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REASONABLE RELATION REASSESSED: THE EXAMINATION OF PRIVATE DOCUMENTS BY FEDERAL REGULATORY AGENCIES

*"for knowledge itself is power"*¹

INTRODUCTION

In the attempt to bring complex patterns of social and economic interaction under effective public control, Congress has relied increasingly on federal regulatory agencies.² These agencies can fulfill their statutory missions only if they possess adequate information to determine both when exercise of their substantive powers would be appropriate and what form that exercise should assume. Without knowledge of the actual conditions prevalent in the areas committed to their supervision, agencies can act only capriciously.

Of necessity, much of the data needed by regulatory agencies must be obtained from the regulated individuals or companies themselves. Although such information often is supplied voluntarily,³ difficult legal problems arise when the regulated entity refuses to divulge the requested data. These situations entail collision of important interests: the private entity's proprietary rights in the data⁴ conflict with the public's interest in effective regulation.⁵ This Note examines a major aspect of this conflict: the constitutional and statutory limits on the demands of federal regulatory agencies to inspect documents held by private entities.⁶

¹ F. Bacon, *Religious Meditations*, in 7 *The Works of Francis Bacon* 253 (J. Spedding, R. Ellis & D. Heath ed. London 1870) (1st ed. London 1597).

² As long as a generation ago, Justice Jackson observed: "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, review of administrative decisions apart." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (dissenting).

There are two types of administrative agencies. Regulatory agencies prescribe and enforce rules legally binding upon private agencies. Nonregulatory agencies dispense benefits under statutory social welfare schemes. See B. Schwartz & H. Wade, *Legal Control of Government* 26-37 (1972). This Note deals with regulatory agencies only.

³ See B. Schwartz, *Administrative Law* 87 (1976).

⁴ See text accompanying notes 74-134 *infra*.

⁵ See text accompanying notes 37-45 *infra*.

⁶ This Note discusses document examination at the investigatory, prelitigation phase only. Examination during litigation would, of course, be governed by normal rules of discovery. For an explanation of differences between document inspections before and during litigation, see *United States v. IBM Corp.*, 83 F.R.D. 97, 100-02 (S.D.N.Y. 1979).

Document inspection disputes typically arise in the following fashion. An agency representative tenders, by mail or in person, an informal request to be allowed to examine and copy documents held by the private entity. Sometimes the request identifies the documents sought by type, date, or subject matter; not infrequently the request is for plenary access to all files maintained by the entity. Should its informal demand be refused, the agency issues an administrative subpoena for the material.⁷ The matter may reach the courts in either of two ways. The person on whom the subpoena is served may challenge its validity in federal court.⁸ Alternatively, the agency itself may sue for a court order directing compliance.⁹ Regardless of how the suit reaches the courts, the validity of the administrative subpoena will be evaluated by a single standard. The universal rule in the federal courts is that agency access demands will be enforced if the documents sought are reasonably related to an investigation that is within the agency's authority.¹⁰

Section I of this Note traces the history of judicial treatment of agency access demands, emphasizing the evolution of the reasonable relation standard. Section II critiques the manner in which that standard has been employed, arguing both that it has undermined important constitutional principles and that it has proven incapable of rational application. Finally, Section III proposes a different approach, which, through more careful elaboration of the relevant criteria, better reconciles the competing sets of principles in document access disputes.

⁷ The authority to issue subpoenas is sometimes specified by statute. See, e.g., 15 U.S.C. § 49 (1976) (FTC); 15 U.S.C. § 78u(b) (1976) (SEC); 29 U.S.C. § 161(1) (1976) (NLRB). In other instances, when enabling statutes do not specify investigatory procedures, agencies themselves have promulgated regulations to govern issuance of subpoenas. See, e.g., 14 C.F.R. § 305.7(a) (1981) (CAB); 49 C.F.R. § 1100.54 (1980) (ICC).

⁸ See, e.g., 49 U.S.C. § 1486 (1976 & Supp. III 1979) (CAB); 49 U.S.C.A. § 10322(h) (West Special Pamph. 1981) (ICC).

Before seeking judicial redress, the party on whom the inspection demand is served must attempt to have the demand modified or quashed through procedures within the agency itself. E.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 653 (1950). This requirement is consistent with "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (footnote omitted); see *McKart v. United States*, 395 U.S. 185, 193-95 (1969); *FTC v. Feldman*, 532 F.2d 1092, 1095-96 (7th Cir. 1976).

