THE EFFECT OF A CLAIM OF PRIVILEGE UPON THE SUBPOENA POWER OF AN ADMINISTRATIVE LAW JUDGE

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I.

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts. . . .
>
> *Justice Robert H. Jackson*[1]

The federal administrative process is dependent upon administrative law judges,[2] who preside at administrative proceedings having many of the elements of a judicial hearing.[3] The powers exercised by administrative law judges are derived from the Administrative Procedure Act.[4] As such, an administrative law judge is not vested with all the powers usually associated with judicial office.[5] Instead, his authority is proscribed by the Administrative Procedure Act and subject to initial review by the administrative agency

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1. FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

2. Since approximately 1972, the title of hearing examiner was changed to Administrative Law Judge. Segal, *The Administrative Law Judge*, 62 A.B.A.J. 1424, 1425 (1976).

3. Federal administrative agencies are vested with "legislative, judicial, and executive powers." Prentis v. Atlantic Coast Line, 211 U.S. 210, 224 (1908). The Administrative Procedure Act § 4, 5 U.S.C. § 553 (1976) sets forth the procedures to be followed in rulemaking which is deemed to be a legislative function. *See, e.g.*, Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889 (D.D.C. 1965). 5 U.S.C. § 554 (1976) sets forth procedures to be followed in adjudicatory proceedings.

4. Section 7(c), 5 U.S.C. § 556(c) (1976) states as follows:

> (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—
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> (1) administer oaths and affirmations;
> (2) issue subpoenas authorized by law;
> (3) rule on offers of proof and receive relevant evidence;
> (4) take depositions or have depositions taken when the ends of justice would be served;
> (5) regulate the course of the hearing;
> (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
> (7) dispose of procedural requests or similar matters;
> (8) make or recommend decisions in accordance with section 557 of this title; and
> (9) take other action authorized by agency rule consistent with this subchapter.

5 U.S.C. § 556(c) (1976).

5. It has been said that judicial power is " 'the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' " United States v. Carrollo, 30 F. Supp. 3, 5 (W.D. Mo. 1939).

on behalf of which he is acting, and thereafter subject to review by the federal court system.[6]

Limits on the judicial power of administrative law judges is not without rationale. It has been argued with persuasiveness that, where the legal rights of adverse parties are adjudicated, a preference for decisions by judges rather than decisions by administrators prevails.[7] It has also been maintained that judges, rather than administrators, should, in the absence of congressional action, shape the outlines of national economic policy.[8] In contrast, it can be argued that administrative law judges should have full judicial powers since adjudicatory proceedings are virtually identical with civil trials without juries.[9] Moreoever, because an administrative law judge theoretically is chosen for his expertise in the matter pending before him for initial decision, his powers should be broad.[10]

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6. 5 U.S.C. § 557(b) (1976) states as follows:

> When the agency did not preside at the reception of the evidence, the presiding employee . . . an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

In the instance of the Federal Energy Regulatory Commission, which succeeded the Federal Power Commission (pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) and Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (1977)), appellate review of the agency's decision is under the Natural Gas Act, 15 U.S.C. § 717r(b) (1976).

7. J. HONNOLD, THE LIFE OF THE LAW 379 (1964). Honnold states that "every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and, secondly, to call into question in such a court the legality of any act done by an administrative official." *Id.*

8. Schwartz, *Legal Restrictions of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). Professor Schwartz contends that:

> [J]udges have more 'expertise' than commissioners. If the latter are expert in their special fields, the former are experts in synthesis. Daily confronted with the entire range of social conflict, the judges acquire perspective, become aware, as no administrators can, of all the conflicting goals towards which a society struggles.

Id. at 474. *See also* Mogel, *Bank Mergers and The Antitrust Laws*, 17 AM. U.L. REV. 57, 69 (1967).

9. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1. In his opinion regarding administrative hearings, Gellhorn states:

> At first glance many, and perhaps most, administrative adjudications appear to be merely carbon copies of judicial trials. Usually open to the public, the majority are conducted in an orderly and dignified manner, although not necessarily with the formality of a judicial trial. . . . In general, therefore, a lawyer experienced in litigating cases in state or federal courts will not find an administrative hearing strange or unfamiliar. The parties are represented by counsel; the examiner is treated with deference; and the evidence is received in the usual question and answer form.

Id. at 3-4.

