FCC v. Schreiber - A New Weapon in the Administrative Arsenal

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NOTES

FCC v. Schreiber — A New Weapon in the Administrative Arsenal?

I. INTRODUCTION

The use of federal investigatory hearings as an ancillary tool of law enforcement by administrative agencies would appear to be more widespread today than ever before. While it is not to be argued that volumes of needed legislation have sprung from administrative investigations, a new and perplexing problem now looms before the judiciary—that of enforcing administrative processes at the expense of legitimate private interest. Under statutes designed to protect the public interest, many federal administrative agencies are granted authority to conduct investigations dealing with substantive matters within their jurisdiction.[1] Most agencies are endowed with compulsory process; persons may be ordered to appear and give testimony or to produce documents in investigatory hearings, and many agencies may impose criminal sanctions for noncompliance.[2] The most pressing problem for the judiciary, however, arises when an agency must turn to the courts for enforcement of compulsory process.

Consider the hypothetical case of *W*, a leading producer in a competitive industry, who is called upon in the course of an investigation by a federal agency to produce certain papers and documents relating to the sale and distribution of its product for the preceding fiscal year. *W* refuses to produce the documents unless they are received in confidence, on the ground that release of the information will greatly benefit its competitors in the industry. *W* further assails the subpoena as an unnecessary and improper inquisitorial investiga-

[1] Interstate Commerce Commission, 24 Stat. 383 (1887), as amended, 49 U.S.C. § 12 (1958); 49 Stat. 548, 550 (1935), as amended, 49 U.S.C. § 305(d) (1958); 49 Stat. 543 (1935), 49 U.S.C. § 901 (1958). Communications Act of 1934, 48 Stat. 1073, 1094 (1934), 47 U.S.C. §§ 208, 403 (1958). Securities and Exchange Act of 1934, 48 Stat. 85, 86 (1934), 15 U.S.C. §§ 77s, 77v (1958); 48 Stat. 899 (1934), 15 U.S.C. § 78u (1958); 49 Stat. 831 (1935), 15 U.S.C. § 79r (1958); 53 Stat. 1174 (1939), 15 U.S.C. § 77uuu (1958); Jones v. SEC, 298 U.S. 1 (1936). Federal Trade Commission, 38 Stat. 722, 723 (1914), 15 U.S.C. §§ 49, 50 (1958).

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

tion. If the federal agency maintains its position that the subpoena is a valid exercise of its statutory powers and refuses to provide *in camera* proceedings, judicial determination is available. In the normal case, *W* would refuse to produce the items subpoenaed, and the agency would file a petition for enforcement with the district court.

In considering requests for enforcement, the courts are faced with multitudinous statutes and scattered case law. The former establish no workable criterion, and the latter are largely in conflict. The two declarations of policy most often used by the courts in this area are: (1) the statement found in section 6(c) of the Administrative Procedure Act (APA) that the court shall sustain the subpoena "to the extent that it is found to be in accordance with law";[3] and (2) the attempt by the Court in *Oklahoma Press Publishing Co.* v. *Walling*[4] to establish three basic tests under which the courts can determine whether the subpoena is "in accordance with law." Yet neither the APA nor the *Oklahoma Press* case affords decisive criteria for the courts in the difficult problems posed by agency requests for enforcement of administrative subpoenas. An examination of the conflicting case authority underscores the need for clear guidelines if the courts are to treat the problem in its modern form successfully and uniformly.

II. Early Treatment of Administrative Subpoenas

During the formative period of administrative regulation, substantive limitations were placed on agency subpoena powers.[5] The judicial attitude was one of hostility based on a fear of governmental encroachment upon the individual's right of privacy. Subpoenas "too sweeping in [their] terms"[6] were subject to condemnation. Perhaps the best example of the Supreme Court's early position is *FTC v. American Tobacco Co.*[7] Subpoenas under an investigation into alleged antitrust violations called for production by respondent of all books, papers, records, contracts and other memoranda relating to salesmen, customers and certain wholesale grocers' associations. The Commission

[3] 60 Stat. 240 (1946), 5 U.S.C. § 1005(c) (1958).

[4] 327 U.S. 186 (1946).