⁹ See, e.g., 15 U.S.C. § 49 (1976) (FTC); 15 U.S.C. § 78u(c) (1976) (SEC); 29 U.S.C. § 161(2) (1976) (NLRB); 49 U.S.C. § 1487 (1976 & Supp. III 1979) (CAB); 49 U.S.C. § 11702(a)(3)-(6) (Supp. III 1979) (ICC).

Agency subpoenas are not self-enforcing. E.g., *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir.), cert. denied, 449 U.S. 822 (1980).

¹⁰ See notes 71-73 and accompanying text *infra*.

I

EVOLUTION OF THE REASONABLE RELATION STANDARD

An administrative agency possesses no inherent authority. It is created by statute and can wield only those powers conferred on it by statute.¹¹ Thus, the starting points in determining the scope of access authority are the congressional enactments creating the various federal regulatory agencies.

The access powers delegated by these statutes are, in their terms, sweeping indeed. The first major enactment was the Interstate Commerce Act,¹² which provided that the Interstate Commerce Commission "shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and [authority] to inspect and examine any and all accounts, records, and memoranda kept by such carriers."¹³ The documentary inspection powers of most other major federal regulatory agencies have been modelled on those conferred on the ICC,¹⁴ and thus are similarly broad.¹⁵

Were such sweeping language given literal effect, federal regulatory agencies would possess plenary power to examine the documents of private entities within their spheres of supervision. The courts, however, have not allowed agencies to go as far in documentary inspection as literal reading of the statutes would permit.¹⁶ The extent of the judicially imposed limitations on agency access to private documents has varied depending on which of two conflicting interests has been accorded greater priority. Until the early 1940's, the federal courts believed protecting the privacy of individuals and corporations from governmental intrusion to be of greater moment than promoting

¹¹ See W. Gellhorn, C. Byse & P. Strauss, *Administrative Law: Cases and Comments* 52 (7th ed. 1979); *Peters v. Hobby*, 349 U.S. 331, 345 (1955); *Exxon Corp. v. Mobil Oil Corp.*, No. 80-1395, slip op. at 6 (D.C. Cir. Sept. 14, 1981); *Canadian Tarpoly Co. v. United States Int'l Trade Comm'n*, 640 F.2d 1322, 1328 (C.C.P.A. 1981); *Lehigh & N. E. Ry. v. ICC*, 540 F.2d 71, 79 (3d Cir. 1976); *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974) ("An administrative agency is a creature of statute.").

¹² Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. § 10101 et seq. (Supp. III 1979)).

¹³ Act of Feb. 4, 1887, ch. 104, § 20(5), 24 Stat. 379 (1887), as amended by Act of June 29, 1906, § 7, ch. 3591, 34 Stat. 584 (current version at 49 U.S.C. § 11144 (1978)).

¹⁴ See, e.g., *CAB v. United Airlines, Inc.*, 542 F.2d 394, 396 (7th Cir. 1976) (inspection powers of CAB modelled on those of ICC); cf. B. Schwartz, *supra* note 3, at 5 (ICC is prototype of federal regulatory agency).

¹⁵ Among the statutes governing document inspection by major federal regulatory agencies are 15 U.S.C. § 49 (1976) (FTC); 15 U.S.C. § 78u (1976) (SEC); 29 U.S.C. § 161(1) (1976) (NLRB); 49 U.S.C. § 1377(e) (Supp. III 1979) (CAB); 49 U.S.C. § 11144 (Supp. III 1979) (ICC).

¹⁶ See, e.g., *SEC v. OKC Corp.*, 474 F. Supp. 1031, 1034 (N.D. Tex. 1979) ("[A]n administrative agency's subpoena power is [broad but] not limitless.").

effective public regulation by assuring governmental agencies access to information. Accordingly, during this period the courts construed agency inspection powers restrictively.¹⁷ However, since the early 1940's, the courts have thought the regulatory interest more pressing than the privacy interest and, as a result, have treated agency access powers as quite broad, though still less than plenary.¹⁸

*A. The Early Cases:
Stringent Restrictions on Agency Access*

The foundation of the early, restrictive approach was laid in three steps. First, the Supreme Court held that Congress could not punish as contempt a witness' refusal to answer questions or to produce books and papers sought by a congressional committee.¹⁹ Compulsion was inappropriate, the Court stated, because "neither [house of Congress] possesses the general power of making inquiry into the private affairs of the citizen."²⁰ Second, the protection of "private affairs" was extended beyond legislative investigation and was found to be rooted in the fourth amendment. In *Boyd v. United States*,²¹ the Court held unconstitutional a statutory provision authorizing government attorneys to compel production of private books, invoices, and papers in forfeiture proceedings under the revenue laws, terming the provision repugnant to "the very essence of constitutional liberty and security"²² safeguarded by the fourth amendment.²³ Finally, fourth amendment protection was extended to agency investigations, initially those involving attempts to compel oral testimony²⁴ and subsequently those demanding production of documents.²⁵

¹⁷ See text accompanying notes 19-36 *infra*.

