination.

† This article is based on the product of a research project conducted by a seminar group at The University of Michigan Law School. The group undertook to read all the reported cases decided during the past twelve years dealing with the enforcement of administrative subpoenas in an attempt to determine the standards by which the courts decide whether a subpoena is in accordance with law. Members of the seminar were Ceferino Gaddi, Edward Keller, Robert Margolin, David Reed, Dean Shipman, Marvin Wilenzik, and Morton Zedd; Denis Rice was director of research for the group.—Ed.

* Of the Detroit Bar; Professor of Law, University of Michigan.—Ed.

1 60 Stat. 240 (1946), 5 U.S.C. § 1005 (c) (1958).

2 327 U.S. 186 (1946).

The prevailing interpretation of the three basic tests suggested in the *Oklahoma Press* case will be first discussed; thereafter a brief analysis will be made of the seven subsidiary principles most often urged in the application of the three basic tests.

I. INTERPRETATION OF THE THREE BASIC TESTS

A. *Defense That Issuance of Subpoena Is Not Authorized by Statute*

It is commonplace that an agency does not have power to issue a subpoena except as authorized by statute. This is established both by case law and by the provisions of the APA.[3]

As the Court phrased it in *Oklahoma Press,* the initial question is whether "the inquiry is one the demanding agency is authorized by law to make."[4] In other words, when enforcement of an administrative subpoena is resisted, the court first looks to the statute creating the agency to determine whether it authorizes the issuance of the subpoena.

In making this determination, the task of the court is not the barren legalistic one of rhetorical construction of the statutory provision. The courts do not make a fortress of the dictionary, nor deem their task one which can be accomplished by dispassionate, disinterested construction of the language found in the statute. Rather, they consider the consequences of alternate constructions.

Thus, where the agency is authorized to compel by subpoena the appearance of *witnesses,* it is held in immigration cases that the person against whom the agency is proceeding is not a *witness,* but in Federal Trade Commission cases such person is a *witness.*[5]

Why does the word *witness* have a broader meaning in one statute than in the other? In the immigration case, the Court said that a restrictive reading of the "Janus-faced word 'witness' " was proper in view of the circumstance that the power to issue subpoenas was not restricted to the heads of the agency but was delegated to "any immigration officer"; and the subpoena power

3 See Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942), and 60 Stat. 240 (1946), 5 U.S.C. § 1005 (b), (c) (1958).

4 327 U.S. at 208.

5 *Compare* United States v. Minker, 350 U.S. 179 (1956) (immigration) *with* FTC v. Scientific Living, Inc., 150 F. Supp. 495 (D. Pa. 1957).

"is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."[5a] The Court apparently believed that grave mischief might result if the term "witness" were given its natural reading as meaning any person subpoenaed to testify. In Federal Trade Commission cases, on the other hand, where there is less fear of the consequences of oppressive use of the subpoena power, the word "witness" is read as including respondents as well as anyone else.

The ability of the Court to read statutory language restrictively, as illustrated by the immigration case, is paralleled by its ability to read statutory language expansively, where to do so is deemed to accomplish a desirable result. Such expansive reading is illustrated in *FTC v. Tuttle*[6] and *FTC v. Bowman.*[7] Both cases involved the same question. The FTC was authorized by statute "to copy any *documentary evidence of any corporation being investigated* . . . [and] to require by subpoena . . . the production of all *such* documentary evidence. . . ."[8] Did this authorize the Commission to require the production of documentary evidence of a corporation not being investigated—or did the phrase "*such* documentary evidence" indicate that the right to subpoena was no broader than the right to copy, *i.e.*, that in either case the power could be exercised only with respect to a corporation being investigated? This latter restrictive construction would seem to be justified (if not required, as eloquently argued by Judge Medina in his dissent in the *Tuttle* case) by the plain language of the statute. But both courts facing this question found that the public need for broad investigatory powers justified the expansive reading for which the Commission contended.

These two cases illustrate the great change which has occurred during the past thirty-five years in the willingness of courts to adopt a liberal construction of statutory language, where it is felt that such construction is socially desirable.[9]

5a United States v. Minker, *supra* note 5, at 187, quoting Cudahy Packing Co. v. Holland, 315 U.S. 357, 363 (1941).

6 244 F.2d 605 (2d Cir. 1957).

7 248 F.2d 456 (7th Cir. 1957).

8 Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958). (Emphasis added.)

9 In FTC v. American Tobacco Co., 264 U.S. 298 (1924), the Court held that the Commission's power to examine *documentary evidence* did not include the power to

But the trend is not exclusively in the direction of so-called liberal interpretation. In *United States v. O'Connor*,[10] the court ruled that the Internal Revenue Service was not authorized to utilize its power to issue subpoenas for the purpose of obtaining information to help the Justice Department prosecute a criminal case. This, said the court, would be a perversion of statutory powers.

