

CHAPTER 7

Powers to Compel Furnishing of Information

A. AGENCY POWERS TO COMPEL FURNISHING OF INFORMATION

ADMINISTRATIVE agencies normally possess many methods of obtaining evidence which are not available to private litigants. Indeed, they possess powers in this connection not exercised by any other government officers. The fact that the agencies are often able to learn, in advance of hearing, the facts on which the respondent may rely in his defense (and as well many facts and circumstances which he might never be forced to reveal were it not for the agencies' extraordinary powers of discovery) is one of the principal reasons why the whole tone and character of judicial proceedings before administrative agencies are entirely different than in the case of proceedings in the courts.

Thus, the agencies, if they utilize the facilities commonly afforded them by statute, frequently can be better prepared on the facts of the case than are the parties appearing before them. In addition to the information which the agency has obtained from the respondent, it may have obtained a great quantity of factual data from sources not available to the respondent. While it can often compel the respondent to reveal his case in advance, it is not under any requirement to afford a reciprocal privilege to the respondent. The advantages thus inherent in the agency's position, if unfairly used, could be utilized to deprive the opposite party of much of what is intended to be assured him by the general guarantee of a fair trial. Aside from this possibility of abuse of

power, there remains an inequality of position which affects the character of the entire proceedings.

One result is that, in the case of many agencies, the hearing officer normally looks primarily to counsel for the agency for the information which he needs to decide the case. This of course is beneficial to the extent that it leads to an assumption of responsibility by the agency to make sure that all the important facts of each case are presented at the hearing. But to the extent that it may produce a predisposition on the part of the hearing officer to rely on the evidence presented by the agency more heavily than on that presented by the opposite party, the tendency may lead unfortunately to an erroneous decision.

Another result is a temptation to decide the case on the basis of the agency's private information rather than on the basis of the evidence produced at the hearing. An agency obtains information for many general purposes not specifically related to any particular case, and there is a natural tendency on the part of agency representatives to rely on the contents of secret investigational files in reaching the determination in any particular case, if the contents of such secret files may seem relevant. There is a possibility that information which the administrator has gathered for the purpose of recommending legislation may subconsciously influence him in deciding what weight should be given, or what interpretation should be placed on, evidence appearing in the record of a particular contested case.

The responsibility which the agencies assume to determine independently the true facts of the case, rather than following the traditional judicial approach which shifts that responsibility to parties independent of the tribunal that decides the case, is thus far-reaching in its implications. It colors the proceedings as well in cases where an agency is more or less a disinterested judge in a contest between opposed pri-

vate parties, as in cases where the agency is an active party in interest.

In obtaining information, the agencies normally have available at least four methods of discovery: (1) investigation and examination of books and records; (2) requiring the appearance of witnesses and the production of documents by subpoena; (3) requiring the furnishing of reports; and (4) physical inspections.

I. EXAMINATION OF BOOKS AND RECORDS

Many statutes creating administrative agencies bestow upon them broad powers to examine the books, papers, records, and other documents of the parties subject to the regulatory activities of the agency (but the agencies have no independent investigatory powers except such as may be delegated to them by statute—*cf.*, Section 6(b) of the Federal Administrative Procedure Act of 1946). Such investigations may be either for the purpose of gathering general information or for the purpose of ascertaining whether or not there exist infractions of legislative or administrative rules.

While important as establishing broad patterns of public policy, these provisions have but little mandatory effect in compelling disclosure of information, for except as power is given to compel the production of papers (by enforcement of a subpoena or proceedings in the nature of *mandamus*) the power to inspect is one which can be exercised only with the consent of the party whose papers are to be inspected.¹ If a party refuses to grant representatives of the agency access to the desired information, the agency must ask the court for aid in enforcing its demand.

When such application is made to the courts, the issues presented are substantially the same as in case of an appli-

¹ *Cudahy Packing Co., Ltd. v. Holland*, 315 U. S. 357, 62 S. Ct. 651 (1942).

cation to enforce a subpoena issued during the course of an administrative proceeding. The question as to judicial enforcement of requests by administrative agencies to compel disclosure of books and records for examination by the agency, therefore, will be discussed below in connection with the question as to enforcement of administrative subpoenas.

There is wide variation in respect to the breadth of powers of inspection granted the various agencies, ranging from the almost unlimited visitorial rights of some state agencies to examine into the affairs of corporations franchised by the state² to the somewhat closely circumscribed grants of investigatory powers found in some of the earlier federal statutes. The general validity of a grant of such power is established beyond question; and decisions, as to whether or not the furnishing of the requested information will be compelled in a particular case, are based generally on the construction of particular statutes, rather than on broad constitutional grounds. But in construing statutes, the courts have been influenced by considerations as to the reasonableness of the agency's demands, as will be discussed more fully below in connection with cases involving applications to enforce subpoenas.