10. One of the arguments asserted for giving an administrative law judge broad powers is that, because administrative hearings tend to produce evidence of general rather than specific conditions, an administrative law judge often is called upon to shape public policy, as well as to adjudicate the individual rights of the parties before him. *See* Gellhorn, *supra* note 9, at 4:

As the result of these contrasting philosophies concerning the scope of the power of an administrative law judge, many questions have arisen. The scope of this article is limited to the question of how such a judge should rule when a claim of privilege, such as lawyer-client,[11] husband-wife,[12] accountant-client[13] or trade secrets,[14] is asserted by a private party attempting to avoid the mandate of an administrative subpoena compelling the disclosure of certain evidence.[15]

An administrative law judge does not have contempt power to compel compliance with an administrative subpoena.[16] However, because of his role as trier of fact, his familiarity with a possible voluminous hearing record,[17] his freedom from strict adherence to the rules of evidence,[18] his strong predil-

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Another and more significant distinction between judicial and administrative adjudications, however, is that agency hearings tend to produce evidence of general conditions as distinguished from facts relating solely to the respondent. This difference can be traced back to one of the original justifications for administrative agencies, namely the development of policy. Administrative agencies more consciously formulate policy by adjudicating—as well as by rulemaking—than do courts. Consequently, administrative hearings require that the hearing officer consider the impact of his decision upon the public interest as well as upon the particular respondent.

11. *See, e.g.,* Colton v. United States, 306 F.2d 633 (2d Cir. 1962); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); United States v. Summe, 208 F. Supp. 925 (E.D. Ky. 1962); CAB v. Air Transp. Ass'n of America, 201 F. Supp. 318 (D.D.C. 1961); SEC v. Harrison, 80 F. Supp. 226 (D.D.C. 1948).

12. *See, e.g.,* Cahan v. Carr, 47 F.2d 604 (9th Cir.), *cert. denied*, 283 U.S. 862 (1931); Gilles v. Del Guercio, 150 F. Supp. 864 (S.D. Cal. 1957).

13. *See, e.g.,* FTC v. St. Regis Paper Co., 304 F.2d 731 (7th Cir. 1962).

14. *See, e.g.,* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474 (1974). In *Kewanee*, the Supreme Court defined a trade secret to be "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

15. A related subject which is not within the scope of this article is that of requests for records which are made upon administrative agencies pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976) (replacing section 3 of the Administrative Procedure Act, 5 U.S.C. § 552 (1970)). *See, e.g.,* Legal Aid Society of Alameda County v. Shultz, 349 F. Supp. 771 (N.D. Cal. 1972). *See, generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 5:1-5:45 (1958).

16. ICC v. Brimson, 154 U.S. 447, 485 (1894), *dissenting opinion filed*, 155 U.S. 3 (1894).

17. Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 435 (1960). In his article, Judge Friendly observes that "the agencies have gone overboard in their zeal for a record that will drain the last dregs from the cask—and sometimes a good many staves as well." *Id.*

18. The Court of Appeals in Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 380 (2nd Cir.), *cert. denied*, 326 U.S. 734 (1945) admonished the hearing examiner for rigidly following the rules of evidence:

> Why either he or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in

iction for full disclosure[19] and his knowledge that courts will "rubber stamp" administrative subpoenas,[20] the administrative law judge has effectively been granted subpoena power substantially in accord with the subpoena power of the judiciary. Such power should be exercised with restraint, particularly if there is a claim of privilege involved. The desire of administrative agencies to build a complete record,[21] with findings supported by substantial evidence,[22] should not be a viable rationale for administrative law judges to compel the divulgence of evidence sought to be protected by a claim of privilege, without at least providing for an *in camera* inspection of the evidence sought.

II.

> [I]ntrusion into, and compulsory exposure of one's private affairs and papers, without judicial process, or in the course of judicial proceedings . . . is abhorrent to the instincts of Englishmen and Americans.
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> *Justice Stephen J. Field*[23]

Prior to examining the Administrative Procedure Act and various cases decided thereunder to determine the limits imposed upon the subpoena power of an administrative law judge when a claim of privilege is asserted by a private party, it is helpful to briefly examine the approximately 50 year period preceding the 1946 enactment of the Administrative Procedure Act. At issue in the early litigation was whether violation by a private party of an agency order was punishable by contempt. However, the earlier decisions dealt only with the enforcement power of the agency and not with claims of privileges.

The United States Supreme Court held in *ICC v. Brimson*[24] that the ICC could not be vested with the power to fine or imprison those who failed to

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depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.

Judge Learned Hand in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2nd Cir.), *cert. denied*, 304 U.S. 567 (1938), *rev'd on other grounds*, 110 F.2d 148 (2nd Cir. 1940) observed:

> [Hearsay evidence may form the basis for the hearing examiner's findings] if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

19. FCC v. Schreiber, 381 U.S. 279, 293 (1965).

20. *See, e.g.*, Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940).

21. WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir.), *cert denied*, 393 U.S. 914 (1968).

22. The term substantial evidence can be defined to mean:

> [M]ore than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of fact to give it the credence and weight essential to support findings. It must have those characteristics to such an extent that in the setting made by the entire record the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord.

Gooding v. Willard, 209 F.2d 913, 916 (2d Cir. 1954).

23. *In re* Pacific Ry. Comm'n, 32 F. 241, 251 (C.C.N.D. Cal. 1887).

24. 154 U.S. 447 (1894).

obey the ICC's orders.[25] However, the Court, in *Brimson*, concluded that a judicial proceeding in an appropriate district court could enforce, by a contempt order, a subpoena issued by the agency.[26] As a result of *Brimson*, it has been concluded by Professor Davis, one of the foremost authorities on administrative law, that although Congress has refused to grant administrative agencies the power to hold someone in contempt for violating one of its subpoenas, it has provided for the appropriate district court to enforce an agency's order upon proper application by the agency.[27]

Chronologically, the next major case to be decided in this area of administrative law was the Seventh Circuit's decision in *Fleming v. Montgomery Ward & Co.*,[28] a case which involved a determination of the lawfulness of a subpoena *duces tecum* issued pursuant to the Fair Labor Standards Act of 1938.[29] The district court had ordered Montgomery Ward & Co. to comply with the subpoena which was issued by the administrator of the Act.[30] On appeal, it was contended that: (1) the subpoena was unreasonable under the fourth amendment to the United States Constitution,[31] and (2) that the district court's refusal to develop the facts surrounding the issuance of the subpoena deprived the company of its day in court.[32]

Relying on *Brimson*, the *Fleming* court concluded, in sweeping language, that an administrative agency, acting pursuant to congressional authority under the commerce clause, could examine records and require disclosure of information regardless of the absence of the probable cause requirement of the fourth amendment.[33] The court went on to state that an agency, created to regulate and supervise an industry, could require the industry to maintain certain records, and, as such be entitled to inspect the records of the industry under its purview.[34]

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25. *Id.* at 485.

26. *Id.* at 489.

27. DAVIS, *supra* note 15, § 3.11 at 213. For example, the following agencies currently are empowered to issue subpoenas but enforcement is in the courts: Federal Trade Commission, 15 U.S.C. § 49 (1976); Federal Energy Regulatory Commission, 15 U.S.C. §§ 717c, 717d (1976); National Labor Relations Board, 29 U.S.C. § 161(1) (1976); Federal Communications Commission, 47 U.S.C. § 409(e) (1976); Interstate Commerce Commission, 49 U.S.C. § 12(1) (1976); Administrator of the Federal Aviation Agency, 49 U.S.C. § 1354(c) (1976); and Civil Aeronautics Board, 49 U.S.C. § 1484(b) (1976).

28. 114 F.2d 384 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940). Decided before *Fleming* was McMann v. SEC, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937) which held that a broker-client relationship was not a basis to preclude enforcement of an SEC subpoena to obtain records of a brokerage account.

29. 29 U.S.C. §§ 201-16, 217-19 (1976).

30. Fleming, 114 F.2d at 386.

31. U.S. CONST. amend. IV.

32. This contention is significant because what was sought was in effect *de novo* hearing before a judicial officer. The Seventh Circuit in *Fleming* declined to do this but merely "rubber stamped" the district court's "rubber stamping" of the administrator's action. 114 F.2d at 384.

33. *Id.* at 390-91. Professor Davis commented that the holding in *Fleming* was an "especially strong one" because the company was denied the opportunity to present evidence showing lack of probable cause to believe the company had violated the Act. DAVIS, *supra* note 15, § 3.12 at 218.

34. 114 F.2d at 391.

In reaching its conclusion, the *Fleming* court rejected a contention based upon *FTC v. American Tobacco Co.*,[35] a case in which the Supreme Court affirmed the district court's[36] denial of a general demand by the FTC for two tobacco companies' "records, contracts memoranda and correspondence"[37] on the grounds that the request was an impermissible "fishing expedition"[38] and that no showing had been made that the documents sought were relevant and material to the issues involved.[39] The *Fleming* court observed that *American Tobacco* "is limited to the proposition that the . . . government may demand only records and papers which are relevant to a lawful inquiry. . . ."[40] This observation by the *Fleming* court is accurate but fails to recognize that in *American Tobacco*, the Supreme Court examined the basis of the agency's request. In contrast, in *Fleming*, the court merely "rubber stamped" the subpoena requested as being appropriate to the cause at hand.