Other cases decided since the enactment of the Administrative Procedure Act support the conclusion suggested by the cases discussed above: the statutory language authorizing agencies to issue subpoenas is typically cast in terms broad enough to be capable of being characterized as "ambiguous" whenever the court finds there is a need for interpretation.[11] Such words as "witness," and "evidence," relevant to a "matter" within the "jurisdiction" of the agency, all afford a wide area for judicial interpretation—either for a broad and expansive interpretation which results in almost unlimited power to issue subpoenas, or in tight restrictive definition which greatly limits the subpoena power. The same courts which at times engage in broad interpretation, on other occasions engage in restrictive interpretation, apparently being influenced by their judgment as to the social desirability of empowering a particular agency to obtain a certain type of information under the stated circumstances.

B. *Defense of Irrelevancy*

It is impossible to reconcile the many decisions passing upon the defense that the subpoena should not be enforced because of the asserted irrelevancy of the material sought. Nor is it pos-

examine the documents of the very corporation being investigated unless the Commission could show that those documents contained information that would be relevant to the Commission's charge (because unless they contained relevant information they would not be "evidence"). There, the construction was so strict as almost to choke off the Commission's powers of investigation. Now the pendulum has swung far in the opposite direction, and the Commission may examine documents of companies not under investigation, in the hope they might turn up something relevant to a company that is under investigation.

10 118 F. Supp. 248 (D. Mass. 1953).

11 See United States v. Zuskar, 237 F.2d 528 (7th Cir. 1956); Sale v. United States, 228 F.2d 682 (8th Cir. 1956); General Trades School v. United States, 212 F.2d 656 (8th Cir. 1954); Carroll Vocational Institute v. United States, 211 F.2d 539 (5th Cir. 1954).

sible to derive from them any convenient horn-book rule. The fundamental reason for the difficulty faced by the courts when the question of relevancy is raised arises from the fact that the court is asked to determine the relevancy of unknown documents to unspecified issues—a rather difficult feat for even the most agile judges. The agency has not seen the documents it is demanding; not knowing what the documents might reveal, it is difficult for counsel for the agency to establish their relevancy. Counsel for respondent has a slightly different problem. He knows the contents of the documents, to be sure, but he does not wish to reveal them; and it is a bit difficult to establish the irrelevancy of a document whose contents one does not wish to disclose. Further, when the issue of relevancy is argued, the actual issues involved in the administrative proceeding may not yet have been crystallized.

Faced with this practical difficulty, the courts are inclined to say that the agency has discharged whatever initial burden may be imposed on it as moving party, if it accompanies the application with an affidavit setting forth such information as may be presently available to it indicating why it believes the subpoenaed material will be of material aid to the agency. It is important that the agency make such a showing. Many judges exhibit a much less hospitable attitude when an agency demands enforcement of a subpoena without thus explaining its need for the information. If the court feels it is being asked to rubber-stamp the agency's subpoenas, an attitude of judicial resentment frequently appears.[12]

There can be found in the cases strong and explicit statements that relevancy must be shown before the subpoena will be enforced.[13] However, most courts rule that if the agency has made an initial showing that the desired information may be "reasonably relevant,"[14] the burden shifts to the respondent to "disprove" its

12 See, *e.g.*, Chapman v. Maren Elwood College, 225 F.2d 230 (9th Cir. 1955).

13 Thus, in Hermann v. CAB, 237 F.2d 359, 362 (9th Cir. 1956), *rev'd*, 353 U.S. 322 (1957), the court said: "In order to have the subpoena enforced, the issue as to whether each of the documents subpoenaed is relevant and material is a judicial question which must be passed on by the courts." The same court, in Hubner v. Tucker, 245 F.2d 35 (9th Cir. 1957), said that a lack of specification of particular documents precluded a showing that any one of the documents was relevant, and that accordingly an IRS subpoena would not be enforced.

14 FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957).

relevancy,[15] and the courts are generally inclined to overrule a defense of irrelevancy unless the party resisting the subpoena makes it appear plainly to the court that the documents in question are "palpably irrelevant" or "plainly incompetent,"[16] or that they have "no potential relevancy." The phrases vary, but the general effect is that a heavy burden of persuasion is placed on defendant if he is to convince the court that production of the material should be denied for reasons of irrelevancy alone.[17]

Of course, it is a rare case where the defense of irrelevancy is raised alone. Almost every case which involves the demanded production of allegedly irrelevant documents also involves demands which the defendant conceives to be unduly burdensome. In deciding cases, the district judges exhibit a tendency to consider "irrelevancy" as a sort of secondary defense. If the court feels that the subpoena as a whole imposes an unconscionable burden upon defendant, and that enforcement would not be in the public interest, it is likely to throw in as an additional reason for denying enforcement the statement that the documents appear to be largely irrelevant.[18]

In the end, it would seem that enforcement of the subpoena is not likely to be denied on grounds of irrelevancy unless defendant makes a strong showing that the documents are obviously irrelevant, and further that their production would cause so substantial a burden that enforcement of the request would involve an unreasonable interference with protected rights of privacy.