II. ISSUANCE AND ENFORCEMENT OF SUBPOENAS

1. Right to Issue Dependent on Statute

An agency's powers as to the issuance of subpoenas are regulated by statute. In the absence of statutory authorization, an agency has no such power. Statutes granting the power are rather strictly construed. For example, it has been held that if the power is granted to the head of an agency, it may not be delegated by him to his subordinates, unless the statute also provides for delegation of such power.³

² See, for example, *State ex rel. Public Utilities Commission v. Atchison, T. & S. F. Ry. Co.*, 115 Kan. 3, 221 Pac. 259 (1923).

³ *Cudahy Packing Co., Ltd. v. Holland*, 315 U. S. 357, 62 S. Ct. 651 (1942), holding that delegation was not permitted under the Wage Hour

Granting the existence of the power, the conditions upon which subpoenas will be issued are within the control of the respective agencies, and widely variant practices have been adopted as to the showing required in an application for the issuance of a subpoena, as to the identity of the officials passing upon such applications, as to service of the papers, and as to the general availability of the device. This is another of the many situations in which the heterogeneity of agency rules causes needless confusion.⁴

2. Methods of Enforcement

The traditional and most effective method for enforcing obedience to the command of a subpoena, imprisonment for contempt, is one which the courts have been unwilling to permit administrative agencies to exercise. Occasionally, a legislature has undertaken to grant such a power to an administrative agency, but the view of most courts is that such grant of power is invalid.⁵ The reason ordinarily assigned in support of this conclusion is that the power to punish for contempt is exclusively judicial. But clearly such is not the true character of the power, for it is conceded that Congress and state legislatures, exercising no judicial powers, may punish for contempt,⁶ and in several cases it has been held

Law. Cf., *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 67 S. Ct. 1129 (1947), finding authority for such delegation in the Emergency Price Control Act. For general discussion, see note 19 TENN. L. REV. 544 (1946); 42 ILL. L. REV. 672 (1947).

⁴ See "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 414 *et seq.*

⁵ *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190 (1892), which cites several cases. See *Sherwood*, "The Enforcement of Administrative Subpoenas," 44 COL. L. REV. 531 (1944). See also 54 HARV. L. REV. 129 (1940); 35 COL. L. REV. 578 (1935). A few courts have reached a contrary result, and have upheld the constitutionality of such provisions. E.g., *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931).

⁶ *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319 (1927); *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375 (1935).

that such power may be conferred upon notaries public.⁷ The real reasons for the unwillingness of the courts, in the absence of express constitutional provision, to permit administrative agencies to exercise the power to punish for contempt are deeper reaching. They lie in the traditional distrust of any proposal to vest in any agency other than the legislature itself or the courts, the power to interfere with personal liberty. It is felt that the hazards of reposing such powers in the partisan hands of the agencies would exceed the advantages that might be gained thereby. Such being the underlying reasons, there is a possibility that with the further acceptance of agencies as co-ordinate judicial agencies with the courts there may in future years be a relaxation of the doctrines now generally prevailing.

Aside from occasional statutory provisions attaching penal sanctions to refusal to obey an administrative subpoena,⁸ the usual method provided for enforcement is by application to a court for an order directing obedience to the command of the subpoena.⁹ The statutes ordinarily make it discretionary with the court whether or not the requested order shall be entered. Occasionally, the statute seems to make it mandatory upon the court to issue the requested order, but such provisions are construed as granting a wide measure of discretion in the court to refuse to enforce the subpoena if it appears unreasonable.¹⁰ While somewhat cumbersome, and theoretic-

⁷ *Noell v. Bender*, 317 Mo. 392, 295 S. W. 532 (1927). The courts divide on this particular question. See 35 COL. L. REV. 578, 582 (1935).

⁸ E.g., Federal Alcohol Administration; Department of Agriculture (Packers and Stockyards Act).

⁹ *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115 (1908). The typical provision is along the lines which seemingly originated with the Interstate Commerce Commission. See 49 U.S.C. § 12.

¹⁰ *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901). But there are limits to the Court's discretion. In *Penfield Co. of California v. Securities & Exchange Commission*, 330 U. S. 585, 67 S. Ct. 918 (1947), it was held that the trial court had abused its discretion in permitting a witness, convicted of contempt for failure to obey a subpoena, to purge himself of contempt by paying a \$50 fine. Under such circumstances, it was held, an answer should have been compelled.

cally subject to the objection that it imposes a heavy burden on the agencies to satisfy the court as to reasonableness and propriety of the subpoena, still, in view of the judicial tendency to grant the agencies the benefit of any doubts on this score, the method has worked very well. Indeed, there are very few cases where administrative subpoenas are contested. Partly because of the disinclination of the party subpoenaed to suggest, by contumacious behavior, that he may have something to hide, and partly because of the readiness of the courts to enforce obedience, a subpoena issued by an administrative agency is usually as effective as a judicial subpoena. It is essentially the power to punish for contempt that is reserved to the courts.

3. Objections to Enforcement of Subpoena, or Other Demand for Revelation of Information

General requirements as to validity. The general restrictions developed in the common-law courts as to the use of subpoenas in connection with the trial of cases are ordinarily applicable to subpoenas issued by administrative agencies, subject to such modifications as are suggested by the analogy between administrative subpoenas and those of a grand jury.