[5] Since compulsory process was held to be a form of search and seizure, subpoenas were subjected to a strict fourth amendment test of reasonableness. See Hale v. Henkel, 201 U.S. 43, 71 (1906); Boyd v. United States, 116 U.S. 616 (1886). Thus, process could be issued only on showing of probable violation of law. Harriman v. ICC, 211 U.S. 407, 419 (1908); FTC v. Baltimore Grain Co., 284 Fed. 886 (D. Md. 1922), *aff'd per curiam*, 267 U.S. 586 (1924). In addition, the agency had to describe the documents sought with particularity and demonstrate their relevancy to the specific violation under investigation. FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924); Hale v. Henkel, *supra* at 77.

[6] Hale v. Henkel, 201 U.S. 43, 76 (1906).

[7] FTC v. American Tobacco Co., 264 U.S. 298 (1924).

asserted authority to inspect these materials under a claim of "unlimited right of access to respondents' papers"[8] with reference to possible statutory violations. A unanimous Court struck down the subpoena, indicating that it "would be loath to believe that Congress intended to authorize one of its subordinate agencies . . . 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 respondents' records, relevant or irrelevant, in the hope that something will turn up."[9] The Court at this time indicated a strong aversion to unwarranted governmental interference with matters in the private domain. In addition, the *American Tobacco* decision reveals a reluctance to part with the power of inquiry, a power then thought to be inherently judicial in character.[10]

Restrictions on the subpoena power were subsequently relaxed as Congress continued to delegate broad investigatory authority[11] and as courts grew more familiar with the administrative process. The change in judicial attitude seems to begin with *Fleming* v. *Montgomery Ward & Co.*[12] Refusing to quash a subpoena issued by the Wage and Hour Division of the Department of Labor, the Court announced a new theory—that an administrative agency could be authorized to inspect books and records and to require disclosure of information "regardless of whether there is any pre-existing probable cause for believing that there has been a violation of the law."[13] In the ten years following this decision the Supreme Court so completely reformed the federal law of subpoena enforcement that commentators have generally agreed that the judicial attitude of *FTC* v. *Amer-*

[8] *Id.* at 305.

[9] *Id.* at 305-06.

[10] See also Jones v. S.E.C., 298 U.S. 1 at 28 (1936), where the majority likened zealous investigative techniques to Star Chamber tactics. A contrary opinion was expressed in ICC v. Brimson, 154 U.S. 447, 481 (1894) (dictum). The dissent in *Brimson* argued that judicial enforcement of an administrative subpoena would violate the principle of separation of powers:

> This is something more important than a mere question of the form of procedure. It goes to the essential difference between judicial and legislative action. If this power of the courts can be invoked to aid the inquiries of any administrative body, or enforce the orders of any executive officer, why may not the power to punish for contempt be vested directly in the administrative board or in the executive officer? Why call in the court to act as a mere tool?

155 U.S. 3.

[11] See, *e.g.*, Securities and Exchange Act of 1934, 48 Stat. 899, as amended, 15 U.S.C. § 78u (1958); Communications Act of 1934, 58 Stat. 1077-78, as amended, 47 U.S.C. §§ 218-20 (1952).

[12] 114 F.2d 384 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940).

[13] Fleming v. Montgomery Ward & Co., 114 F.2d 384, 390 (7th Cir. 1940). This represented a radical departure from the "traditional" view taken by the Supreme Court in the *American Tobacco* case. *But see* United States v. Morton Salt Co., 338 U.S. 632 (1950).

ican Tobacco Co.[14] had become "utterly exhausted."[15] In *Endicott Johnson Corp.* v. *Perkins*[16] a subpoena *duces tecum* had been served on the corporation pursuant to the provisions of the Walsh-Healey Act during an investigation by the Secretary of Labor. The corporation refused to comply on the ground that the subpoena related to records that were beyond the coverage of the statute. The district court denied the Secretary's request for enforcement until the issue of coverage had been settled;[17] the court of appeals reversed.[18] The Supreme Court affirmed the court of appeals, declaring that the district court not only lacked jurisdiction to determine the question of coverage under the statute, but that it also could not require that the Secretary decide that question prior to requesting enforcement of the subpoena. With this decision, a party could no longer avoid producing documents on the ground that the agency's statute did not cover such documents.[19]