C. *Defense of Undue Burden*

The Supreme Court in the *Oklahoma Press* case did not define the "unreasonable disclosure" that is proscribed as being oppressive and unduly burdensome. However, applications of this test by the lower courts indicate that the mere circumstance that

15 Shaughnessy v. Bacolas, 135 F. Supp. 15 (S.D.N.Y. 1955).

16 Jackson Packing Co. v. NLRB, 204 F.2d 842 (5th Cir. 1953).

17 See Kilgore Nat'l Bank v. Federal Petroleum Bd., 209 F.2d 557 (5th Cir. 1954).

18 Conversely, where the demand appears on the whole to be fair and proper, the courts may require submission of a specified group of records (*e.g.*, time records of all employees) even though some of them are concededly irrelevant, on the eminently practical ground that the easiest way to separate the relevant from the irrelevant is to let the agency sort them out. See McComb v. Hunsaker Trucking Contractor, Inc., 171 F.2d 523 (5th Cir. 1948).

compliance with the requirements of the subpoena will be expensive and will interfere with the conduct of respondent's business does not in itself often afford a basis for refusal to enforce the subpoena. Rather, the courts take into consideration the character of the administrative investigation, the apparent importance to the agency of the documents in question (*i.e.*, their potential relevancy), and the purpose of the agency in issuing the subpoena.

A succinct phrase of Judge Hutcheson in *Winn & Lovett Grocery v. NLRB*[19] suggests the attitude which apparently is characteristic of the district courts and courts of appeals in considering contentions that a subpoena is unduly burdensome. He suggests that if it appears to the court on the whole record that the purpose of the subpoena is to "annoy and embarrass" rather than to "discover and reveal," the court may deny enforcement.

Usually something more than inconvenience is involved where the court finds the disclosure demanded "unreasonable," and the requirements of the subpoena therefore unduly burdensome. It is noteworthy that in most of the cases where a court has relied on the undue burden imposed by a subpoena in declining application for enforcement, there is a strong suggestion that the subpoena was issued for improper purposes.[20]

The considerations that sway the court were well stated in *FCC v. Cohn*,[21] where the court spoke of the "necessity for drawing lines between the protection of the public interest . . . and the

19 213 F.2d 785, 786 (5th Cir. 1954).

20 Thus, enforcement has been denied where: (1) a subpoena requiring production of service certificates of seamen was apparently utilized as an indirect means of effecting a temporary suspension of their licenses, pending a hearing—a suspension which the agency was without authority to accomplish by direct order. *In re* Merchant Mariners Documents Issued to Dimitatos, 91 F. Supp. 426 (N.D. Cal. 1949); (2) a subpoena was issued after the respondent had refused to accept what the court described as a "penalty arbitrarily fixed" by representatives of the agency, who then issued the subpoena apparently with the purpose of exerting pressure upon respondent to accept the proposed penalty. Chapman v. Maren Elwood College, 225 F.2d 230, 233 (9th Cir. 1955); (3) a subpoena requiring a large number of companies to produce their records at a distance far removed from their offices was issued not in connection with any scheduled hearing, but apparently for the convenience of an agency attorney who in preparing for a contemplated hearing thought it would be more convenient to him to have all the witnesses (not parties to the case) bring their records to his offices, rather than following the customary course of traveling to the offices of the prospective witnesses and seeing what relevant evidence their records might disclose. NLRB v. Pesante, 119 F. Supp. 444 (S.D. Cal. 1954).

21 154 F. Supp. 899, 904 (S.D.N.Y. 1957).

rights of individual businessmen to pursue their legitimate business activities without being subjected to unnecessary and harassing governmental inquisition." The court declared, "There are many instances where the drawing of such lines might exclude agencies of the Government from pursuing inquiries into purely private business affairs, absent sufficiently broad or sufficiently defined grant of power by Congress concerning subject matter within the realm of the public interest." In enforcing the subpoena (with some limitations) the court concluded that while the production of the materials subpoenaed "would place a considerable burden upon the respondents, I do not feel that such burden is so great as to be unreasonable and oppressive in the light of the purposes to be served by the . . . investigation."[22]

The courts exhibit diligence in discovering practical means to modify the command of the subpoena, where literal compliance would be unnecessarily burdensome. Among the devices employed toward this end are (1) requirements that the agency take steps to avoid public disclosure of trade secrets revealed to it,[23] (2) provisions for examination of the documents by agency representatives at respondent's place of business,[24] and (3) provisions for production of the documents over a period of time, so that respondent will not be deprived of all his records at once.[25]

While there are dicta in a few cases that inconvenience to respondent is never in itself enough to make the demand unduly oppressive,[26] it appears that if the inconvenience is truly burdensome, the courts will take this into account by requiring the wit-

22 *Id.* at 912. The balancing of the perennially competing public and private interests is nicely demonstrated in cases involving demands by revenue agents for reexamination of tax records concerning years that have been previously examined, or years that are "closed" by the statute, in absence of fraud. As the factual complexion of cases in this area is altered by particular factors, so the results obtained vary. See O'Connor v. O'Connell, 253 F.2d 365 (1st Cir. 1958); Application of United States (*In re* Carroll), 246 F.2d 762 (2d Cir. 1957), and cases cited therein.

