

# NOTES AND COMMENTS

## RESISTING ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS DUCES TECUM: ANOTHER LOOK AT CAB v. HERMANN\*

WHETHER objections to an administrative subpoena duces tecum<sup>1</sup> should be heard at the district court enforcement stage<sup>2</sup> is an overlooked corollary to the substantive question of a subpoena's validity. Although federal agencies usually obtain voluntary compliance with their requests for documents,<sup>3</sup> compulsory process has long been recognized as essential to their investigatory functions.<sup>4</sup> No agency, however, is authorized to enforce its own subpoenas by contempt citations.<sup>5</sup> Instead, statutory provisions require that the agency petition a district court for an order forcing compliance.<sup>6</sup> An adversary proceeding, similar to a trial between private litigants, is then conducted<sup>7</sup> at which the court will either rule on the affected individual's

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\*CAB v. Hermann, 353 U.S. 322 (1957), *reversing per curiam* 237 F.2d 359 (9th Cir. 1956).

1. A subpoena duces tecum is an order "for the production of documentary evidence." 5 MOORE, FEDERAL PRACTICE ¶ 45.05[1], at 1716 (2d ed. 1948). A statute may confer authority to order production of documents without expressly labelling it a subpoena power. See, e.g., The Trading With the Enemy Act, 40 Stat. 415 (1917), as amended, 50 U.S.C. App. § 5(b) (1952). On administrative investigations, see generally 1 DAVIS, ADMINISTRATIVE LAW ch. 3 (1958) [hereinafter cited as DAVIS].

2. For a detailed breakdown of administrative proceedings into "stages," see Note, 71 HARV. L. REV. 1541 (1958).

3. See *Hearings on H.R. 4572 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 9 (1949) (statement of Mr. Wilson); U.S. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 414 (1941); cf. 16 C.F.R. § 1.31 (Supp. 1959) (investigatory policy of the FTC). But cf. *Hearings on H.R. 4572, supra* at 2 (letter of Mr. Kingsley).

4. Congress has recognized this need since the creation of the first administrative agency, the ICC, in 1887. See Interstate Commerce Commission Act § 12, 24 Stat. 383 (1887), as amended, 49 U.S.C. §§ 12(2)-(3) (1952). See also U.S. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 174 (1955); *Hearings on H.R. 4572, supra* note 3, at 5 (statement of Mr. Keefe).

5. See 1 DAVIS § 3.11, at 213 & n.7.

6. E.g., The Federal Trade Commission Act, 38 Stat. 722 (1914), as amended, 15 U.S.C. § 49 (1958); see 8 WIGMORE, EVIDENCE § 2195, at 41 (Supp. 1957) (collecting statutes).

In addition to petitions for enforcement, some statutes provide for the institution of criminal proceedings in cases of refusal to produce evidence. E.g., The Federal Trade Commission Act, 38 Stat. 723 (1914), as amended, 15 U.S.C. § 50 (1958); see 1 DAVIS § 3.11, 213 n.4 (collecting statutes). These criminal provisions are, however, infrequently utilized. See 1 DAVIS § 3.11, 212 n.1.

7. These proceedings constitute a "case or controversy" within the meaning of the Constitution, as distinguished from an interlocutory issue arising out of a primarily

objections or postpone judicial action until review of a subsequent administrative hearing.<sup>8</sup> The inevitability of choice between these alternatives has been obscured, however, until recently, by concentration on the merits of objections to enforcement.<sup>9</sup>

During the formative period of administrative regulation, substantive limitations were placed on agency subpoena powers.<sup>10</sup> Since compulsory process was held to be a form of search and seizure,<sup>11</sup> subpoenas were subjected to a strict fourth amendment test of reasonableness.<sup>12</sup> Consequently, they could be issued only after a showing of probable violation of law.<sup>13</sup> Additionally, the agency had to describe the documents sought with particularity<sup>14</sup> and demonstrate their relevancy to the specific violation under investigation.<sup>15</sup> Even if these requirements were met, enforcement could effectively be resisted on non-fourth-amendment grounds such as self-incrimination<sup>16</sup> or lack of agency jurisdiction.<sup>17</sup>

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administrative hearing. Thus, the parties may present evidence, witnesses, and oral argument to whatever extent appears necessary. See *ICC v. Brimson*, 154 U.S. 447, 489 (1894). The applicability of the Federal Rules of Civil Procedure in enforcement proceedings is unclear. See 7 MOORE, *FEDERAL PRACTICE* ¶ 81.06[1] (2d ed. 1948).