Although *Endicott Johnson* seemingly put an end to the defense of lack of coverage, the question remained as to whether that decision applied solely to the provisions of the Walsh-Healey Act.[20] The Supreme Court provided an answer in *Oklahoma Press Publishing Co.* v. *Walling*.[21] A subpoena *duces tecum* had been issued during a preliminary investigation of possible violations of the Fair Labor Standards Act. Defendants claimed that the act was not applicable to them and insisted upon an adjudication of the question of coverage prior to enforcement of the subpoena. In affirming and extending the *Endicott Johnson* decision, the Court clearly precluded use of the defense of lack of coverage in proceedings for the enforcement of any administrative subpoena.[22] The Court went on to state the basic elements by which courts were to be guided in the enforcement of administrative subpoenas. The tests to be applied were those of statutory authorization to conduct the inquiry, relevancy, and reasonableness of the burden placed upon the witness.[23]

The Court's attempt to establish explicit criteria provides little aid to the modern courts in their search for guidelines with which to

[14] 264 U.S. 298 (1924).

[15] See 1 DAVIS, ADMINISTRATIVE LAW § 3.01, at 162 (1951); FORKOSCH, ADMINISTRATIVE LAW § 139, at 226-27 (1956); of course, this pattern also reflects somewhat the Court's closer sympathy for the objectives of New Deal legislation.

[16] 317 U.S. 501 (1943).

[17] 37 F. Supp. 604 (N.D.N.Y. 1941); 40 F. Supp. 254 (N.D.N.Y. 1941).

[18] 128 F.2d 208 (2d Cir. 1942).

[19] *Contra,* General Tobacco & Grocery Co. v. Fleming, 125 F.2d 596 (6th Cir. 1942).

[20] See 1 DAVIS, ADMINISTRATIVE LAW § 3.12 n.26 (1958).

[21] 327 U.S. 186 (1946).

[22] See, *e.g.,* Crafts v. FTC, 244 F.2d 882 (9th Cir.), *rev'd mem.,* 355 U.S. 9 (1957); CAB v. Hermann, 353 U.S. 322 (1957) (per curiam).

[23] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

determine when an agency subpoena should be enforced. The first test, statutory authorization, fails for ambiguity. Statutory language is typically broad enough to lend itself to a liberal judicial interpretation. The language is sufficiently broad in this section to encompass the extremes of judicial definition — resulting in either unlimited power to issue subpoenas or in restrictive definitions that limit the subpoena power. It is this ambiguity plus the conflict in the cases to which it is tied that prevents the use of section 6(c) as a guideline for the courts. The test of relevancy fails consistently to aid the courts because of the inherent difficulty of proof.[24] As to the third test, the Court in *Oklahoma Press* did not define the "unreasonable disclosure" that is proscribed as oppressive and unduly burdensome. Subsequent decisions have suggested, however, some particular demands for disclosure that can be classified as unreasonable and unduly burdensome.[25] Perhaps the best statement of the considerations which influence the courts in making this determination is found in *FCC* v. *Cohn*. The Court there spoke of the "necessity for drawing lines between the protection of the public interest . . . and the rights of individual businessmen to pursue their legitimate business activities without being subjected to unnecessary and harassing governmental inquisition."[26] In enforcing the subpoena (with limitations) the Court concluded that while the production of the materials subpoenaed "would place a considerable burden upon respondents, I do not feel that such burden is so great as to be unreasonable and oppressive in the light of the purposes to be served by the investigation."[27] *Cohn* adheres to the principles of *Oklahoma Press* and *Endicott Johnson* and follows to some extent the trend of judicial abdication in the area of administrative subpoena enforcement. *Cohn* indicates that mere inconvenience or additional expense will not constitute undue burden upon the party required to produce and suggests that if the record shows on the whole an administrative purpose to discover and reveal without arbitrariness or caprice, the subpoena should be enforced. *Cohn* apparently stands for the theory that the

[24] See Cooper, *Federal Agency Investigations; Requirements for the Production of Documents*, 60 MICH. L. REV. 187-95 (1961).

[25] Enforcement has been denied where: (1) a subpoena requiring production of service certificates of seamen was apparently utilized as an indirect means of effecting a temporary suspension of their licenses, pending a hearing—a suspension which the agency was without authority to accomplish by direct order; (2) a subpoena issued as a coercive measure to force the party to accept penalties fixed unreasonably or arbitrarily; (3) a subpoena requiring a number of companies to produce records at a distance far removed from their offices when issued not in connection with scheduled hearing, but apparently for the convenience of the agency.

[26] FCC v. Cohn, 154 F. Supp. 899, 904 (S.D.N.Y. 1957).