The relevancy of the information sought to the matter under investigation must be shown, if a question is raised as to this,¹¹ but the rigor of this requirement is attenuated by the readiness of the courts to assume that sufficient relevancy exists, unless it can be clearly shown that it does not.

Similarly, the general requirement that the documents sought must be appropriately described, while recognized as a limitation, has not been construed in such a way as to interfere with the effective exercise by agencies of their sub-

¹¹ *Sinclair v. United States*, 279 U. S. 263, 49 S. Ct. 268 (1929); *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319 (1927); *Kilbourn v. Thompson*, 103 U. S. 168 (1880); *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448 (1917).

poena powers.¹² Subpoenas requiring the production of all documents relative to a specified inquiry have been often sustained by the courts.¹³

Privilege. The same rules as to privilege applicable to judicial proceedings ordinarily apply to efforts by administrative agencies to enforce the production of information.¹⁴ Objections based on the privilege against self-incrimination are thus recognized, although the practical effect of this is minimized in two ways: (1) by the frequency of statutory provisions eliminating this privilege upon a grant of immunity from prosecution based upon the information adduced; and (2) by the unavailability of this objection where the subpoena is directed to a corporation.¹⁵

Jurisdiction of agency. Not infrequently, an administrative agency desires to compel the furnishing of information upon the basis of which it can be determined whether or not the agency has jurisdiction to proceed further. The respondent, contending that he is not engaged in activities which the agency is authorized to supervise, may contest the subpoena on the grounds that the agency has no jurisdiction. In such cases, obviously, the agency would find itself in a dilemma if it were required to prove its jurisdiction over the case before it could get the information which would enable it to determine whether jurisdiction existed. Influenced by these practical considerations, and in part by the suggestion that decision on the jurisdictional issue is primarily for the agency, the courts have generally held that the subpoena will be enforced, despite the denial of jurisdiction, if the agency asserts that it has reasonable ground to believe that

¹² *Brown v. United States*, 276 U. S. 134, 48 S. Ct. 288 (1928).

¹³ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 S. Ct. 178 (1908); *Consolidated Mines of California v. Securities & Exchange Commission* (C.C.A. 9th 1938), 97 F. (2d) 704; *cf.*, *Shotkin v. Nelson* (C.C.A. 10th 1944), 146 F. (2d) 402.

¹⁴ *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 35 S. Ct. 363 (1915).

¹⁵ *Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644 (1896).

the necessary jurisdictional facts are present.¹⁶ But respondent should be, and seemingly is, entitled to a hearing on the narrower issue as to whether such reasonable belief exists.¹⁷

The statutes empowering agencies to issue subpoenas or otherwise require disclosure of information are not ordinarily limited by any requirement that the agency can proceed only where it has probable cause to believe that a violation of law exists; and objections based on this ground have been unsuccessful.¹⁸

Invasion of privacy. The principal objection raised to the enforcement of agency subpoenas is that based on the ground that the particular demand is unreasonable in scope, interfering unjustifiably with the respondent's privilege of privacy, and constituting a mere fishing expedition.

At this point, a clear distinction is apparent between demands for the production of documents and demands addressed to oral testimony.

In the case of a subpoena *duces tecum*, or a demand for the production of records for examination, the guarantee of the Fourth Amendment against unreasonable searches and seizures presents difficulties which can often be avoided where

¹⁶ *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 63 S. Ct. 339 (1943), discussed in 41 MICH. L. REV. 959 (1943); 43 COL. L. REV. 254 (1943); 52 YALE L. J. 175 (1942); *National Labor Relations Board v. Northern Trust Co.* (C.C.A. 7th 1945), 148 F. (2d) 24; *Walling v. Benson* (C.C.A. 8th 1943), 137 F. (2d) 501. Somewhat stricter requirements were imposed in *General Tobacco & Grocery Co. v. Fleming* (C.C.A. 6th 1942), 125 F. (2d) 596; but see the later decision of the same court in *Walling v. La Belle S.S. Co.* (C.C.A. 6th, 1945), 148 F. (2d) 198.

¹⁷ *Securities & Exchange Commission v. Tung Corporation of America* (D. C. Ill. 1940), 32 F. Supp. 371; and see dictum in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 58 S. Ct. 459 (1938). But the point is not entirely clear; in *Fleming v. Montgomery Ward & Co., Inc.* (C.C.A. 7th 1940), 114 F. (2d) 384, respondent was denied the privilege of introducing evidence that the agency had no reasonable cause to believe that the respondent was subject to the act.