8. The more complex the area being regulated the more a court, presumably, will feel that the claim should be subject to primary agency determination. Closely related is the problem of exhaustion of administrative remedies with its corollary question of whether the court feels that Congress intended the agency to initially decide the questions at issue. In this regard, the complexity of the question and the need for agency expertise will be important factors influencing the court. See *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752, 767-69 (1947).

9. See, e.g., *Shapiro v. United States*, 335 U.S. 1 (1948) (discussing the self-incrimination privilege); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (discussing probable cause and relevancy); *Wagman v. Arnold*, 257 F.2d 272 (2d Cir. 1958) (discussing effect of illegal search and seizure).

10. It has been suggested that restrictions resulted, at least in part, from early judicial hostility to administrative agencies. See *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). For a contemporary discussion of earlier doctrines and their development, see Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (pts. 1 & 2), 28 COLUM. L. REV. 708, 905 (1928).

11. *Hale v. Henkel*, 201 U.S. 43, 71 (1906); *Boyd v. United States*, 116 U.S. 616, 622 (1886). This doctrine was subsequently modified in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 202 (1946).

12. See *Boyd v. United States*, *supra* note 11.

13. *Jones v. SEC*, 298 U.S. 1, 26-27 (1936); *Harriman v. ICC*, 211 U.S. 407, 419 (1908); *FTC v. Baltimore Grain Co.*, 284 Fed. 886 (1922), *aff'd per curiam*, 267 U.S. 586 (1924).

14. *Hale v. Henkel*, 201 U.S. 43, 77 (1906).

15. *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924); *Hale v. Henkel*, *supra* note 14, at 77.

16. *Boyd v. United States*, 116 U.S. 616, 634-35 (1886). Other privileges, such as attorney-client, husband-wife, and government secret might conceivably be raised. See generally McCORMICK, *EVIDENCE* 151-302 (1954); 8 WIGMORE, *EVIDENCE* §§ 2227-2396 (1940, Supp. 1957).

17. See *FTC v. Claire Furnace Co.*, 285 Fed. 936 (D.C. Cir. 1923), *rev'd on other grounds*, 274 U.S. 160 (1927).

Restrictions on subpoena validity were subsequently relaxed, as Congress continued to delegate broad investigatory authority<sup>18</sup> and courts grew more familiar with the administrative process.<sup>19</sup> Thus, an agency need no longer show a probable violation before issuing a subpoena; the investigation merely must relate to some congressionally delegated function.<sup>20</sup> Moreover, a jurisdictional objection will seldom prevail since determination of "coverage" is not requisite to subpoena enforcement.<sup>21</sup> Diminished judicial interference has not, however, resulted in unlimited agency subpoena power.<sup>22</sup> For example, demanded documents must still relate to the subject matter of an inquiry within the agency's authority;<sup>23</sup> a less stringent particularity requirement still obtains;<sup>24</sup> and the self-incrimination privilege, while reduced in scope, remains a protection.<sup>25</sup> In addition, courts will modify or refuse to enforce orders so broad as to be unduly burdensome or oppressive.<sup>26</sup> But,

18. See, e.g., The Securities and Exchange Act of 1934, 48 Stat. 899-900, as amended, 15 U.S.C. § 78u (1958); The Communications Act of 1934, 48 Stat. 1077-78, as amended, 47 U.S.C. §§ 218-20 (1952).