[27] *Id.* at 912.

courts, in passing on agency requests for enforcement, should clothe the agency with some discretion as to its investigatory subpoena power. Under *Cohn*, the purposes of administration can be served while allowing such agency discretion; but the courts must at the same time determine whether the private interests in non-disclosure is outweighed by the investigatory purpose. As a statement of judicial policy, *FCC* v. *Cohn* stood for eight years. It stood as a rule of logic and fairness in the determination of a question that is basically one of balancing public and private interests. As such, *Cohn* remained the most consistent criterion upon which the courts could draw until 1965.

III. FCC SCHREIBER[28]

In the course of an investigation of the television industry conducted by the Federal Communications Commission,[29] the presiding officer issued a subpoena *duces tecum* to a vice president of a corporate producer-packager of television programs, directing him to produce at public hearing a list of all programs produced or packaged by the corporation. The vice president (Schreiber) refused to submit the list of packaged programs unless the information would be held in confidence. The request for *in camera* proceedings was rejected by the presiding officer and the Commission.

Schreiber's request for a private hearing was based on the argument that the industry was highly competitive and that disclosure of the requested information might unjustly aid competitors. The Commission countered that it had determined that public proceedings should be the rule and that private hearings would be available only in those instances where disclosure would irreparably damage private competitive interests and where those private interests could be found by the Commission to outweigh the public interest in full disclosure. Schreiber next sought to have the evidence held without disclosure and released if the courts should authorize public disclosure. When this request was rejected by the presiding officer, Schreiber refused to comply with the subpoena and the Commission's orders to produce.

The Commission then petitioned the district court for enforcement of its subpoena and orders. The court found that the subpoena was a valid exercise of the Commission's statutory powers and ordered Schreiber to produce the documents. However, in order to protect

[28] 381 U.S. 279 (1965).

[29] It is interesting to note that the *Schreiber* case is an outgrowth of the same investigation which brought litigation in *FCC* v. *Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957).

"respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage," the court ordered the Commission to receive the documents in confidence.[30] The court further ordered that the Commission could, at the close of evidence, petition the court for an order to make the evidence public should good cause exist.[31] On appeal, a divided court of appeals affirmed, holding that the district court was within its discretion in conditioning its order to require confidential treatment of the information sought.[32]

It should be noted at this point that the district court and the court of appeals departed upon no strange new course of action in dealing with the enforcement of the agency subpoena. These courts merely applied those criteria enumerated in *Cohn;* and, using *Cohn's* statements with regard to confidentiality, found that Screiber had asserted legitimate private interests which were deserving of protection. Neither court stated any right of Schreiber to be free from disclosure of its business documents *in toto;* they sought instead an equitable method of balancing the public interests in obtaining full disclosure against the private interests of Schreiber in concealing the information from competitors. The method chosen was to postpone the adjudication of Schreiber's claim for confidentiality until the interest of the FCC in obtaining the information had been determined.

The Supreme Court affirmed as to the finding of proper exercise of subpoena power but reversed the district court's action in limiting the investigation to *in camera* proceedings.[33] In its simplest terms, the question faced by the Court in *Schreiber* was whether the district courts should make the decision with regard to balancing public and private interests or whether that function should be left within the discretion of the agency. The Court held that the courts may not inquire into the relative merits of the competing interests; the existence of Commission rules on that question establishes a presumption into which the courts may inquire only with regard to consistency with statute and constitutionality. The reasoning of the Court draws upon statutory interpretation, legislative intent, decisional trends, and statements of "general public policy."

The Communications Act of 1934 empowers the FCC to "conduct its proceedings in such manner as will best conduce to the

[30] 201 F. Supp. 421 (S.D. Calif. 1962).
[31] *Id.* at ¶ 2 of the Order.
[32] 329 F.2d 517 (9th Cir. 1964).
[33] 379 U.S. 927 (1964).

proper dispatch of business and to the ends of justice."[34] The Court had determined that this statute confers upon the Commission power to promulgate rules generally applicable to all Commission proceedings[35] and that it vested in the Commission broad discretionary power to prescribe rules for specific investigations.[36] The statute was similarly construed in *FCC* v. *Pottsville Broadcasting Co.*[37] where the court announced the principle that administrative agencies should be free to fashion their own rules and to pursue methods of inquiry enabling them to discharge their duties. While the act has been broadly construed on other occasions, the results do not appear to furnish a basis upon which to rest the Court's holding that the scope of judicial review is to be limited in the manner prescribed. The Court invoked "legislative intent" to indicate that agencies' procedures should be designed by those most familiar with the problems involved.[38] To support this "intent" the Court cited cases in which the principle of the *Pottsville* case had been upheld,[39] from which it determined that Congress intended the determination of the question to rest in the Commission and that the district courts may not substitute their judgment for that of the agency in the question of private interests versus public interests. Reasoning in this way, the Court held that the Commission had power to promulgate a rule requiring public disclosure and that the Commission was within its discretion in applying the rule to Schreiber. The decision of the district court was modified to eliminate the conditions of confidentiality imposed.