¹⁸ See text accompanying notes 46-70 *infra*.

¹⁹ *Kilbourn v. Thompson*, 103 U.S. 168, 199-200 (1881).

²⁰ *Id.* at 190. This remained the law for nearly a half century until repudiated in *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

²¹ 116 U.S. 616 (1886).

²² *Id.* at 630.

²³ *Id.* at 622.

²⁴ See *In re Pacific Ry. Comm'n*, 32 F. 241, 250-51 (C.C.N.D. Cal. 1887) (Field, Circuit Justice).

²⁵ See *ICC v. Brimson*, 154 U.S. 447, 478-79 (1894). Building on this foundation, a series of cases in the first two decades of this century restrictively construed the investigatory powers of the ICC. See *United States v. Louisville & N.R.R.*, 236 U.S. 318, 335-37 (1915) (ICC lacks authority to inspect correspondence of regulated rail carriers); *Harriman v. ICC*, 211 U.S. 407, 419 (1908) ("the purposes . . . for which the commission may exact evidence embrace only complaints for violation of the [Interstate Commerce Act], and investigations by the commission upon matters that might have been made the object of complaint."). But see *Smith v. ICC*, 245 U.S. 33, 42-43 (1917) (testimony compelled even though investigation was not directed at

The most illuminating of the early decisions was *FTC v. American Tobacco Co.*²⁶ After complaints of price fixing in the industry had been filed with the Commission, the FTC investigated the tobacco trade, asserting authority under statute and Senate resolution to act against unfair competition. From one company, the Commission demanded all letters and telegrams received from or sent to all its jobbers over a one-year period. From another, the Commission sought the same material plus all letters, telegrams, or reports from or to its salesmen, from or to all jobbers' or wholesale grocers' associations, all contracts or arrangements with the associations, and correspondence and agreements with a list of corporations. Deciding the case on the FTC's general assertion of "an unlimited right of access to the [companies'] papers with reference to the possible existence of [illegal] practices,"²⁷ a unanimous Supreme Court refused to enforce the subpoenas.

American Tobacco stated the principle that later would become the touchstone of agency access doctrine:²⁸ agencies may inspect only those documents relevant to investigations they are legally empowered to conduct.²⁹ The significance of the case, though, and the way in which it differed from the post-World War II decisions, lay in how it demanded that relevance be established. Agencies could not order production of private documents merely to see whether some matter of regulatory interest would turn up. Instead, they had to possess in advance "[s]ome evidence of the materiality of the papers demanded."³⁰ Although the Court was able to decide the case without reaching the fourth amendment issue, it left little doubt that prior possession of material evidence was seen as a constitutional requirement:

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

specific violations of law); *Ellis v. ICC*, 237 U.S. 434, 446 (1915) (demand that rail carrier answer questions about relationship with parent company enforced in part and denied in part). Although these decisions involved statutory construction, they were informed by a belief that broadly conceived agency power would have been unconstitutional. See note 37 *infra*.

²⁶ 264 U.S. 298 (1924).

²⁷ *Id.* at 305.

²⁸ See text accompanying notes 71-73 *infra*.

²⁹ 264 U.S. at 306-07.

³⁰ *Id.* at 306.

search through all the [companies'] records, relevant or irrelevant, in the hope that something will turn up.³¹

The Supreme Court persisted in a narrow view of agency access powers as late as 1936.³² In *Jones v. SEC*,³³ a registration statement had been filed with the SEC whereupon that body instituted a proceeding challenging the accuracy of the statement. Before the proceeding, the Commission served on the company a subpoena for various books and records. The company then withdrew the statement, despite which the SEC continued to seek the documents. The Court refused to enforce the subpoena. On withdrawal of the statement, the Court held, the Commission lost any legitimate purpose for the inquiry.³⁴ Agencies possess no general inquisitorial power; "[t]he citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer."³⁵ *Jones* reflects the key legal choice made by the early cases. The Court believed that the contribution easier access to information might make to effective regulation was outweighed by the peril to private rights that such access would pose.³⁶

But in balancing these considerations the early cases³⁷ seriously undercut the public interest in regulation. A leading commentator has

³¹ Id. at 305-06; cf. *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906) (showing of materiality required for enforcement of grand jury subpoena). But cf. *Brown v. United States*, 276 U.S. 134, 143 (1928) (grand jury subpoena sustained without discussion of materiality).