Three years after *Fleming*, in the case of *Endicott Johnson Corp. v. Perkins*, the Supreme Court had an opportunity to review the nature and extent of a hearing held before a district court upon an agency's request for enforcement of its subpoena.[41] In *Endicott Johnson*, the Court was faced with the issue of whether a subpoena, issued by the Secretary of Labor pursuant to the Walsh-Haley Act,[42] which requested a shoe manufacturer's payroll records, was a valid exercise of the administrative subpoena power. That Act required, *inter alia*, that government contractors, under certain circumstances, pay "not less than the minimum wages as determined by the Secretary of Labor."[43] The district court refused to enforce the subpoena and set for trial the question of whether the particular shoe plants from which the records set forth in the subpoena were sought fell within the ambit of the Act.[44] With Justices Murphy and Roberts dissenting, the Supreme Court reversed the district court and held that it was the duty of the district court to compel the production of the documents requested by the subpoena absent

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35. 264 U.S. 298 (1924).

36. FTC v. American Tobacco Co., 283 F. 999 (S.D.N.Y. 1922).

37. 264 U.S. at 303.

38. In Jones v. SEC, 298 U.S. 1, 26 (1936), the Supreme Court refused to uphold issuance of a subpoena in connection with a registration statement because it was a condemned "fishing expedition."

39. Mr. Justice Holmes, speaking for the Court, stated:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. . . . It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up.

American Tobacco, 264 U.S. at 305-06.

40. 114 F.2d at 391.

41. 317 U.S. 501 (1943).

42. 41 U.S.C. §§ 35-45 (1976).

43. Endicott Johnson, 317 U.S. at 502.

44. *Id.* at 507.

a showing that the documents were "plainly incompetent or irrelevant to any lawful purpose. . . ."[45]

It has been observed that this language in *Endicott Johnson* means that an enforcing court may go no further than inquiring whether or not the information subpoenaed is plainly irrelevant to any lawful purpose of the administrative agency.[46] Thus, the *Endicott Johnson* test means that the judicial enforcement proceeding may not inquire into the merits of the subpoena if the evidence sought can be construed to be within the ambit of the agency's jurisdiction. At a minimum, application of the *Endicott Johnson* standard seems unduly harsh when a party has honest doubts about a subpoena's validity.[47]

At its next opportunity, the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*,[48] endorsed *Endicott Johnson* and sustained the judicial enforcement of an administrative subpoena issued in the course of an investigation conducted pursuant to the Fair Labor Standards Act.[49] Mr. Justice Rutledge, speaking for the majority, concluded that the Administrator's power was essentially the same as a grand jury's or as a court's when issuing pretrial discovery orders.[50] Furthermore the majority concluded that the Administrator's power was governed by the same limitations as that of the grand jury's or the court's in that the Administrator could not "act arbitrarily in excess of his statutory authority . . . ."[51] *Oklahoma Press* also affirmed *Endicott Johnson's* determination that the district court was not authorized to decide the question of the subpoena's coverage.[52]

However, the endorsement of the administrative law judge's subpoena power in the *Oklahoma Press* majority was not without criticism. Mr. Justice Murphy eloquently dissented:

> It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years. But I am unable to approve the use of nonjudicial subpoenas issued by administrative agents.
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> Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves.
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> . . . .

45. *Id.* at 509. The dissenters in *Endicott Johnson* argued that the district court should "inquire and satisfy itself whether there is probable legal justification for the proceeding, before it exercises its judicial authority to require . . . a party to reveal his private affairs." *Id.* at 515.

46. DAVIS, *supra* note 15, § 3.10 at 210.

47. *See* 75 HARV. L. REV. 1222, 1224 (1962).

48. 327 U.S. 186 (1946).

49. 29 U.S.C. § 211 (1976).

50. Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 216-17.

51. *Id.*

52. *Id.* at 211.

> To allow a nonjudicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power.
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> . . . .
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> Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.[53]

In response to Mr. Justice Murphy's dissent, one commentator has observed that even if the subpoena power was confined exclusively to the judiciary, the result would be that subpoenas would be issued by clerks of the court, rather than by administrative law judges.[54]

The movement started by *Fleming, Endicott Johnson* and *Oklahoma Press* toward judicial sanction of broad subpoena powers for administrative agencies reached its zenith in *United States v. Morton Salt Co.*[55] *Morton Salt* was decided just after the enactment of the Administrative Procedure Act. At issue was a Federal Trade Commission order requiring a "complete statement [of] prices, terms and conditions of sale of salt . . . ."[56] Mr. Justice Jackson spoke for the majority in *Morton Salt,* and he noted that the power of an administrative agency was more analogous to a grand jury rather than to a court. The agency need not have a case or controversy before it has the power to request information, rather it can investigate either on the suspicion that the law is being violated or merely on the grounds that the agency wants assurance that the law is not being violated.[57] Mr. Justice Jackson further emphasized that like the grand jury, an administrative agency to which investigative and accusatory duties are delegated must be able to take the necessary steps to enable it to determine if and when there has been a probable violation of the law.[58]