19. See *United States v. Morton Salt Co.*, 338 U.S. 632, 634 (1950).

20. *United States v. Morton Salt Co.*, *supra* note 19; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 215-16 (1946); *FTC v. Scientific Living, Inc.*, 150 F. Supp. 495, 500 (M.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940 (1958).

21. *FTC v. Crafts*, 355 U.S. 9 (1957), *reversing per curiam* 244 F.2d 882 (9th Cir. 1957); *Oklahoma Press Publishing Co. v. Walling*, *supra* note 20, at 214; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1943); *NLRB v. Roddy Mfg. Co.*, 165 F. Supp. 412, 418 (E.D. Tenn. 1958). *But see FCC v. Cohn*, 154 F. Supp. 899, 904 (S.D.N.Y. 1957) (discussing "coverage" on the merits).

22. In addition to judicial safeguards, agency officials themselves may exercise a degree of restraint on their use of the subpoena power.

23. See *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09 (1946).

24. *Oklahoma Press Publishing Co. v. Walling*, *supra* note 23, at 208 (fourth amendment guards against indefiniteness); *FTC v. Scientific Living, Inc.*, 150 F. Supp. 495, 500 (M.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940 (1958); cf. *Application of Certain Chinese Family Benevolent and District Ass'ns*, 19 F.R.D. 97 (N.D. Cal. 1956) (grand jury subpoena quashed for lack of specificity). See also *FCC v. Cohn*, 154 F. Supp. 899, 908 (S.D.N.Y. 1957) (discussing applicability of *Watkins v. United States*, 354 U.S. 178 (1957), to administrative subpoenas).

25. See *Curcio v. United States*, 354 U.S. 118 (1957).

The privilege, however, may not be claimed on behalf of a corporation or its officers in relation to corporate records. *Wilson v. United States*, 221 U.S. 361, 385 (1911); *FTC v. Scientific Living, Inc.*, *supra* note 24, at 500. Neither may an unincorporated labor union or union official claim the protection as to union records. *United States v. White*, 322 U.S. 694 (1944). Moreover, the privilege is unavailable in connection with public or quasi-public records and may be eliminated entirely by the use of immunity statutes. See *Shapiro v. United States*, 335 U.S. 1 (1948); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951).

26. See *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 453 (6th Cir. 1941); *FTC v. Bowman*, 149 F. Supp. 624, 629-30 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

In addition to excessive breadth, oppressiveness may result from a threatened public disclosure of the information sought. Where such a situation appears, the court may

even these remaining protections are threatened by apparent curtailment of the scope of judicial inquiry at the enforcement stage.

Such curtailment may be indicated by *CAB v. Hermann*,<sup>27</sup> where the Civil Aeronautics Board sought to enforce subpoenas issued in connection with a Board complaint.<sup>28</sup> Enforcement was resisted on grounds of burdensomeness and oppressiveness (compliance would require a search through more than a million documents),<sup>29</sup> of irrelevancy,<sup>30</sup> and, under the right to privacy, of immunity of personal tax returns from inspection.<sup>31</sup> The district court first granted a ten-day continuance on condition that respondent allow the Board to inspect and copy all requested documents, except tax returns,<sup>32</sup> so that it could limit its ultimate demand to those which appeared most necessary.<sup>33</sup> This procedure necessarily implied a finding that all other documents were relevant; the agency was granted access to the very records whose irrelevancy was alleged.<sup>34</sup> Respondent failed to comply,<sup>35</sup> however, and at the end of the continuance the court enforced the subpoenas—including those subject to her “privacy” claim—without formal hearing on the merits of the objections.<sup>36</sup> Its order was based solely on a finding that no irrelevancy was apparent on the face of the subpoenas.<sup>37</sup> The Ninth Circuit, reversing and remanding, required both a determination of the relevancy of each document and a ruling

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require that the agency treat the information as confidential. See *FTC v. Menzies*, 145 F. Supp. 164, 171 (D. Md. 1956), *aff’d*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957).