¹⁸ *Fleming v. Montgomery Ward & Co., Inc.* (C.C.A. 7th 1940), 114 F. (2d) 384; *National Labor Relations Board v. Barrett Co.* (C.C.A. 7th 1941), 120 F. (2d) 583; *Consolidated Mines of California v. Securities & Exchange Commission* (C.C.A. 9th 1938), 97 F. (2d) 704. See 40 MICH. L. REV. 78 (1941); 29 GEO. L. J. 328 (1940).

the demand is merely that a witness answer a particular question or furnish specified information. Further, in the case of a subpoena *duces tecum*, the courts cannot be insensitive to the practical difficulties involved in complying with a demand that a large mass of records be collected and transported to the place of the hearing, where they may remain for quite a period of time, inaccessible to individuals having occasion to use them in the normal conduct of their daily business.¹⁹ For these reasons, the considerations that sometimes persuade the courts to deny enforcement of administrative subpoenas when challenged on this ground, are given greater weight in cases involving demands for the production of voluminous records than in cases of subpoenas *ad testificandum*.

The difference, however, is essentially one of degree. The same broad considerations of public policy are relied on, whether the demand is that a party produce a certain paper or that he answer a certain question. In either case, the court in determining whether the subpoena should be enforced will take into account: (a) the nature of the proceeding; (b) the form of the particular request; and (c) the balance of interests, in terms of the particular case, between the public interest in disclosure and the private interest in suppressing public knowledge of the facts.

(a) *The nature of the proceeding.* The demand of the agency for information may be made in the course of a judicial-type proceeding, or as part of a legislative inquiry, or in connection with a general inquisitorial investigation.

Where the information is desired for use in a proceeding where the agency must pass on a judicial question affecting the party upon whom the demand is made, the courts are

¹⁹ *Federal Trade Commission v. Smith* (D. C. N. Y. 1929), 34 F. (2d) 323; *Bank of America Nat. Trust & Savings Ass'n v. Douglas* (App. D. C. 1939), 105 F. (2d) 100.

inclined to grant enforcement of the demand. In such cases—typically, where a hearing is to be had on a complaint—the issues are ordinarily defined at least in general terms, and there is but little reason why any information pertinent to such issues should be withheld.

For somewhat different reasons, the courts quite readily enforce demands for information desired in the course of a legislative inquiry, undertaken to obtain information on the basis of which a statute is to be written or amended. Where such inquiry is undertaken by a legislative committee, or by an agency pursuant to a specific request from the legislature, the courts are inclined to presume (at least in the absence of a clear contrary showing) that the inquiry is properly related to the legislative purpose. A somewhat different situation is presented, however, where an administrative agency on its own initiative undertakes a general investigation on the basis of which it contemplates making recommendations to the legislature as to possible statutory amendments. It is hard to distinguish this from the broad inquisitorial investigations which have received but little favor from the courts.

In the latter type of case, where an administrative agency is conducting a general investigation better to advise itself of conditions existing in the field wherein its regulatory activities are exercised, enforcement of the demand for information exhibits more clearly a tendency to violate the assumed right of the law-abiding citizen or corporation to be free of "officious intermeddling"; and accordingly it is in these cases that the courts have sometimes been more reluctant to enforce the administrative subpoena. Until recent years, at least, the demand for information, when made under such circumstances, has often been denied on the theory that there exists a right of privacy which cannot be invaded unless there clearly appears a compelling public interest in disclosure.

(b) *Form of demand.* The particular form of the demand—the way a question is put or the manner in which the desired documents are described—is also a factor. If the inquiry is grossly impertinent, as if the question is directed more to the personal affairs of the witness than to his business practices, the courts are somewhat reluctant to compel disclosure. Such considerations (at least equally with the argument based on a somewhat minor change in the language of the controlling statute), led the Supreme Court to deny the right of the Interstate Commerce Commission to compel the president of the Union Pacific Railroad to answer questions as to his personal investments in railroad stocks,²⁰ but to enforce the Commission's demand that the president of the Louisville and Nashville Railroad testify as to the amounts expended by his company in political activities.²¹

(c) *Public and private interest.* The courts try to prick out a line between mere scandalmongering inquiries, and cases where the requested information is necessary for the enlightened discharge of the agency's functions. For a long time, the courts felt that the rights of privacy were to be respected unless the competing public interest in disclosure was clearly the more compelling.²² Many decisions appeared to create a privilege, linked with the protective rights against compulsory self-accusation and unlawful searches and seizures, against unreasonable inquisitorial investigations. However, more recent decisions, while not denying such a privilege, indicate that it is now much more difficult than it had been in former years to convince the courts as to the

²⁰ *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115 (1908).

²¹ *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 38 S. Ct. 30 (1917).