The analysis in *Morton Salt* turns on the need for broad investigative powers in an administrative agency. Such power can be viewed as being inherent to an agency's legislative-rulemaking function as distinguished from its adjudicatory function.[59] Thus, it can be argued that *Morton Salt's* reason-

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53. *Id.* at 218-19.
54. DAVIS, *supra* note 15, § 3.12 at 223.
55. 338 U.S. 632 (1950).
56. *Id.* at 637.
57. *Id.* at 641-43.
58. *Id.*
59. The Ninth Circuit discussed the rulemaking-adjudication dichotomy in Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 693 (9th Cir.), *cert denied,* 338 U.S. 860 (1949). The court in *Willapoint* stated that:

> The legislative process, i.e., rulemaking, is normally directed primarily at 'situation,' rather than particular persons. Individual protestations of injury are normally and necessarily lost in the quantum of the greater good.
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> . . . .

ing is persuasive only when an agency is acting in other than an adjudicative function.

In any event, *Morton Salt* culminates the trend started by *Fleming, Endicott Johnson* and *Oklahoma Press*. It also represents the Supreme Court's movement 180 degrees away from the law enunciated by Mr. Justice Holmes in *American Tobacco* as well as that articulated by Mr. Justice Field at the outset of this section. Against these Supreme Court decisions giving broad approval to agency subpoenas, the Administrative Procedure Act was promulgated.

III.

> [S]uch administrative agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.
>
> *Elihu Root*[60]

The Administrative Procedure Act of 1946 did not give birth to administrative law.[61] The legal scholar Maitland said in 1888 that "[i]f you take up a modern volume of the reports of the Queen's Bench division, you will find that about half the cases reported have to do with rules of administrative law . . . ."[62] Dean Arthur J. Vanderbilt, in discussing the legislative background of the Administrative Procedure Act, claimed that it owed its existence to the extraordinary growth of the administrative agencies.[63] When enacted, the

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> [Adjudication's] primary concern is with individual rights, liabilities for past conduct, or present status under existing law, and tends to be accusative and disciplinary in nature. (footnote omitted).

One commentator has suggested, in assaying whether an administrative agency has exceeded its rulemaking authority derived from a general statutory power, that the search for authority is one "to see if for some reason Congress has specifically withheld rulemaking authority, intending that the agency proceed only by traditional adjudicatory methods." Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 493 (1970). *See* Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 390-91 (1964); Note, *The FTC's Claim of Substantive Rulemaking Power: A Study in Opposition*, 41 GEO. WASH. L. REV. 330 (1972).

60. HONNOLD, *supra* note 7, at 358-59.

61. The significance of administrative law can be appreciated by the statistics for 1963 which showed for that period there were 70,000 administrative trials as compared with 11,000 civil and criminal trials before federal district courts. Gellhorn, *supra* note 9, at 2-3.

62. F. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 505 (1908).

63. A VANDERBILT, LEGISLATIVE BACKGROUND OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT, FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 1, 4 (1947). Dean Vanderbilt supported his contention with the following statistics:

> The Final Report of the Attorney General's Committee on Administrative Procedure traces the origin of three agencies to the First Congress, finds eight more coming into existence before the Civil War, six others, including the Interstate Commerce Commission, in the ensuing period to the end of the century, nine more from 1900 to the end of World War I, and a like number from 1918 to the beginning of the Great Depression, and 17 more from 1930 to 1940—51 agencies in all, of which 22 are outside the regular

Administrative Procedure Act was both hailed[64] and criticized.[65]

Although the legislative history of the Administrative Procedure Act is extensive,[66] this section of the article deals only with the legislative history relevant to the subpoena power of administrative law judges. Section 555(d) of the Administrative Procedure Act,[67] which substantively is unchanged since its enactment as section 6(c) in Senate Bill Number 7,[68] provides as follows:

> Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, *on a statement or showing of general relevance and reasonable scope of the evidence sought*. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be *in accordance with law*. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt of contumacious failure to comply.[69]

From the section's language, it is apparent that the terms "reasonable scope" and "in accordance with law" are susceptible to more than one definition.