The Administrative Procedure Act §§ 6(b)-(c), 60 Stat. 240-41 (1946), 5 U.S.C. §§ 1005(b)-(c) (1958), also govern agency investigations and the use of compulsory process. These provisions do not, however, alter the existing case law. *Tobin v. Banks & Rumbaugh*, 201 F.2d 223 (5th Cir. 1953); see *Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 227, 363, 415 (1946). *But see id.* at 28, 206. See also U.S. CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES ON APRIL 29, 1953, REPORT 19 (1955); U.S. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 61 (1955); N.Y.U. SCHOOL OF LAW, INSTITUTE PROCEEDINGS VOL. 7, THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 100, 332, 463 (1947).

27. 353 U.S. 322 (1957), *reversing per curiam* 237 F.2d 359 (9th Cir. 1956).

28. See Record, pp. 14-60. The district court opinion is unreported.

29. *Id.* at 72, 109.

30. *Id.* at 72-73.

31. *Id.* at 73, 114.

32. 237 F.2d at 361.

33. See *id.* at 363 (“[The inspection procedure] was extremely fair and . . . would have permitted the Board to issue subpoenas for the exact documents which they wished”).

34. But the court would have aided respondent by transferring the burden of searching through records to the Board. See *ibid.*

35. 353 U.S. at 323.

36. The Board, however, withdrew one subpoena, the nature of which is not revealed. See 237 F.2d at 361-62.

37. 353 U.S. at 323; 237 F.2d at 362 (both quoting district court).

on respondent's privacy claim.<sup>38</sup> Only full review, the court reasoned, would prevent "rubber stamp" enforcement of administrative subpoenas.<sup>39</sup>

The Supreme Court, in a per curiam opinion, reinstated the enforcement order on the ground that the district court "duly enforced the Board's right to call for documents relevant to the issues of the Board's complaint."<sup>40</sup> Thus, the Court impliedly affirmed the district court's broad relevancy test—"laying the subpoenas alongside the charges in the Complaint."<sup>41</sup> Respondent's privacy claim was not considered.<sup>42</sup> Most important, the district court's refusal to conduct a full adversary proceeding, in which respondent might have substantiated her claims, was not expressly discussed. The Court noted, however, that objections might be raised if the agency subsequently sought to introduce the documents into evidence.<sup>43</sup> This offhand approval of the district court's procedure was unfortunate; it created difficulties in predicting the opinion's application in future decisions whether to hear objections to administrative subpoenas in enforcement proceedings.<sup>44</sup>

*Hermann* might be interpreted broadly as general approval of summary enforcement proceedings in which only a cursory examination of the agency subpoena would be necessary. Apparent irrelevancy on the face of the order would prevent enforcement, but the individual would be afforded no further protection beyond, perhaps, the requirement of particularity and the prohibition against burdensome and oppressive requests.<sup>45</sup> Other objections, regardless of their validity, could not be raised until the agency sought to introduce the documents into evidence at a subsequent hearing.<sup>46</sup> By accelerating

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38. *Id.* at 362-63.

39. *Id.* at 363 ("Such an action would constitute the Board the final judges of the materiality and relevancy of each document subpoenaed. It is hornbook law that they have no such authority or function.").

40. 353 U.S. at 323.

41. 237 F.2d at 362. Such a test was justifiable in this case, since the subpoena was limited by a specific complaint. See note 57 *infra* and accompanying text.

42. Rehearing was sought so that the Court might consider the privacy issue, Respondent's Petition for Rehearing, p. 2, but was denied, 354 U.S. 927 (1957).

43. 353 U.S. at 324.

44. The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.

Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

45. See notes 24-26 *supra* and accompanying text. In *Hermann*, the subpoenas, although broad in scope, specifically described the documents sought. See Brief for Respondents, appendix (Summary of Subpoenas). And the district court did not require the production of all the documents at once—a procedure which the Supreme Court viewed as easing the burden on respondents. See 353 U.S. at 323.