23 See FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957), in which the court authorized, in lieu of production of documents, a statement signed by a responsible officer of the company whose records were subpoenaed, setting forth the information which would be shown by all the documents. See also Winn & Lovett Grocery Co. v. NLRB, 213 F.2d 785 (5th Cir. 1954) ("in lieu" proviso suggested by the agency).

24 See CAB v. Hermann, 353 U.S. 322 (1957).

25 *Ibid.*

26 See, *e.g.*, Westside Ford v. United States, 206 F.2d 627 (9th Cir. 1953); Application of Compton, 101 F. Supp. 547 (N.D. Tex. 1951).

ness to produce only such information as is necessary to the attainment of the proper objectives of the agency.

Where the person subpoenaed is not involved in the administrative proceedings except as a witness, the courts are more likely to attach importance to a plea that the demands of the subpoena are unduly burdensome. Thus, in two cases enforcement has been denied to subpoenas which would have required banks to undertake a prodigious search of all their records to discover whether certain individuals under investigation by the Internal Revenue Service had purchased bank credits.[27]

II. SEVEN SUBSIDIARY PRINCIPLES

A. *Defense That Agency Does Not Have Jurisdiction Over Respondent*

It is a troublesome and unsettled question whether, in a case where an agency asserts jurisdiction, the Court should, before enforcing the agency's subpoena, make an independent inquiry as to whether the agency does in fact possess the asserted jurisdiction.[28]

The lower federal courts for years had believed it proper to make at least a preliminary investigation of the alleged lack of agency jurisdiction to issue a subpoena.[29] Typical of the trend of decisions are the two which provided the setting for the precedent-making determination in the *Oklahoma Press* case.[30] In both cases, the Wage and Hour Division had sought production of records in connection with investigations under the wage-hour law. The Courts of Appeals for the Third and Tenth Circuits, respectively, enforced the subpoenas—the Third on the basis that the agency had shown reasonable grounds for making the investigation, and the Tenth on the grounds that the agency had shown probable

27 First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947); United States *ex rel.* Sathre v. Third N.W. Nat'l Bank, 102 F. Supp. 879 (D. Minn. 1955).

28 The question appears not to have been considered by the Supreme Court prior to Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). That decision did not dispose of the problem. It appeared to be limited principally to cases involving government contractors and, indeed, it was far from clear that any actual question of lack of jurisdiction was involved.

29 See cases collected in Note, 56 YALE L.J. 165 (1946).

30 The Court combined for decision Walling v. News Printing Co., 148 F.2d 57 (3d Cir. 1945) and Oklahoma Press Publishing Co. v. Walling, 147 F.2d 658 (10th Cir. 1945).

cause.[31] On appeal, these two cases were consulted and the Supreme Court indicated that the applications for enforcement should have been granted without examination of these jurisdictional questions, and strongly hinted that the issue of lack of jurisdiction could not be raised as a defense on application for enforcement of a subpoena, that being a question to be determined, at least in the first instance, by the agency itself.[32]

The continued adherence to this decision has been widely criticized as in effect nullifying the explicit provision of the Administrative Procedure Act that an agency subpoena should be enforced only if it is found to be "in accordance with law," for it would seem that an agency should not be permitted to examine the affairs of respondents over whom it lacks jurisdiction,[33] nevertheless it appears that the rule of the *Oklahoma Press* case has survived the act.

The Fifth Circuit has specifically declared that the Administrative Procedure Act has not modified the rule of the *Oklahoma Press* case.[34] The Ninth Circuit found authority in the act to deny enforcement of an FTC subpoena which called for a mass of material, at least part of which was thought to relate to matters clearly beyond the Commission's jurisdiction.[35] But this decision

31 Walling v. News Printing Co., *supra* note 30, at 60; Oklahoma Press Publishing Co. v. Walling, *supra* note 30, at 662.

32 327 U.S. at 214.

33 The *Oklahoma Press* case was decided in February 1946, three months before the enactment of the Administrative Procedure Act, and the decision apparently was not considered by Congress in adopting that statute. As one commentator put it, although the draftsmen of the act undoubtedly felt that private parties should be allowed to raise the defense of lack of agency jurisdiction in a subpoena enforcement proceeding, they did not include an express provision to that effect because they deemed it unnecessary. Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U.L. REV. 1173 (1954).

The legislative history of the Administrative Procedure Act is not clear on this point. While the Senate Judiciary Committee Report and the floor explanation delivered by the chairman of the House Subcommittee indicate a purpose to require some judicial scrutiny of the agency's jurisdiction, they conflict as to the scope of this authority. The Senate Report indicated it would be enough if the court were satisfied that the agency could possibly find that it had jurisdiction. S. REP. No. 752, 79th Cong., 1st Sess. 20 (1945). The House Report indicated that the phrase "in accordance with law" meant that the subpoena should be enforced only if the facts demonstrated that the persons and subject matter to which the subpoena was directed were within the jurisdiction of the agency. H. REP. No. 1980, 79th Cong., 2d Sess. 32-33 (1946).