²² *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115 (1908); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336 (1924); *Jones v. Securities & Exchange Commission*, 298 U. S. 1, 56 S. Ct. 654 (1936).

unreasonableness of the demand. Recently, the Supreme Court indicated that if (a) the agency is authorized by law to make the inquiry it proposes, and if (b) the information sought is relevant to that inquiry, then the subpoena should be enforced unless it is so broad and indefinite as to be plainly a case of "officious intermeddling." Only then is it to be called unreasonable, because the private interests to be protected "are not identical with those protected against invasion by actual search and seizure."²³

The real problem always is balancing the public interest against private security. The question is whether the demand for information "is out of proportion to the end sought."²⁴ Since the question is thus one of axiology, of balancing competing values, it is not surprising that the factual elements of each particular case may sway the balance in one direction or the other. A demand by an agency to examine a broker's records may be either "a violation of the natural law of privacy in one's own affairs," or "unobjectionable," depending on the court's appraisal of the general morals of the particular situation.²⁵

In drawing the dividing line between the permissible and the illicit, the courts are influenced by the apparent reasonableness of the request, its apparent relevancy to a clearly proper and important administrative purpose,²⁶ the degree to

²³ *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 213, 66 S. Ct. 494 (1946), commented on in 14 GEO. WASH. L. REV. 602 (1946); cf., *Fleming v. Montgomery Ward & Co., Inc.* (C.C.A. 7th 1940), 114 F. (2d) 384; *Securities & Exchange Commission v. Vacuum Can Co.* (C.C.A. 7th 1946), 157 F. (2d) 530. The current trend of the federal courts to grant enforcement of administrative subpoenas in almost every case is discussed in Davis, "The Administrative Power of Investigation," 56 YALE L. J. 1111 (1947).

²⁴ *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d) 377, 379.

²⁵ *Zimmerman v. Wilson* (C.C.A. 3d 1936), 81 F. (2d) 847, 849. Later, after the agency alleged that it wished to examine the records to uncover suspected fraud, the examination which had at first been denied was subsequently permitted. *Zimmerman v. Wilson* (C.C.A. 3d 1939), 105 F. (2d) 583.

²⁶ *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d) 377.

which the business in question is affected by a public interest, and the apparent intent of the legislature as to the breadth of the inquiry authorized.²⁷

4. Compelling Production of Documents in Possession of Disinterested Parties

Not infrequently, the records of a bank or a stockbroker revealing the financial dealings of a customer, or a telegraph company's copies of messages sent over its wires, may be a productive source of information for an administrative agency. May an agency, by subpoena or other demand directed to the company, require it to permit an examination of all its records which may throw some light on the activities of the company's customers?

If the company itself objects, the question of course is determinable on the same basis as in any other case where the owner of records objects that a broad demand for disclosure thereof is unreasonable. But frequently the company has no objection to producing the records in question save for a general desire to protect the customer's good will by respecting his wishes for privacy; and this is not often a sufficient incentive to compel the company to contest vigorously the demand of the agency.

In such cases, has the company's customer, whose affairs are the ultimate object of the investigation, any grounds to complain? Since the search is not directed to the customer's own records, he apparently cannot invoke the protection of the Fourth Amendment against unreasonable searches;²⁸ nor

²⁷ In addition to the cases above cited, see *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 38 S. Ct. 30 (1917); *Federal Trade Commission v. Baltimore Grain Co.* (D. C. Md. 1922), 284 Fed. 886, aff'd 267 U. S. 586, 45 S. Ct. 461 (1924); *Federal Trade Commission v. National Biscuit Co.* (D. C. N. Y. 1937), 18 F. Supp. 667; *Cudahy Packing Co. v. United States* (C.C.A. 7th 1926), 15 F. (2d) 133.

²⁸ *Newfield v. Ryan* (C.C.A. 5th 1937), 91 F. (2d) 700; *Zimmerman v. Wilson* (C.C.A. 3d 1939), 105 F. (2d) 583—this decision citing many cases; *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d)

can he ordinarily show that any privilege prohibits the disclosure of the information (as would be true in the case of communications to counsel).²⁹

He does, however, seem to be accorded a derivative right to insist that the company assert, and to assert on the company's behalf, any objection to the disclosure that could properly be urged by the company.³⁰ But this amounts to little, for ordinarily the company has no grounds for complaining that the search is unreasonable.³¹

Despite the fact that the person whose activities are the subject of the search is not immediately involved, he is nevertheless the real party in interest. Should he not have a standing to object to a procedure that would compel disclosure by a disinterested third party of its duplicate records, in cases where he could resist a similar demand directed to him personally? If his private copies of telegrams which he has sent, or his own record of his banking transactions or deposits in a stockbroker's accounts, are protected as against a general inquisitorial search, should not the protection be extended to counterparts of such records in the hands of the banker, broker, or telegraph company? Decisions in some cases, and dicta in others, recognize that the person being investigated should be regarded as the real party in interest, and should have a right to injunctive relief to prevent the opening of the records of his agent to an unreasonably broad search.³² The fact that such records are not strictly private doubtless inclines the courts to view with greater complaisance a rather broad demand. Again, the question is fundamentally one calling for the court's judgment as to the

²⁹ *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d) 377.

³⁰ This is conceded by dicta in the *McMann* case, *supra*.

³¹ *United States v. First Nat. Bank of Mobile* (D. C. Ala. 1924), 295 Fed. 142, *aff'd sub nom. First Nat. Bank of Mobile v. United States*, 267 U. S. 576, 45 S. Ct. 231 (1925).