46. See note 43 *supra* and accompanying text.

This interpretation conflicts with the long-standing "fruit of the poisonous tree" doctrine. If respondent objects to the admission of a particular document into evidence on

enforcement, administrative efficiency would be increased. This view of *Hermann* was suggested by one commentator shortly after the decision appeared.<sup>47</sup>

But later cases have neither clearly adopted nor explicitly repudiated this interpretation. Thus courts, notwithstanding *Hermann*, have considered on their merits such objections to subpoena enforcement as: invalid issuance;<sup>48</sup> improper subdelegation of authority;<sup>49</sup> arbitrariness or unreasonableness;<sup>50</sup> presubpoena illegal search and seizure;<sup>51</sup> self-incrimination;<sup>52</sup> burdensomeness;<sup>53</sup> and irrelevancy of the documents to the investigation.<sup>54</sup> Yet no court has attempted specifically to limit *Hermann*'s possibly broad implications. In fact, the case has been used to justify summary disposal of a burdensomeness claim.<sup>55</sup> The possibility remains, therefore, that a court confronted with a *Hermann*-based plea for summary subpoena enforcement will squarely hold

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the ground that it was obtained in violation of the fourth amendment, and is sustained, the agency faces a string of objections to the admissibility of *all* other evidence obtained as a result of information in the illegally "seized" document. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); 8 WIGMORE, EVIDENCE § 2184 (1940, Supp. 1957).

47. Note, 71 HARV. L. REV. 1541, 1543-44 (1958), arguing that *Hermann* refuted the assumption that enforcement requires a full hearing, and speaking of that case as ensuring "a speedy conclusion of the first stage [enforcement] proceeding by attributing to the subpoena an irrefutable presumption of relevancy if it is relevant on its face." The Note suggests that, under *Hermann*, objections should be postponed until the subsequent "agency hearing." *Id.* at 1544 & n.20. Possible inconsistency of *Hermann*, broadly interpreted, with the "fruit of the poisonous tree" doctrine, see note 46 *supra*, is not dealt with.

Although not willing to abandon completely the concept of a "hearing" at the enforcement stage, other commentators have generally approved restrictions on the individual's right to be heard, in the belief that these restrictions would increase administrative efficiency. See Sherwood, *The Enforcement of Administrative Subpoenas*, 44 COLUM. L. REV. 531, 537-38 (1944); Note, 45 GEO. L.J. 683 (1957); Note, 14 GEO. WASH. L. REV. 602, 609-10 (1946); Note, 31 GEO. L.J. 304, 309, 312 (1943); Note, 52 YALE L.J. 175, 180 (1942).

48. See *Lewis v. NLRB*, 357 U.S. 10 (1958); *FTC v. Waltham Watch Co.*, 169 F. Supp. 614, 617-18 (S.D.N.Y. 1959); *FCC v. Cohn*, 154 F. Supp. 899, 906 (S.D.N.Y. 1957); *FTC v. Scientific Living, Inc.*, 150 F. Supp. 495, 503 (M.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940 (1958).

49. See *NLRB v. Duval Jewelry Co.*, 357 U.S. 1, 7 (1958); *FCC v. Cohn*, *supra* note 48, at 909-11.

50. See *FTC v. Scientific Living, Inc.*, 150 F. Supp. 495, 500 (M.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940 (1958).

51. See *Wagman v. Arnold*, 257 F.2d 272 (2d Cir. 1958).

52. *Ibid.*

53. See *FTC v. Bowman*, 149 F. Supp. 624, 629 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

54. *FTC v. Hallmark, Inc.*, 265 F.2d 433, 439 (7th Cir. 1959); *FTC v. Scientific Living, Inc.*, 150 F. Supp. 495, 500 (M.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940 (1958).

55. *National Plate & Window Glass Co. v. United States*, 254 F.2d 92, 93 (2d Cir.), *cert. denied*, 358 U.S. 822 (1958).

that the Supreme Court has eliminated the need for full district court consideration of substantive objections.