34 Tobin v. Banks & Rumbaugh, 201 F.2d 223 (5th Cir. 1953); D. G. Bland Lumber Co. v. NLRB, 177 F.2d 555 (5th Cir. 1949).

35 FTC v. Crafts, 244 F.2d 882 (9th Cir. 1957).

was reversed by the Supreme Court in a one-sentence *per curiam* opinion,[36] citing *Endicott Johnson Corp. v. Perkins*[37] and *Oklahoma Press.*

Unfortunately, it is not clear just what the *Oklahoma Press* case stands for. It seemingly does not prevent a court from denying enforcement of a subpoena if it appears clear that the respondent is not subject to the agency's jurisdiction. But if the issue is doubtful, most of the courts feel obliged to enforce the subpoena.

Apparently the only relief from the uncertain and unsatisfactory state of affairs now existing in this area is by legislative enactment. The Hoover Commission Task Force on Legal Services and Procedure concluded that the jurisdictional question should be considered by the courts in proceedings to enforce subpoenas, to a limited extent, *viz.*: "The court shall quash the subpoena . . . to the extent that it finds the same . . . beyond the probable jurisdiction of the agency. . . ."[38]

B. *Fishing Expeditions*

When one goes fishing, he casts about in all directions as far as he can; he probes the bottom with sinker and hook; and he may indeed utilize a net to sieve the entire contents of a lake. Whether federal agencies may utilize such tactics in their search for information would seem to depend, in the present state of the law, upon the breadth of the investigatory power delegated to the agency by the governing statute.

No longer can the mere characterization of the agency's activity as a "fishing expedition" serve to brand the search as illegal. The philosophy of an earlier day, which held unconstitutional any "roving inquisitorial investigation"[39] has been displaced by an attitude which led the Court in *United States v. Morton Salt Co.*[40] to declare that the mere fact that "courts could not go fishing" does not mean that administrative agencies must be deprived of

36 FTC v. Crafts, 355 U.S. 9 (1957).

37 317 U.S. 501 (1943).

38 *Proposed Administrative Code* § 204(b), COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *Legal Services and Procedure*, A Report to the Congress 368 (1955).

39 See Jones v. SEC, 298 U.S. 1 (1936); Harriman v. ICC, 211 U.S. 407 (1908).

40 338 U.S. 632 (1950).

the pleasure. Indeed, said the Court in the same case, even if the agency's request were regarded "as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." Rather the test is, the Court continued, that "the disclosure sought shall not be unreasonable."[41]

In determining the reasonableness of the disclosure, the courts consider a number of factors.[42] In the *Morton Salt* case, it seems probable that the Court was influenced by the fact that the Commission wanted to learn whether respondent was in compliance with the requirements of an order previously entered against it. It may be doubted whether so broad an inquiry would have been sustained if addressed to one who had not previously been found to have been engaged in illegal trade practices. Similarly, it may be doubted whether, if an agency undertook on its own initiative a general investigation to obtain all the information it could as to the business practices of television stations and those doing business with them,[43] it would be permitted to make so broad an inquiry as that permitted in the cited case, where the investigation had been specifically authorized by Congress.

It is suggested that there is no longer any doctrine which prohibits "fishing expeditions" as such. Rather, where an agency is proceeding to drag the nets of inquiry, in the hope that a tasty fish may be caught, the court will test the legality of the demand in terms of statutory authorization, the potential relevancy and significance of the information sought, and the degree of burden imposed on the respondents. In other words, the courts consider the same factors that are balanced whenever application for enforcement of a subpoena is resisted.

As a matter of policy, there is room for debate. There have been indications both from Congress and from unofficial organ-

41 *Id.* at 652-53.

42 Thus, if a price control agency is authorized by statute to examine all the records of a seller to determine whether price ceilings have been exceeded, a broad scope of inquiry will be permitted. Wockner v. United States, 211 F.2d 490 (9th Cir. 1954). Also if Congress has by resolution requested an agency to obtain all the information it can relating to a particular topic of congressional inquiry, a far-reaching search is deemed reasonable. FTC v. National Biscuit Co., 18 F. Supp. 667 (S.D.N.Y. 1937).

43 *Cf.* FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957).

izations that it would be better on the whole if such broad inquiries were discouraged. In the committee report which accompanied the Administrative Procedure Act, it was said that section 6 (b) of the act was "designed to preclude 'fishing expeditions' " and it was asserted that "investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise."[44] In similar language, the Hoover Commission Task Force on Legal Services and Procedure urged that "fishing expeditions" should not be permitted which unduly "impinge on the rights of the citizen."[45] Such considerations of policy are fundamentally the responsibility of legislative bodies, in defining the scope of inquiry permitted.

C. *Specific Description of Documents Sought*

The contentions urged in an earlier day that each particular document sought must be individually described—in terms, for example, of a letter of a certain date from a named writer to a named addressee—have long since gone by the board.