With regard to the former term, the legislative history clarifies the reasons behind using the above quoted language. The pertinent sections state as follows:

> (1) In the first sentence use the phrase 'and reasonable' rather than 'or reasonable' to indicate that the agency may require a showing of 'relevance, necessity *and* reasonable scope'. If the change were made, agencies would, strictly speaking, be compelled to require all the elements or none; as written, agencies may require all or some.[70]

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executive department and 29 within. World War II utilized or evoked a host of agencies, many of which came within the meaning of an administrative agency as defined by the Attorney General's Committee. Of these agencies 9 antedated 1940, 15 were created in 1940, 44 in 1941, 48 in 1942, 28 in 1943, 19 in 1944, 19 in 1945, and 20 even in 1946—in all 202 emergency agencies in addition to the 51 peacetime tribunals.

Id. at 4.

64. Dean Vanderbilt said that the Act was "the most significant and far reaching legislation in the realm of federal judicial administration since the Judiciary Act of 1789." *Id.* at 1.

65. F. Blachly, Critique of the Federal Administrative Procedure Act, Federal Administrative Procedure Act and the Administrative Agencies 30 (1947). In his article, Blachly writes that "[t]here are several ways in which the Administrative Procedure Act seriously interferes with these broad regulatory functions of administrative agencies." *Id.* at 43.

66. *See, e.g.*, Walkup, *The Administrative Procedure Act*, 34 Geo. L. Rev. 457 (1946).

67. 5 U.S.C. § 555(d) (1976).

68. S. 7, 79th Cong., 1st Sess. (1945). On March 12, 1946, the Senate debated S. 7, which was introduced by Senator McCarran on January 6, 1945. 92 Cong. Rec. 2148 (1946). The bill was passed the same day. 92 Cong. Rec. 2167 (1946). On January 8, 1945, Representative Summers introduced H.R. 1203, 79th Cong., 2d Sess. (1945) which was considered by the House as H.R. Res. 615, 79th Cong., 2d Sess. 92 Cong. Rec. 5645 (1946). The bill was passed by the House on the same day. 92 Cong. Rec. 5668 (1946).

69. 5 U.S.C. § 555(d) (1976) (emphasis added).

70. S. Doc. No. 248, 79th Cong., 2d Sess. 27-28 (1946).

Thus, a court, in following the standard for judicial enforcement of an administrative subpoena, need not consider either the particular relevance or the specific necessity of the evidence sought by the subpoena before an administrative agency's subpoena compelling a private party to disclose information will be deemed justified.[71] As such, under section 555(d) of the Administrative Procedure Act, an administrative law judge's subpoena power is broad.

With regard to the section's phrase "in accordance with law," the legislative history makes clear that review by a court of a subpoena issued by an administrative agency is narrow and limited to a cursory finding that the agency has jurisdiction.[72] Thus, it would not be unreasonable for a reviewing court to conclude that once it makes a preliminary finding of jurisdiction it can look no further and must "rubber stamp" the agency's subpoena as being valid.[73]

This view is confirmed by a report issued by the Senate Committee on the Judiciary on November 19, 1945 (approximately five months after Senate document Number 248)[74] stating that courts should be satisfied with the agency's determination of its jurisdiction.[75] The report states that the court should only "inquire generally into the legal and factual situation. . . ."[76] Indeed, the legislative history admonishes the courts not to enter into a "detailed examination of facts and issues" upon its review of a subpoena issued by an administrative law judge.[77]

Although the Congress, in enacting section 6(c) of the Administrative Procedure Act merely believed that it was codifying the law as enunciated by *Endicott Johnson*,[78] the legislative history alone would sanction broader authority for an administrative law judge and less judicial review than that contemplated by the Supreme Court decisions.

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71. Compare this conclusion with the statement made in explanation of section 6(c) (now 5 U.S.C. § 555(d) (1976)), saying it is designed to "[l]imit the showing required of private parties so that they may not be required to disclose their entire case for the benefit of agency prosecutors." *Id.* at 27.

72. S. Doc. No. 248, 79th Cong., 2d Sess. 28 (1946) states that "in accordance with law" means that no agency subpoena can be enforced beyond the lawful jurisdiction of the agency.

73. In the Senate debate on S. 7, the Administrative Procedure Act's sponsor, Senator McCarran, said that a subpoena will issue upon a "showing of general relevance and reasonable scope *if the agency rules so require*" (emphasis added). 92 CONG. REC. 2157 (1946).

74. S. Doc. No. 248, 79th Cong., 2d Sess. 27-28 (1946).

75. S. REP. No. 752, 79th Cong., 1st Sess. 20 (1946).

76. *Id.*

77. The House Committee on the Judiciary's Report with regard to old section 6(c) is identical with the Senate Report Number 752. H.R. REP. No. 1980, 79th Cong., 2d Sess. 33 (1946).