Courts need not, however, deny individuals a full hearing in order to accommodate *Hermann*. The only claim explicitly considered in the opinion was irrelevancy.<sup>56</sup> Thus, even if the case means that the district court should not hear relevancy objections during subpoena enforcement proceedings, it might not extend to other claims. Moreover, *Hermann* can be limited by its unique facts. Since the agency's inquiry was limited by a specific prior complaint, it was reasonable to determine the documents' relevancy, for subpoena purposes, from the subpoena's face—the test approved in that case.<sup>57</sup> So viewed, *Hermann* is a holding on the merits of a particular objection, rather than a ruling that objections should not be considered in enforcement proceedings. And had examination of particular documents been required, respondent's failure to comply with the district court's suggested preenforcement inspection procedure seems to have been held a waiver of this protection.<sup>58</sup> Since the agency was thereby prevented from limiting its subpoena to those documents it thought most necessary, all the records originally sought remained in issue.<sup>59</sup> In order to adjudicate respondent's broad claim of irrelevancy, the court would have been required to examine more than a million documents.<sup>60</sup> The attendant delay and inconvenience of such a procedure also justifies *Hermann*'s summary determination of relevancy. Where, however, the individual's actions have not made complete examination of documents impractical, courts are not compelled by *Hermann*'s reference to raising objections at a later time<sup>61</sup> to postpone consideration of objections until future administrative hearings. Indeed, the Court's "subsequent opportunity" language may be viewed merely as an attempt to ensure that respondent's failure to raise specific claims in the enforcement proceeding would not bar later objections, of any sort, to the admission of particular documents into evidence. *Hermann*, therefore, can have little or no effect on the adjective aspects of enforcement proceedings.

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56. See 353 U.S. at 323. Although respondent also raised a privacy claim, see Brief for Respondents, p. 27, the Court did not mention this argument, perhaps because it was not based on specific constitutional or legislative provisions, or even a claim of privilege, see *id.* at 29.

57. Thus, in post-*Hermann* subpoena cases not involving specific complaints, courts have conducted full hearings into relevance claims. See *FTC v. Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y. 1959) (investigation into misleading advertising and other unfair trade practices); *FTC v. Scientific Living, Inc.*, 150 F. Supp. 495 (M.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940 (1958) (investigation into false advertising). *But cf.* *FTC v. Hallmark, Inc.*, 265 F.2d 433 (7th Cir. 1959) (subpoena limited by previously issued cease and desist order; full hearing conducted).

58. This inference is drawn from the fact that the Court, in a brief *per curiam* opinion, took care to mention respondent's failure to comply with the inspection procedure suggested below. See 353 U.S. at 323.

59. *Ibid.*

60. See Brief for Respondents, appendix (Summary of Subpoenas), for detailed listing of the documents involved.

61. See note 43 *supra* and accompanying text.

Narrow interpretation of *Hermann* accords with legislative intent and judicial policies against unrestricted agency subpoena power. If district courts conducted rubber-stamp enforcement proceedings, the agency would, for all practical purposes, have the power—consistently denied by Congress<sup>62</sup>—to enforce its own subpoenas.<sup>63</sup> Further, unless individuals are afforded a full hearing wherein they may raise substantive objections before being forced to surrender documents, courts can not adequately determine whether agency acquisition of the documents constitutes an unlawful intrusion into privacy under the Supreme Court's construction of the fourth amendment.<sup>64</sup> For although a re-

62. See note 5 *supra* and accompanying text. See also Lillienthal, *The Power of Governmental Agencies To Compel Testimony*, 39 HARV. L. REV. 694, 700-02 (1926).

63. Administrative subpoenas do not subject the witness to punishment for contempt until the agency has secured enforcement from a District Court after proceedings in which . . . the witness has an opportunity to raise all issues pertinent to a motion to quash a subpoena alleged to be unreasonable or oppressive.

FTC v. Hallmark, Inc., 265 F.2d 433, 437 (7th Cir. 1959) (dictum).