IV. The Schreiber Rationale

FCC v. *Schreiber* is difficult to defend on principles of logical reasoning based upon authority. The Court concludes that questions concerning disclosure in investigatory proceedings should be resolved by inquiry into the relative merits of the parties' interests, and that that inquiry may be conducted by the Commission. To reach this result, the Court proceeds from a discussion of congressional intent to a conclusion based upon public policy. Reasoning from a presumption that agencies should deal with their own problems of procedure since they are most familiar with the industry involved, the Court proceeded to a determination that Congress intended a division of

[34] 48 Stat. 1066, as amended, 47 U.S.C. § 154(j) (1952).
[35] FCC v. WJR, 337 U.S. 265 (1949).
[36] Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 321-22 (1933).
[37] 309 U.S. 134 (1940).
[38] The court cited no congressional proceeding or statute as authority for the finding of congressional intent.
[39] See 381 U.S. 279, 286 n.7.

authority on this point. Having found legislative "authority," the Court says, "it is apparent that the courts below did not respect this congressional distribution of authority."[40] Stated simply, the Court's argument is that because judicial abdication has become the rule, Congress originally intended the statute to preclude judicial participation. Completely ignored is the plain fact that such abdication has been initiated by the courts in response to dockets clogged with administrative appeals. True, the courts have frequently refused to consider administrative appeals, but seldom, if ever, have the courts contended that they were precluded from acting by any statutory proscription. The argument in *Schreiber* appears, at best, to be grounded in circuitous reasoning. Nevertheless, the holding here was to be expected in light of the prevailing trend toward administrative autonomy.

While the holding represents no clear test for enforcing agency subpoenas, and no theory upon which the courts may take future action, it does give clear and unequivocal notice of the position the Court will take in the future. The case represents the culmination of the trend toward judicial abdication in the area of enforcement of agency process—a trend beginning with the *Oklahoma Press* case[41] and previously thought to end with the definitive statement of *FCC* v. *Cohn*.[42]

As *Schreiber* now stands, the party called upon to produce materials before an administrative agency has recourse only to the agency. The courts have been instructed to defer to the agency so far as the party's claim of private interest is concerned. The function of the courts in this area has now been limited to investigation of the constitutionality of the agency's action and the conformity of the action with the statute. The Court has placed the agency in a more positive position of control with regard to its dealings with the business community. Based upon the Court's presumption that those closest to the regulation of the industry affected can best determine the weight to be afforded the private interests of the industry, the Court has now vested federal agencies with broad power to adjudicate the private interests of those it seeks to regulate. Under *Schreiber,* the federal agency may now feel free to detail its rules and procedures, assured that rulings in a specific case which turn upon the weighing of private interests against public interests must be upheld by the courts. The party called to produce, then, cannot rely on the courts to pro-

[40] 381 U.S. 279, 291 (1965).
[41] 327 U.S. 186 (1946).
[42] 154 F. Supp. 899 (S.D.N.Y. 1957).

tect his private interests; he may only seek judicial aid where there is demonstrable arbitrariness or unconstitutionality.

V. Conclusion

Although the Supreme Court has confined *Schreiber* to the FCC and the Communications Act, it is reasonable to assume that the precedent of the *Endicott Johnson Corp.* v. *Perkins*[43] and the *Oklahoma Press Publishing Co.* v. *Walling*[44] decisions will extend its application to other federal agencies. Absent the statutory argument, the decision in such a case could only be based upon the policy argument in *Schreiber; viz,* that there is a presumption, based on public policy, in favor of disclosure. Relying on this presumption, most federal agencies such as the FTC, ICC, and IRS undoubtedly will exercise the power to determine that claims for confidentiality are contrary to public policy and thus may be rejected. It is not suggested that the agency involved will act arbitrarily or unlawfully but that the power given to the agency lays aside the traditional barriers imposed around "trade secrets." It may be fairly stated that there is no right to be free from competition; nor is the protection of any business essential to the functioning of our society. Equally nonessential, however, is the equilization of all business in a given industry through disclosure of trade secrets. Such equalization is particularly objectionable when grounded in "public policy."