As the court observed in one recent case, it is enough if the documents are described as accurately as possible under the circumstances.[46] Thus, a demand for "all records relating to your said business for the year 1952,"[47] or a demand for "records . . . relative to all sales of . . . automobiles,"[48] is considered to contain a sufficiently specific description of the documents sought.

However, in any case where it is thought that the description is so vague as to cause real difficulty, courts feel free to modify the subpoena by incorporating in the court order requiring production a more specific description of the documents to be produced.[49]

D. *Privilege Against Self-Incrimination*

The same general tests that apply where the privilege of the fifth amendment is invoked in the course of oral testimony also

44 H. REP. No. 1980, 79th Cong., 2d Sess. 32 (1946).

45 COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *Legal Services and Procedure*, A Report to the Congress 60 (1955).

46 Menzies v. FTC, 242 F.2d 81 (4th Cir. 1957).

47 United States v. Woerth, 130 F. Supp. 930, 934 (N.D. Iowa 1955).

48 Wockner v. United States, 211 F.2d 490, 492 (9th Cir. 1954).

49 General Trades School, Inc. v. United States, 212 F.2d 656 (8th Cir. 1954); Wagman v. Arnold, 152 F. Supp. 637 (S.D.N.Y. 1957).

apply where a subpoena requiring production of documents is resisted on the grounds that the production of the documents would tend to incriminate the witness.[50]

There are, however, two particularly troublesome—and completely unsolved—problems that arise in connection with subpoenas duces tecum.

First is the problem of invoking the privilege as a basis for refusing production of any single part of a large mass of documents. For example, if a subpoena calls for production of all cancelled checks from the personal checking account of a witness for a three-year period—or production of all letters exchanged with named correspondents over a lengthy period—may the witness refuse to produce any evidence at all? Or should it be said that the privilege is prematurely claimed if urged in blanket form at the outset, and that the witness must appear with the subpoenaed documents and raise the claim of privilege only as to particular documents when examination of such particular documents is requested?

Either approach encompasses administrative difficulties. If the witness is permitted to assert the claim in blanket fashion, it would be put within the power of the witness to foreclose examination of documents which perhaps had no possible tendency to incriminate him. On the other hand, if he is restricted to the assertion of the privilege only as to specifically described individual documents, there is a danger that the very identification of the document, coupled with a statement of his reasons for refusing to produce it, might itself lead to incrimination. The problem is one that the courts have tried to meet, in a practical fashion, on the facts of the particular case.[51]

Perhaps the best solution of the problem is to avoid it by framing requests for production of documents in specific terms,

50 Such tests may be summarized by saying that the court can refuse to allow the invocation of the privilege only if it is clear that no possible answer to the question (and, possibly, anticipated follow-up questions) could tend either to incriminate the witness or to furnish any link in a chain of testimony that might convict him of crime. See Justice Marshall's oft-cited statement in United States v. Burr, 25 Fed. Cas. 38, 40 (No. 14692e) (C.C.D. Va. 1807): "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself." See also Emspak v. United States, 349 U.S. 190 (1955).

51 See Hubner v. Tucker, 245 F.2d 35 (9th Cir. 1957); Shaughnessy v. Bacolas, 135 F. Supp. 15 (S.D.N.Y. 1955).

rather than to rely on broad, all-inclusive demands. If the particular categories of documents which the agency requests are specifically described, the court can more readily see whether there is a possibility that all documents falling within the class described might have a tendency to incriminate.

Even more troublesome is the doctrine of *Shapiro v. United States*,[52] that records which one is required by law to keep become *ipso facto* public records, and that the privilege does not apply to public records. Despite the eloquent expostulation in the three dissenting opinions in the *Shapiro* case of the dangers which would result if this doctrine were applied without limitation, the lower courts have exhibited some tendency to apply it in axiomatic fashion to refuse to permit a witness to assert the privilege with respect to any type of record which he is required by administrative regulation to keep.[53]

There must be limits to this doctrine; surely the courts would not sustain a scheme requiring all residents of the United States to keep a diary of all their acts, and providing for the production of the diary upon subpoena. The limits are described, it is believed, in the majority opinion in the *Shapiro* case,[54] where it is suggested that the initial question must always be whether the government can constitutionally require the keeping of the particular record. If by regulation an agency undertook to require the keeping of records reporting criminal acts, or to require the keeping of records so voluminous and involving such deprivation of well-established rights of personal privacy as to constitute the very requirement of keeping of the records an unreasonable search, it would be said that the keeping of such a record could not constitutionally be required, and that the doctrine of the *Shapiro* case would be inapplicable. It is perhaps significant that the doctrine has been applied principally, if not solely, in connection with records of wages paid, hours worked, imports of foreign goods, and the prices at which goods were sold—all areas in which there can be little question as to the reasonableness of a record-keeping requirement.

[52] 335 U.S. 1 (1948).