64. See *Jones v. United States*, 357 U.S. 493, 498 (1958) (essential purpose of fourth amendment is to prevent unwarranted intrusions into privacy); *McDonald v. United States*, 335 U.S. 451, 453 (1948) (right of privacy a unique value); *Trupiano v. United States*, 334 U.S. 699, 709 (1948) (fourth amendment protects against unreasonable intrusions into privacy); *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be determined by a judicial officer . . .").

The intrusion into privacy is complete upon surrender of documents, regardless of subsequent opportunities to keep them out of evidence. See *NLRB v. Duval Jewelry Co.*, 357 U.S. 1, 9 (1958) (concurring opinion):

It is obvious that after the illegal or oppressive subpoena has been enforced, the . . . [agency] on its review of the completed record can no more relieve the consummated oppression than it can unring a bell . . . . [T]he . . . [agency's] subpoenas may be enforced *only* by a United States District Court, and thus an effective means exists to revoke an illegal or oppressive subpoena *duces tecum* before the damage has been done.

Although many of the cases focus on the right to privacy of individuals, the fourth amendment applies to corporations as well. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946) (dictum); *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924). See also *FCC v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957), referring, at 904, to "rights of individual businessmen to pursue their legitimate business activities without being subjected to unnecessary and harassing government inquisition" where the records sought were corporate. See generally LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 137-38 (1937).

A possible relaxation of the fourth amendment's protection of privacy may be indicated by *Frank v. Maryland*, 359 U.S. 360 (1959), upholding a conviction and fine for failing to permit a health inspector to enter private premises without a warrant. The case, however, concerned the fourteenth amendment which was construed as "not restricted" by the "historic bounds" of the fourth. *Id.* at 366. The "constitutional right to privacy" was admitted and the Court noted that the case merely interpreted the attempted search as "reasonable" in the light of the safeguards in the particular statute involved. *Id.* at 366-67. Although the dissenting Justices apparently felt the majority was primarily restricting the fourth amendment to criminal cases, see *id.* at 377, the majority refers to "entry which has as its design the securing of information to fortify the coercive

fusal to surrender documents can be punished only after a contempt proceeding,<sup>65</sup> the validity of the court order cannot usually be attacked at that time.<sup>66</sup>

Even were the fourth amendment satisfied by a "subsequent opportunity" to object to the admissibility of documents into evidence, the individual would often be placed in a disadvantageous position. While the final agency rulings are subject to judicial review,<sup>67</sup> courts have been reluctant to reverse an agency because of the use of inadmissible evidence.<sup>68</sup> In addition, some sub-

power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property," *id.* at 365. These conditions are present in administrative investigations. And the majority's references to "searches for evidence to be used in criminal prosecutions," *ibid.*, *id.* at 372, are made in the context of an "actual" search and seizure, not the "constructive" search and seizure of a subpoena duces tecum. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

65. The agency must initiate the contempt proceedings, since the court may punish summarily only those contempts which occur in its presence. See *Sacher v. United States*, 343 U.S. 1 (1952).

66. *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948) ("disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place"); *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) ("We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings. . . . This is true without regard even for the constitutionality of the Act under which the order is issued."); *Howat v. Kansas*, 258 U.S. 181, 189 (1922); *Kasper v. Brittain*, 245 F.2d 92, 96 (6th Cir. 1957); *Land v. Dollar*, 190 F.2d 366, 379 (D.C. Cir. 1951); *Clarke v. FTC*, 128 F.2d 542 (9th Cir. 1942) (court order is reviewable only on direct appeal and may not be collaterally attacked upon appeal from order adjudging party in contempt for disobedience); see MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 502 (1949); Murphy, *The Contempt Power of the Federal Courts*, 18 FED. B.J. 34, 41 (1958); cf. *United States v. Minker*, 350 U.S. 179, 183 n.4 (1956). But see *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); Note, 71 HARV. L. REV. 1541, 1545 (1958) ("[T]he respondent must now disobey the subpoena to obtain a hearing on the merits as to the validity of the subpoena. Under the *Hermann* doctrine, those issues not open to contest at the first [enforcement] stage may be raised at the second [contempt] stage.").