78. 317 U.S. 501 (1943). The Attorney General's Manual on the Administrative Procedure Act 69 (1947) concludes that "nothing in the language of section 6(c) suggests any purpose to change this established rule in Endicott Johnson." But see the statement by Representative Walter, who said that "[t]he effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see Endicott Johnson v. Perkins . . . have been held inapplicable (citations omitted)." 92 CONG. REC. 5652 (1946).

IV.

> The reported cases are apt to be only the small change of legal thought. They represent the compromise of the moment between tradition and precedent on the one side and the free conception of the desirable on the other.
>
> *Justice Oliver Wendell Holmes*[79]

Against the background of the two preceding sections which discussed both the judiciary's and Administrative Procedure Act's sanctioning of broad subpoena powers for a federal administrative agency, this section of the article deals with certain recent cases involving a clash between the exercise of an agency's subpoena power and a private party's assertion of a claim or privilege. Such controversies may require a reviewing court to balance two policies. The first is the agency's need to obtain information to further its statutory functions.[80] The other competing policy is that of encouraging free and confidential communications between certain parties, such as attorney and client.[81] For reviewing courts, the problem may be resolved easily if they wish to endorse the " 'right to know' explosion"[82] and lower the "barriers of truth" by narrowing the field of privilege.[83] However, if a court wishes to resort to precedent to sustain a claim of privilege, it will find that "the case law is scanty and rarely provides firm holdings."[84]

In summarizing the state of the law in 1971, one commentator observed that agencies generally grant privileges in situations involving attorney and client, physician and patient and husband and wife. However, neither Congress or the administrative agencies have clearly stated whether or not privileges must be recognized when not constitutionally mandated.[85] An examination of recent decisions enables one to agree that the foregoing observation is apposite today. For example, it can be concluded that courts have both recognized and refused to recognize the attorney-client privilege,[86] but gener-

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79. HONNOLD, *supra* note 7, at 3-4.

80. Note, *Privileged Communictions Before Federal Administrative Agencies: The Law Applied In The District Courts*, 31 U. CHI. L. REV. 395, 411 (1964) (hereinafter cited CHICAGO Note).

81. *See* CAB v. Air Transp. Ass'n of America, 201 F. Supp. 318 (D.D.C. 1961). With regard to this privilege, it could be argued that the right to appear before an agency represented by counsel implies the corollary that testimonial privilege be given between the subpoenaed person and his counsel.

82. Segal, *supra* note 2, at 1425.

83. *E.g.*, C. MCCORMICK, THE LAW OF EVIDENCE § 81 (1954) states:

> The manifest destiny of evidence law is a progressive lowering of the barriers to truth. Seeing this tendency, the commentators who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege . . . . One may hazard a guess . . . that in a secular sense privileges are on the way out.

84. *See* CHICAGO Note, *supra* note 79, at 398.

85. Gellhorn, *supra* note 9, at 32. However, Mr. Gellhorn further notes that "the trend appears to be toward narrowing testimonial privileges in administrative hearings . . . ." *Id.*

86. *See, e.g.*, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (attorney-client privilege not recognized); United States v. Woodall, 438 F.2d 1317

ally have been unwilling to recognize a claim of accountant-client privilege.[87] In the instance where there has been a claim of privilege based upon trade secrets, the recent trend of court decisions has been more uniform.[88] The general rule was enunciated in *Paul v. Sinnott,*[89] which reiterated the view that courts will exercise discretion to avoid mandating the disclosure of trade secrets, especially in cases involving competitors.[90]

The leading case in the area is *FCC v. Schreiber.*[91] In *Schreiber* the Supreme Court upheld an FCC ruling which permitted public disclosure of evidence except when the proponent of a claim of confidential information demonstrated that the public interest, the proper dispatch of business or the ends of justice would be served by an *in camera* inspection of the evidence requested. Justice Warren held that the rule properly applied to the present situation involving trade secrets. Speaking for the court he concluded that the agency's rule was in keeping with the general public policy favoring disclosure of agency proceeding.[92] The effect of *Schreiber* is to sanction administrative and judicial action which results in "full disclosure."[93] Thus, a party wishing to protect its confidential business secrets bears an extremely heavy burden.[94]

(5th Cir. 1970), *cert. denied,* 403 U.S. 933 (1971) (attorney-client privilege not recognized); Canady v. United States, 354 F.2d 849 (8th Cir. 1966) (attorney-client privilege not recognized); United States v. Judson, 322 F.2d 460 (9th Cir. 1963) (attorney-client privilege upheld); United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973) (attorney-client privilege upheld); United States v. White, 326 F. Supp. 459 (S.D. Tex. 1971), *cert. denied,* 419 U.S. 872 (1974) (attorney-client privilege not recognized); and United States v. Merrel, 303 F. Supp. 490 (N.D.N.Y. 1969) (attorney-client privilege not recognized).