The *American Tobacco* Court was influenced also by the fact that some of the documents demanded related wholly to the companies' intrastate businesses. See 264 U.S. at 307.

³² Some lower court decisions were animated by the same spirit at even later dates. See, e.g., *Bowles v. Insel*, 148 F.2d 91, 92-93 (3d Cir. 1945); *General Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 599-600 (6th Cir. 1942).

³³ 298 U.S. 1 (1936).

³⁴ Id. at 25-26.

³⁵ Id. at 26.

³⁶ If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well

Exercise of "such a power would be more pernicious to the innocent than useful to the public."

Id. at 28 (citation omitted).

³⁷ In form, some of these cases involved only statutory construction. However, it is clear that these decisions limited the broad language of statutory access provisions in order to avoid declaring the provisions unconstitutional. For example, the materiality requirement of *American Tobacco*, see text accompanying notes 30-31 *supra*, was found consistent with congressional intent because "[the Court] cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law." 264 U.S. at 307 (citations omitted); see *United States v. Louisville & N.R.R.*, 236 U.S. 318, 335-36 (1915); *Harriman v. ICC*, 211 U.S. 407, 419-21 (1908); *FTC v. P. Lorillard Co.*, 283 F. 999, 1002-03 (S.D.N.Y. 1922), *aff'd* on other grounds, 264 U.S. 298 (1924).

observed that agency proceedings to produce information are used "to make rules, to determine policy, to recommend legislation, and to illuminate areas that are dark in order to find out whether something should be done and if so what."³⁸

In three respects, the early cases restricted the ability of agencies to gather data for these wide-ranging purposes. First, the courts generally held that compulsory process was available to the government only when "the investigations concern a specific breach of the law."³⁹ Thus, agencies exercising any of their nonprosecutorial functions could be confident of obtaining only that information voluntarily produced or already in their files; regardless of regulatory need, they could not compel production from recalcitrant private entities.⁴⁰ Second, even investigations of possible illegality were limited: subpoenas were held unenforceable "without a showing [by the agency] of probable cause to believe that the law has been violated."⁴¹ Finally, an agency could not demand access to the documents of entities outside its regulatory jurisdiction. For example, a subpoena of the Federal Trade Commission—the jurisdiction of which is interstate commerce—was held enforceable only if the corporation under investigation was engaged in interstate commerce and the subject under investigation was "so related to interstate commerce that its regulation may be accomplished by act of Congress."⁴² The burden was on the agency to establish its jurisdiction in each case.⁴³ This position, however, erroneously equated the power to gather information with the power to regulate; the data an agency obtains from entities outside its jurisdictional ambit may well assist it to better attend to matters within its sphere of regulation.⁴⁴

³⁸ 1 K. Davis, *Administrative Law Treatise* § 4:4, at 234 (2d ed. 1978) [hereinafter *Davis II*].

³⁹ E.g., *Harriman v. ICC*, 211 U.S. 407, 419-20 (1908).

⁴⁰ See, e.g., *FTC v. Claire Furnace Co.*, 285 F. 936, 943, 945 (D.C. Cir. 1923), rev'd on other grounds, 274 U.S. 160 (1927); *FTC v. Baltimore Grain Co.*, 284 F. 886, 887-90 (D. Md. 1922), aff'd, 267 U.S. 586 (1925). But see *Smith v. ICC*, 245 U.S. 33, 44-46 (1917).

⁴¹ *Bowles v. Insel*, 148 F.2d 91, 92-93 (3d Cir. 1945); see *FTC v. Smith*, 34 F.2d 323, 324-25 (S.D.N.Y. 1929); *FTC v. P. Lorillard Co.*, 283 F. 999, 1006 (S.D.N.Y. 1922), aff'd on other ground, 264 U.S. 298 (1924).

⁴² *FTC v. Claire Furnace Co.*, 285 F. 936, 941 (D.C. Cir. 1923), rev'd on other grounds, 274 U.S. 160 (1927); see *General Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 599 (6th Cir. 1942); *S&W Cafeteria v. Aird*, 60 F. Supp. 599, 600 (E.D. Tenn. 1945).

⁴³ See, e.g., *SEC v. Tung Corp. of Am.*, 32 F. Supp. 371, 375 (N.D. Ill. 1940).

⁴⁴ See *FCC v. Cohn*, 154 F. Supp. 899, 905-06 (S.D.N.Y. 1957) (for investigation to be effective, FCC committee reviewing network structure in radio and television broadcasting must be permitted to investigate "all components of the broadcasting industry and the impact of one upon another as well as on the public"); W. Gellhorn, C. Byse & P. Strauss, *Administrative Law: Cases and Comments* 560 (7th ed. 1979).