[53] See Wockner v. United States, 211 F.2d 490 (9th Cir. 1954); Wagman v. Arnold, 152 F. Supp. 637 (S.D.N.Y. 1957); United States v. Jones, 72 F. Supp. 48 (S.D Miss. 1947).

[54] 335 U.S. at 32.

E. *Privileged Communications*

In principle, evidence which is privileged in civil proceedings in the courts should also be privileged in proceedings before administrative agencies.[55] Where the question is raised in connection with the taking of testimony in adversary adjudicatory proceedings before an agency, the claim of privilege has been recognized.[56]

Is the situation different where disclosure is demanded in the course of non-adversary investigatory proceedings by an agency? Considering the reasons which underlie the doctrine of privilege,[57] it would seem that the rule should be the same in adversary and non-adversary proceedings; and a number of courts have recited their willingness to "assume . . . that the conduct of investigations [by administrative agencies] . . . is subject to the same testimonial privileges as judicial proceedings."[58]

Further support for the conclusion that rules of privilege should apply in investigatory proceeding of agencies is found in Rule 81 (a) (3) of the Federal Rules of Civil Procedure, specifically providing for the applicability of the rules to proceedings to compel compliance with administrative subpoenas. Since the federal rules do apply, and since they recognize the testimonial privileges,[59] it would seem that enforcement of administrative subpoenas should be made subject to the condition that privileged testimony would not be disclosed. But, despite all this, a trend may be observed in recent decisions to restrict these privileges

55 8 WIGMORE, EVIDENCE § 2300 (a) (McNaughton rev. 1961). It is suggested that the attorney-client privilege should apply even with respect to disclosures to non-attorneys who are licensed to practice before a particular agency, where the regulations treat the persons appearing before it as having the responsibilities of attorneys and being subject to professional discipline.

56 Baldwin v. Commissioner, 125 F.2d 812 (9th Cir. 1942).

57 See 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

58 The language is that of Learned Hand in McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937); it has been quoted and approved in *In re* Albert Lindley Lee Mem. Hospital, 209 F.2d 122, 124 (2d Cir. 1953), and in Falsone v. United States, 205 F.2d 734, 737 (5th Cir. 1953). The opinion in United States v. Louisville & N.R.R., 236 U.S. 318 (1915), appears strongly to support this view, as does City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940). The decision in SEC v. Harrison, 80 F. Supp. 226 (D.D.C. 1948), specifically applied the privilege to excuse the production in an investigation by the SEC into matters protected by the attorney-client privilege.

59 FED. R. CIV. P. 43 (a).

to narrow limits in cases where the public need for information is great.[60]

F. *Delegations of Authority*

Occasionally, administrative subpoenas are resisted on the basis that the person acting for the agency in the matter has no authority to act. While such defenses have in a number of cases been sustained in the lower courts (perhaps for the reason that the court felt the request for information was, under all the circumstances, unfair, and wished to have a convenient legal point upon which to base its refusal to enforce the subpoena) the strong trend of appellate decisions is to overrule such defenses.[61]

Indeed, the agencies have been successful in avoiding the question as to the validity of subpoenas issued by agency employees, through the simple expedient of having the agency heads sign subpoenas in blank, which are then supplied to staff assistants for use at their convenience as the occasion arises. This practice appears to have been uniformly upheld on the theory that even though the administrator cannot delegate the power to sign the subpoena, he may sign the document in blank, permitting his assistants to fill it out.[62]

In several NLRB cases, a question arose whether the power to *revoke* subpoenas could be delegated to trial examiners. The

[60] See *In re* Albert Lindley Lee Mem. Hospital, 209 F.2d 122 (2d Cir. 1953); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953). Indeed, language in these two cases suggests a possibility that some courts would be willing to permit an agency to obtain by subpoena privileged information, were the public need sufficiently impelling, on the theory that since agencies are not bound to observe the common law exclusionary rules of evidence, they should also be free to disregard the rules as to privileged communications. It seems more likely, however, that the courts will undertake the accommodation of competing policies by restrictive interpretations of the scope of the asserted privilege.

[61] In the early 1940's, the decision in Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942), was generally considered to stand for the proposition that the power to issue subpoenas could not be delegated by agency heads to staff assistants, unless the statute provided for such delegation. This case has been limited, however, on the basis that the result in that case must be explained on the particular legislative history of the enactment there involved. The attitude of the courts now appears to be that the power to delegate issuance of subpoenas should be sustained unless the statute plainly or by necessary implication prohibits such delegation. See Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947); NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958); NLRB v. John S. Barnes Corp., 178 F.2d 156 (7th Cir. 1949).