³² *Hearst v. Black* (App. D. C. 1936), 87 F. (2d) 68; *Newfield v. Ryan* (C.C.A. 5th 1937), 91 F. (2d) 700.

reasonableness of the demand, under all the circumstances of the case.³³

5. Remedy Against Improper Demand for Production of Information

Where a subpoena, or other demand for production of information, is improper (on the basis of any of the objections above discussed) ordinarily the only course open to the party objecting to the demand is to refuse to obey it, and challenge its validity in the course of proceedings brought by the administrative agency to enforce it. Ordinarily, motions to quash the subpoena or to enjoin the enforcement thereof are not available as a means of obtaining in advance a judicial determination of the propriety of the demand.³⁴ If violation of the subpoena entails criminal penalties, equitable remedies may be available.³⁵ Similarly, injunctive relief is available in situations where the objection is not only to the enforcement of the subpoena, but to the public disclosure of the information demanded;³⁶ and also in situations of the sort discussed in the preceding section, where the objection is addressed to compliance on the part of a disinterested third party with unreasonable requirements for disclosure of confidential information.

A judicial order directing obedience to a subpoena is appealable.³⁷

³³ Cf., *Zimmerman v. Wilson* (C.C.A. 3d 1936), 81 F. (2d) 847; and the Court's later decision in a subsequent phase of the same case in *Zimmerman v. Wilson* (C.C.A. 3d 1939), 105 F. (2d) 583.

³⁴ *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963 (1938); *Federal Trade Commission v. Millers' National Federation* (App. D. C. 1931), 47 F. (2d) 428; *Fleming v. Arsenal Bldg. Corp.* (D. C. N. Y. 1940), 38 F. Supp. 675.

³⁵ *Federal Trade Commission v. Millers' Nat. Federation* (App. D. C. 1927), 23 F. (2d) 968.

³⁶ *Bank of America Nat. Trust & Savings Ass'n v. Douglas* (App. D. C. 1939), 105 F. (2d) 100.

³⁷ *Brownson v. United States* (C.C.A. 8th 1929), 32 F. (2d) 844.

III. REQUIRING REPORTS

Administrative agencies are frequently granted power to require the filing of reports by those whose activities are subject to the agency's jurisdiction. In the absence of statutory authorization, it is very doubtful whether the filing of reports could be compelled; but even in the absence of such authorization, a suggestion that a report be filed in lieu of submitting to a demand, backed by a subpoena, for production of books and records, is to say the least highly persuasive.

While the preparation of such reports involves practical difficulties in connection with attempting accurately to compress voluminous information into tailor-made forms that sometimes do not well fit the situation, yet there are few legal difficulties involved. The Fourth Amendment is inapplicable.³⁸ Any invasion of asserted rights of privacy which may be involved is not likely to be embarrassing. Because of the opportunity to reconcile figures and report legal conclusions, the filing of reports does not lay open one's affairs to such soul-searching scrutiny as does the revelation of private records and correspondence.

The desire of the agencies for a wealth of information as to topics connected only collaterally with matters within the agencies' jurisdiction is sometimes met by refusal to furnish information called for in the report form. In such cases, the furnishing of the information is generally required if it has a substantial bearing on matters falling within the agency's jurisdiction.³⁹

Closely related to the power to require the filing of reports is the power to prescribe accounting systems, which by

³⁸ *Isbrandtsen-Moller Co., Inc. v. United States*, 300 U. S. 139, 57 S. Ct. 407 (1937).

³⁹ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 S. Ct. 436 (1912); *Terminal Taxi Cab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583 (1916); *United States v. Clyde S.S. Co.* (C.C.A. 2d 1929), 36 F. (2d) 691; *Federal Trade Commission v. Claire Furnace Co.* (App. D. C. 1923), 285 Fed. 936, rev'd 274 U. S. 160, 47 S. Ct. 553 (1927).

statute is vested in some agencies. Compliance with requirements as to the form of accounting prescribed has been quite consistently enforced.⁴⁰ Objections as to the soundness of the accounting system preferred by the agency will be considered only if the system adopted by the agency is so entirely at odds with fundamental principles of correct accounting as to be the expression of a whim rather than an exercise of judgment.⁴¹

IV. PHYSICAL INSPECTIONS

Whether or not the controlling statute gives such power, representatives of administrative agencies (exhibiting the layman's preference, which is in many types of cases entirely justifiable, for getting facts by firsthand investigation rather than on the basis of testimony) frequently rely on personal inspections as a means of obtaining information.

Of course, if an inspection of the premises affords an opportunity to obtain accurate firsthand knowledge of physical facts affecting the determination of a case, there is no sound reason why an administrative tribunal should not rely on information thus gained. But the question in each case is whether or not the inspection does afford such opportunity. The agency's investigators may not see all that there is to be seen. They may report inaccurately to the officers in whom resides the ultimate power of decision. The physical situation may not be the same at the time of the inspection as at the time to which the determination relates.