All defenses are not precluded, however. For example, inability to comply with the court order is a complete defense, absent a showing of bad faith. *United States v. Bryan*, 339 U.S. 323 (1950).

67. See Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958). Compare *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), with *Leedum v. Kyne*, 358 U.S. 184 (1958).

68. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951); *FTC v. Cement Institute*, 333 U.S. 683, 705-06 (1948); *Marmon v. Railroad Retirement Bd.*, 218 F.2d 716 (3d Cir. 1955); *American Rubber Prods. Corp. v. NLRB*, 214 F.2d 47 (7th Cir. 1954); Scanlon, *Judicial Review Under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME LAW. 501, 537 (1948); *Hearings on S. 674, S. 675 and S. 918 Before a Subcommittee of the Senate Committee on the Judiciary*, 77th Cong., 1st Sess. 1353-1359 (1941); Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026 (1941). See also Administrative Procedure Act §§ 7(c), 10(e), 60 Stat. 241, 244 (1946), 5 U.S.C. §§ 1006(c), 1009(e) (1958); 2 DAVIS § 14.03, at 282. But see *NLRB v. Haddock-Engineers, Ltd.*, 215 F.2d 734 (9th Cir. 1954).

poenas are issued pursuant to a broad investigation, rather than a specific complaint, and not all investigations culminate in adjudications.<sup>69</sup> Some individuals will, therefore, never have a "subsequent opportunity." Even if an agency hearing is eventually held, not all individuals who have been required to produce documents will become parties.<sup>70</sup> They too will probably lose all opportunity to object to the investigative action.<sup>71</sup> Thus, for both constitutional and practical reasons, *Hermann* must be narrowly construed.

In contrast, a broad interpretation of *Hermann* would only increase the speed of administrative enforcement at the expense of individual protection. Still, a full enforcement proceeding can increase administrative efficiency. If a hearing and final order follow the investigation, courts may reverse the agency if the order is unsupportable without evidence obtained via an invalid subpoena.<sup>72</sup> Had the subpoena been challenged before enforcement, the agency would have been spared the expense and delay of a useless hearing.

To minimize possibilities of delay, a requirement that objections to enforcement be raised with specificity should be imposed. Under such a requirement, when, as in *Hermann*, objections are stated so broadly that they cannot be assessed without judicial examination of countless documents, the court would not give them a full hearing.<sup>73</sup> If, however, an individual objects to the production of a particular document, courts would make a determination on the merits. In this manner, the agency will be freed from the delay occasioned by broadly framed objections,<sup>74</sup> while the individual will be enabled fully to enjoy his substantive protections.

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69. See 1 DAVIS § 3.02, at 165.

70. See generally 1 DAVIS § 8.11; GELLHORN & BYSE, ADMINISTRATIVE LAW—CASES 833-58 (1954).

71. A nonparty is not entitled to notice of a hearing. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938). If a nonparty desires to be heard, he may petition the agency for permission to intervene. But, "since the vast majority of statutes are silent on the question, there generally is no privilege to intervene unless the agency has given it by prescribing rules governing the matter." GELLHORN & BYSE, *op. cit. supra* note 70, at 843; see *Seaboard & Western Airlines, Inc. v. CAB*, 181 F.2d 515 (D.C. Cir.), *cert. denied*, 339 U.S. 963 (1950).

72. See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). See also note 68 *supra* (emphasizing the requirement that the agency finding must be supported by other substantial evidence in order to overcome the effect of improper admission of some evidence).

73. In such a case, the court would be required only to determine the merits of claims raised in the most convenient alternative manner. Usually, this would entail only an examination of the agency subpoena. See text at note 57 *supra*.

74. In order to protect against spurious claims, made only for reasons of delay, a statutory provision allowing the court to assess monetary penalties against the delaying party might be enacted. See ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS, COMPARISON OF THE ADMINISTRATIVE PROCEDURE ACT AND AMERICAN BAR ASSOCIATION PROPOSED CODE OF FEDERAL ADMINISTRATIVE PROCEDURE § 1009(g), at 13 (1957).