[62] See NLRB v. Lewis, *supra* note 61; Jackson Packing Co. v. NLRB, 204 F.2d 842 (5th Cir. 1953); NLRB v. Pesante, 119 F. Supp. 444 (S.D. Cal. 1954).

language of the act was clearly susceptible to a construction that this power could not be delegated, and some of the lower courts so held.[63] But it is now established that this delegation is permitted.[64]

Whether a staff attorney is a "party" entitled to obtain issuance of a subpoena was doubted in some of the early cases.[65] But later cases find no difficulty in sustaining the right of a staff attorney to obtain issuance of a subpoena in a matter with which he is officially concerned.[66]

The attitude of the courts of appeals and the Supreme Court appears to be that so long as respondent has the protection afforded by his right to demand that a district judge pass upon the reasonableness of the demand for information,[67] no harm is done in permitting delegation to staff assistants of power to take action with reference to the issuance, revocation, and applications for enforcement of subpoenas. Indeed, it is suggested that because of their greater familiarity with the details of the cases involved, these staff assistants are in a much better position than are their superior officers to exercise intelligent discretion on the appropriateness of the requested demand.

G. *"Unnecessary Examinations"*

The Internal Revenue Code, in providing that no taxpayer shall be subjected to "unnecessary examination,"[68] imposes a restriction on the Internal Revenue Service to which most other agencies are not subject.

63 NLRB v. Duval Jewelry Co., 243 F.2d 427 (5th Cir. 1957), *rev'd*, 357 U.S. 1 (1958); NLRB v. Pesante, *supra* note 62.

64 In Duval Jewelry Co. v. NLRB, 357 U.S. 1 (1958), the result was reached on the basis that there was only a partial delegation of authority, with the Board itself retaining supervisory power. In NLRB v. International Typographical Union, 76 F. Supp. 895 (S.D.N.Y. 1948), Judge Medina reached the same result on the theory that such delegation was permitted by the APA. Other courts have reached the same result on the apparent theory that the labor law did not prohibit such delegation. See NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958); NLRB v. Gunaca, 135 F. Supp. 790 (E.D. Wis. 1955), *aff'd*, 230 F.2d 542 (7th Cir. 1956).

65 See, *e.g.*, NLRB v. Pesante, 119 F. Supp. 444 (S.D. Cal. 1954).

66 See NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958); NLRB v. Duval Jewelry Co., 243 F.2d 427 (5th Cir. 1957), *rev'd*, 357 U.S. 1 (1958).

67 This would seem to be the key of the matter. See concurring opinion of Mr. Justice Jackson in Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 123 (1947).

68 INT. REV. CODE OF 1954, § 7605.

The cases applying this provision draw a distinction between cases where the investigation is directed to the taxpayer himself and cases where the investigation is directed to a third party.[69] In the former case, the statutory caveat has had little effect in reducing the agency's discovery powers. In such cases the phrase is construed as designed only to prevent uselessly repetitive procedures and investigations not relevant to any possible tax liability.[70]

However, where the subpoena is directed to a third party whose tax liability is not involved but who is in possession of records which may have a bearing on the tax liability of the taxpayer whose liability is under investigation, the courts have frequently refused to enforce the administrative demand on the theory that the investigation has not been shown to be necessary.[71] In such cases, the statutory caveat against "unnecessary examinations" was apparently relied on as a basis for refusing to enforce subpoenas which the court deemed unreasonably broad under the circumstances.

III. A SUGGESTED CURE FOR THE CURRENT CONFUSION

Only two conclusions can safely be derived from an examination of the decisions of the lower federal courts applying the tests of the *Oklahoma Press Publishing Co.* case.[72] They are: (1) the tests are imprecise; (2) their application lacks consistency. This result is unfortunate both from the viewpoint of the agencies and from that of respondents.

There is a need, surely, for legislation. Even though the questions involved may be of such a nature as to defy the ingenuity of draftsmen to phrase a statutory standard that will be capable of precise and equitable application in all the varied instances in which the question of enforcing a subpoena may arise, at least it would be possible to lay down a few fundamental guides.

Both the Hoover Commission Task Force on Legal Services

[69] *E.g.*, Application of Levine, 149 F. Supp. 642 (S.D.N.Y.), *aff'd per curiam*, 243 F.2d 175 (2d Cir. 1956).

[70] See United States v. Carroll, 246 F.2d 762 (2d Cir. 1957).

[71] See Local 174, Teamsters Union v. United States, 240 F.2d 387 (9th Cir. 1956); First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947); United States *ex rel.* Sathre v. Third N.W. Nat'l Bank, 102 F. Supp. 879 (D. Minn. 1952).

[72] 327 U.S. 186 (1946).

and Procedure and the American Bar Association drafting committee have recognized the need for procedural provisions which would clear up a part of the existing uncertainty by providing that any person subjected to an agency subpoena may, before compliance and upon timely petition, obtain from a federal district court a ruling as to its lawfulness; and requiring the court to quash the subpoena if it is found to be unreasonable in terms, irrelevant in scope, or beyond the jurisdiction of the agency.

Such procedural provisions would be most helpful. But there is a need for something more—for some enunciation of basic policy that will serve as a touchstone in the application of the *Oklahoma Press* tests. Such a need might in substantial measure be met by legislation which applied to all federal agencies a limitation (derived from the provisions of the Internal Revenue Code) that subpoenas should be enforceable only where the disclosure sought was demonstrably necessary.