Reliance by an agency on such inspection of course narrows the sphere of effective judicial review, and in cases where

⁴⁰ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 S. Ct. 436 (1912); *Norfolk & W. R. Co. v. United States*, 287 U. S. 134, 53 S. Ct. 52 (1932).

⁴¹ *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 57 S. Ct. 170 (1936). For discussion of the general problem, see Kripke, "A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107," 57 HARV. L. REV. 433 (1944); Morehouse, "Innovations in Public Utility Accounting Regulation," 46 YALE L. J. 955 (1937).

an agency must decide on the basis of a hearing and support its conclusion by a record containing substantial evidence tending to prove the facts found, reliance by the agency on such a physical inspection may be invalid as depriving the respondent of a hearing. He may be deprived of his right of cross-examination and of the means of showing that there is no substantial evidence to support the agency's findings.⁴² On the other hand, in cases where the agency is not compelled to grant a hearing, or where there is no provision for direct judicial review of the case on the basis of the record made by the agency, the agency is free to decide a case on the basis of its own inspection.⁴³

B. RIGHT OF DEFENDANT TO COMPULSORY PROCESS

1. Where Agency Has No Power to Issue Subpoena

Many agencies have no powers to issue subpoenas. In proceedings conducted before such tribunals, counsel for both parties, the agency as well as the respondent, must rely on informal arrangements to induce witnesses to appear and testify. While the burden thus imposed may weigh more heavily on counsel for the private party than on counsel for the agency, yet the mere fact that compulsory process is not available to the respondent does not, at least in the absence of a clear showing of actual prejudice and deprivation of an opportunity for a full and fair hearing, invalidate the administrative proceedings.⁴⁴ Significantly, almost all the cases

⁴² *Farmers' Elevator Co. of Yorkville v. Chicago, R. I. & P. Ry. Co.*, 266 Ill. 567, 107 N. E. 841 (1915).

⁴³ *People ex rel. Copcutt v. Board of Health of City of Yonkers*, 140 N. Y. 1, 35 N. E. 320 (1893).

⁴⁴ *Low Wah Suey v. Backus*, 225 U. S. 460, 32 S. Ct. 734 (1912); *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 46 S. Ct. 384 (1926); *Brinkley v. Hassig*, 130 Kan. 874, 289 Pac. 64 (1930), appeal dismissed 282 U. S. 800, 51 S. Ct. 39 (1930); In *Jewell v. McCann*, 95 Ohio St. 191, 116 N. E. 42 (1917), which apparently holds the contrary, the decision was placed on the somewhat broader grounds that the statute vested in the agency none of the powers essential to the conduct of a hearing.

so holding point out that the respondent in the administrative proceedings, who was objecting to the unavailability of compulsory process, did not show that this lack actually prejudiced the presentation of his case. It would be a rare case where such a showing could be made, for ordinarily a hostile witness who refuses to testify voluntarily cannot be depended upon to give any helpful testimony, except as to matters of a formal nature which most often can be otherwise proved. But circumstances can be conceived where the inability to compel the attendance of witnesses or the production of documents would actually operate to deprive a party of an opportunity for a full and fair hearing. In such cases it is probable that appropriate relief could be obtained.

2. Conditions on Issuance of Subpoena

In cases where the agency does have power to issue a subpoena, a different question is presented. To what extent may the agency attach conditions to the issuance of subpoenas requested by a private party appearing as respondent in proceedings before the agency?

The sounder administrative practice is to place the issuance of subpoenas on a ministerial basis, making them readily available to all parties, and (this particularly) making them as easily obtainable by counsel for private parties as by counsel for the agency. This conforms with established judicial traditions, under which subpoenas are ordinarily issued in blank by the clerk of the court, to be used by counsel as occasion requires. It is, if anything, more important in administrative proceedings than in judicial proceedings that subpoenas be readily available to the private parties, for the practice of entrusting the agency—one of the parties in interest—with the responsibility to decide whether the adverse party should be aided in preparing his case for trial, creates at least a suspicion if not an appearance of unfairness.

It has been suggested that to avoid any possibility of abuse of this power, it should be transferred from the litigant agency to some independent office.⁴⁵ This may be unnecessary, but at least the agencies should take pains to avoid making their subpoenas more easily obtainable by agency counsel than by private parties.⁴⁶

However, many agencies (with laudable motives but unfortunate shortsightedness) do impose various conditions upon the issuance of subpoenas to respondents, which are not imposed where the staff of the agency seeks a subpoena. While such requirement has been criticized as "unreasonable and unfair,"⁴⁷ the federal courts have generally held that in the absence of clear showing of actual prejudice, imposition of such requirements will be sustained.⁴⁸ Since actual prejudice may be suffered in cases where its existence is not susceptible to precise demonstration, there is much to be said for the view that the burden should be on the agency to prove lack of prejudice, and at least one state court has taken this position.⁴⁹ Section 6 of the Federal Administrative Procedure Act of 1946 requires federal agencies to issue subpoenas to *any party* upon a statement showing the general relevance and reasonable scope of the evidence, and further

⁴⁵ Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 25.