87. Couch v. United States, 409 U.S. 322 (1973) (client-accountant privilege not recognized); *In re* Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973) (client-accountant privilege not recognized); Stuart v. United States, 416 F.2d 459 (5th Cir. 1969) (client-accountant privilege recognized); United States v. Bowman, 236 F. Supp. 548 (M.D. Pa. 1964) (client-accountant privilege not recognized); Hinchcliff v. Clarke, 205 F. Supp. 1 (N.D. Ohio 1961), *cert. denied,* 387 U.S. 941 (1966) (client-accountant privilege not recognized).

88. In an earlier decision, Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir.), *cert. denied,* 323 U.S. 791 (1945), which involved the question of whether certain locks were "pickproof," the court upheld the decision of a trial examiner to have the expert witness pick the defendant's locks *in camera* so as not to reveal a trade secret. 143 F.2d at 937.

89. 217 F. Supp. 84 (W.D. Pa. 1963).

90. *Id.* at 85. *See* FCC v. Cohn, 154 F. Supp. 899, 913 (S.D.N.Y. 1957) (wherein the court ordered special protection to avoid public disclosure of confidential information sought from witnesses rather than parties).

91. 381 U.S. 279 (1965).

92. *Id.* at 293.

93. *See* Boeing Airplane Co. v. Coggenshall, 280 F.2d 654, 662 (D.C. Cir. 1960), wherein the court authorized an *in camera* inspection of certain material but stated that the court should keep in mind the "fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy."

94. *But see* FTC v. United States Pipe and Foundry Co., 304 F. Supp. 1254, 1260-61 (D.D.C. 1969), which approved the Federal Trade Commission's issuance of a subpoena requiring the production of certain confidential data but providing for (1) an *in camera* inspection of the data by the hearing examiner; and (2) the exclusion of counsel, who was also an officer of a competitor, from examining the document. To a similar effect are the cases which have found

In sum, recent federal cases dealing with a claim of privilege or trade secrets have been decided in accordance with *Fleming, Endicott Johnson, Oklahoma Press* and *Morton Salt.* However, in the instance of a claim of a trade secret, courts have been willing to hold *in camera* proceedings to protect disclosure to a business competitor.

V.

> The power of Congress to impose on Courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative [sic]."
>
> *Justice Felix Frankfurter*[95]

Notwithstanding the foregoing observation by Justice Frankfurter, courts will "rubber stamp" administrative subpoenas, even when there is a claim of privilege or trade secrets once they have made a cursory review of the agency's jurisdiction. The state of the law poses real problems for a party which wishes to protect confidential information or a trade secret. *In camera* proceedings are not fully satisfactory because there is still the threat that the government will be forced to disclose the trade secrets pursuant to a Freedom of Information Act request.[96] Thus, an administrative law judge should use restraint in issuing agency subpoenas, making sure that the information is relevant, necessary, its scope reasonable and that the information is sought for a purpose within the jurisdiction of the particular agency. Most important of all, the administrative agencies must keep in mind that, for all practical purposes, their determination of what is to be subpoenaed is, in most cases, final and that most challenges to a subpoena will be resolved, by the courts, in favor of the administrative agency.

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that trade secrets or similar confidential information are entitled to protection from unreasonable disclosure: La Chemise Lacoste v. General Mills, Inc., 53 F.R.D. 596 (D. Del), *aff'd*, 487 F.2d 312 (2d Cir. 1971); A.H. Robbins Co. v. Fadely, 299 F.2d 557, 561 (5th Cir. 1962); United States v. IBM Corp., 67 F.R.D. 40 (S.D.N.Y. 1975); Celanese Corp. v. E.I. dupont de Nemours & Co., 58 F.R.D. 606 (D. Del. 1973); Corbett v. Free Press Ass'n, 50 F.R.D. 179 (D. Vt. 1970); Vogue Instruments Corp. v. Lem Instruments Corp., 41 F.R.D. 346 (S.D.N.Y. 1967); Shawmut, Inc. v. American Viscose Corp., 11 F.R.D. 562 (S.D.N.Y. 1951); Wagner Mfg. Co. v. Cutler-Hammer, Inc., 10 F.R.D. 480 (S.D. Ohio 1950); Ferguson v. Ford Motor Co., 8 F.R.D. 414 (S.D. N.Y. 1948); and Lenerta v. Rapidol Distributing Corp., 3 F.R.D. 42 (N.D.N.Y. 1942).

95. Penfield Co. of Calif. v. SEC, 330 U.S. 585, 604 (1947) (Frankfurter, J., dissenting).

96. *See* note 15 *supra.*