Even if it is assumed that public interests must be heavily weighed against legitimately asserted private interests, the question remains as to why the process of balancing must be at the commission level. Traditionally, the function had been exercised by the courts—at least to the extent that equitable schemes for preserving private interests and public interests have been upheld. The Court in *Schreiber* now seeks to strip the judiciary of its traditional function and place this function almost wholly in the agencies. It is extremely difficult to ascertain from the Court's opinion in *Schreiber* a rational explanation as to why the claims of private parties, traditionally ruled upon by the courts, now can be presented only before administrative agencies. An attempt to expedite the functioning of the agencies in relation to the courts appears to be the moving force.

The past three decades have increased the number and expanded the influence of administrative agencies. The agencies have, in turn, brought increased activity to the courts in the form of appeal from

[43] 317 U.S. 501 (1943).
[44] 327 U.S. 186 (1946).

administrative rulings. As a practical matter, many of these appeals have involved matters which the agencies could have decided with equal competence; but the right to redress in the courts demanded that the courts act. The result has been expanding judicial deference to the agency and an attendant limitation of the right of the private party to gain meaningful judicial review. It is paradoxical to note that at the same time business' right to its day in court is being curtailed by administrative procedures, the right of the private individual to be free from curtailment of his liberty is being enthusiastically protected. That the interests of business have been ignored by the procedures of some agencies cannot be disputed. The growing trend of court decisions which culminate in *FCC* v. *Schreiber* suggests that a basic reappraisal of the investigatory procedures of these agencies is desirable. The tone for such an appraisal is found in the executive order of President Kennedy establishing the Administrative Conference of the United States.[45] The order recognizes that maximum governmental efficiency and fairness to private interests are coequal objectives, that neither is subordinate to the other.

Prior to *Schreiber* a need existed for some enunciation of clear policy by the Court to serve as guidelines in the application of the *Oklahoma Press* tests by the courts. The result in *Schreiber,* however, not only laid no guidelines, but it also wrested control from the judiciary as well. This result is unfortunate from the viewpoint of courts and litigants alike. There appears, then, to be a need for legislation. The questions involved may be of such a nature as to defy the draftsman to phrase precise statutory standards that will be capable of equitable application in all the instances in which the question of enforcing administrative subpoenas may arise; but it would at least be possible to lay down some fundamental guides. Legislation of agency procedures governing the enforcement of administrative process should, at a minimum, give effect to the following principles:

First: Where Congress has not explicitly authorized a denial of requests for confidentiality in investigatory hearings, these rights presumptively are present and should be recognized unless clearly unsupported by the evidence. Where the agency determines that the claim is supported by some evidence but that public disclosure is nonetheless demanded, the right to review should be preserved and treated in accordance with the *Cohn* decision.

Second: Any person compelled to appear and give testimony or produce documents should be given notice in specific form of the nature and scope of the investigation. With regard to all federal

[45] Exec. Order No. 10934, April 15, 1961.

agencies, a limitation should be inserted that subpoenas should be publicly enforced only where disclosure is demonstrably necessary.

Third: The objection to the production of a particular document, or specific objections to the production of a general class of documents should operate to preserve the party's right to have the court make a determination on the merits. Objections stated so broadly that they cannot be assessed without judicial examination of an extra-ordinary amount of evidence should not be accorded a full judicial hearing, provided, however, that the objecting party retain his right to object specifically to the production of any documents at a later time.

Fourth: The statement in section 12 of the APA that the agency and the private party should have equal standing on matters of evidence or procedure should be supplemented by appointment of an impartial hearing officer whose function would be the decision of questions of procedure under one, two, and three above. His function would begin only when a claim of right under the APA or similar legislation had been asserted by the private party; he would not decide the merits of the private party's claim, but merely whether the claim should be determined by a court or by the agency.

Legislation embodying these procedures need not hinder or prevent the orderly conduct of government business. The true challenge to the agencies is to be found in formulating procedures which protect the rights of private parties and at the same time assure the expeditious handling of administrative business. The decision of *FCC* v. *Schreiber* confirms that a point has been reached where no further time can be spent justifying the denial of private rights in the name of efficiency.

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