⁴⁶ See comments of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 124; and further statement of concurring members, *idem.*, 221.

⁴⁷ *Inland Steel Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 109 F. (2d) 9, 20, where the court held that in view of this and other matters respondent had been denied a fair trial.

⁴⁸ *North Whittier Heights Citrus Ass'n v. National Labor Relations Board* (C.C.A. 9th 1940), 109 F. (2d) 76; *National Labor Relations Board v. Dahlstrom Metallic Door Co.* (C.C.A. 2d 1940), 112 F. (2d) 756; *National Labor Relations Board v. Blackstone Mfg. Co.* (C.C.A. 2d 1941), 123 F. (2d) 633.

⁴⁹ *Coney Island Dairy Products Corp. v. Baldwin*, 243 App. Div. 178, 276 N. Y. S. 682 (1935), setting aside an order revoking a milk dealer's license because of the refusal of the commissioner to furnish subpoenas to a respondent who refused to state whom he wished to subpoena. As to the general problem of the respondent's statutory right to subpoena, see 53 HARV. L. REV. 842 (1940).

requires that a denial of such an application must be accompanied by a statement of the reasons therefor.

The reluctance of many agencies to make subpoenas readily available to respondents is based upon a fear that attempts would be made to impede the expeditious progress of hearings by calling too many witnesses, or by calling witnesses to testify to irrelevant or immaterial matters, in the hope of possibly confusing the issue or at least delaying the issuance of the order. Such abuses are well known, but there are many devices to meet them which serve the purpose more aptly than does a conditional refusal to issue the subpoena. Hearing officers, generally, are not without power to exclude immaterial testimony. Where it becomes obvious that the purpose of the respondent is to waste time, administrative agencies can employ the same devices as do the courts to cut the hearing short. The danger that an unlimited right to subpoena witnesses might operate unfairly to the witnesses (as where competitors are subpoenaed to testify on an issue that is clearly irrelevant) can be met by making provision for quashing subpoenas at the instance of the witness.⁵⁰

While there may be sounder grounds for limiting the issuance of subpoenas *duces tecum* than subpoenas *ad testificandum*, in view of the substantially greater burden of producing documentary evidence, yet the admonition of Chief Justice Marshall in the *Burr* case,⁵¹ that "the opposite party can . . . take no more interest in the awarding of a subpoena *duces tecum* than in the awarding of an ordinary subpoena," applies as aptly to administrative agencies as to courts.

A useful purpose would be served by a requirement, equally applicable to agency representatives and to private parties,

⁵⁰ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 162-164.

⁵¹ 25 Fed. Cas. 30, 35 (Case No. 14,692d).

that the application for a subpoena need state only the general reason for the request (and this could be shown without identifying the witness or outlining his testimony). No more should be required.

3. Subpoena to Agency Representatives

The files of an agency may contain matters which, if made a part of the record at the hearing, would be helpful to the respondent's case, but which the agency for tactical reasons does not care to introduce in evidence. Similarly, members of the agency's staff occasionally are potentially valuable witnesses as to occurrences which the agency has no wish to make a matter of record. Since the respondent in such a case must in effect ask the agency to compel itself to testify, he is ordinarily without a remedy to compel the production of any information which the agency does not wish to produce voluntarily, and the agencies quite properly are reluctant to open their files in all cases to the parties appearing before them. Agency staffs welcome fishing expeditions no more than do private parties. Further, the agency's files often contain matters which are privileged from compulsory disclosure.

But where the proceedings are being conducted before a tribunal other than that of the agency to which the request is directed, a subpoena may properly issue to require disclosure of specified, relevant factual data ⁵² (unless the agency has by rule prohibited the production of official records in court proceedings on the ground that to do so would be prejudicial to the public interest) ⁵³ and, in some cases, of certain information as to agency practices and procedures.⁵⁴ Inquiry directed to the mental processes of members of the adminis-

⁵² *Blair v. Oesterlein Machine Co.*, 275 U. S. 220, 48 S. Ct. 87 (1927).

⁵³ *Bank Line, Ltd. v. United States* (C.C.A. 2d 1947), 163 F. (2d) 133.

⁵⁴ *National Labor Relations Board v. Cherry Cotton Mills* (C.C.A. 5th 1938), 98 F. (2d) 444.

trative staff, however, is ordinarily forbidden on the same grounds which preclude cross-examination of a judge or jury as to the basis on which a certain decision was reached.⁵⁵

⁵⁵ United States v. Morgan, 313 U. S. 409, 61 S. Ct. 999 (1941); National Labor Relations Board v. Botany Worsted Mills, Inc. (C.C.A. 3d 1939), 106 F. (2d) 263; National Labor Relations Board v. Biles Coleman Lumber Co. (C.C.A. 9th 1938), 98 F. (2d) 16. For a general discussion, see Pike and Fischer, "Discovery Against Federal Administrative Agencies," 56 HARV. L. REV. 1125 (1943).