A modern regulatory agency could not function under the strictures of the restrictive cases.⁴⁵ Without the ability to compel production of information not related to violations of law, agency functions like rulemaking, general supervision of industry, and recommendation of new legislation are rendered difficult. And, with the necessity to prove probable cause and jurisdiction, agencies' attempts to gather data for adjudication and prosecution also are compromised. It was this very inhibition of the regulatory process that led to the overthrow of the restrictive approach. The New Deal and World War II conditioned public opinion to accept the necessity—even desirability—of vastly expanded governmental intrusion into affairs formerly regarded as private. In this changed social climate, severe judicial limits on agency inspections became increasingly difficult to defend.⁴⁶

*B. The Modern Cases:
Relaxed Restrictions on Agency Access*

More expansive construction of agency inspection powers emerged initially in a series of lower federal court decisions⁴⁷ and ultimately was adopted by the Supreme Court. The first pillar of the earlier approach to fall was the tenet that only entities shown to be within the agency's regulatory jurisdiction may be targets of documentary inspection. The 1943 case *Endicott Johnson Corp. v. Perkins*⁴⁸ involved an administrative subpoena issued by the Secretary of Labor under the Walsh-Healey Public Contracts Act,⁴⁹ which requires governmental contractors to meet certain labor standards. Although the target company produced supplies for the government at only some of its plants, the Secretary demanded access to payroll records at all of the company's facilities. The district court refused to enforce the petition, accepting the defense that plants not involved in the government contract were beyond the Secretary's jurisdiction,⁵⁰ a result consistent with the precedents of the restrictive period.⁵¹ The

⁴⁵ "Information is the fuel without which the administrative engine could not operate." B. Schwartz, *supra* note 3, at 87.

⁴⁶ See generally 1 Davis II, *supra* note 38, § 4:2.

⁴⁷ See, e.g., *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 389-92 (7th Cir.), cert. denied, 311 U.S. 690 (1940); *Consolidated Mines v. SEC*, 97 F.2d 704, 707-08 (9th Cir. 1938); *Woolley v. United States*, 97 F.2d 258, 261-62 (9th Cir.), cert. denied, 305 U.S. 614 (1938); *FTC v. National Biscuit Co.*, 18 F. Supp. 667, 670-71 (S.D.N.Y. 1937).

⁴⁸ 317 U.S. 501 (1943).

⁴⁹ 41 U.S.C. §§ 35-45 (1976 & Supp. III 1979).

⁵⁰ 40 F. Supp. 254, 256-58 (N.D.N.Y. 1941).

⁵¹ See *General Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 599 (6th Cir. 1942); *FTC v. Claire Furnace Co.*, 285 F. 936, 941 (D.C. Cir. 1923), rev'd on other grounds, 274 U.S. 160 (1927); *S&W Cafeteria v. Aird*, 60 F. Supp. 599, 600 (E.D. Tenn. 1945).

Supreme Court reversed, holding that determination of jurisdiction under the statute "was primarily the duty of the Secretary" herself.⁵² "Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was *not plainly incompetent or irrelevant to any lawful purpose* of the Secretary in the discharge of her duties under the Act" ⁵³ So, under *Endicott Johnson*, if the information sought is even arguably within the agency's regulatory purview no jurisdictional defense against the subpoena will lie.⁵⁴

The next shaping decision was *Oklahoma Press Publishing Co. v. Walling*.⁵⁵ This case was significant for two reasons. First, it confirmed and extended *Endicott Johnson*. That prior case had involved a general contractor, and the Court had stressed that Walsh-Healey "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract."⁵⁶ *Oklahoma Press*, enforcing a subpoena against a newspaper under the Fair Labor Standards Act, made clear that the *Endicott Johnson* result did not depend on the target having brought itself within the agency's regulatory purview. Stating that "it would be anomalous to hold that under the Walsh-Healey Act . . . the district court was not authorized to decide the question of coverage" yet to allow district courts that power in other settings, the Court made the liberality of *Endicott Johnson* the measure for all document access cases.⁵⁷

Oklahoma Press made additional inroads on the restrictive precedents: it overthrew the requirements that subpoenas would issue against only violations of law and then only when probable cause

⁵² 317 U.S. at 507.

⁵³ *Id.* at 509 (emphasis added).

⁵⁴ However, it has been held that a subpoena will not be enforced when an agency acts arbitrarily or in excess of its authority by harassing and persecuting officers of a company under investigation. *United States v. Powell*, 379 U.S. 48, 58 (1964); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); *Shasta Minerals & Chem. Co. v. SEC*, 328 F.2d 285, 287-88 (10th Cir. 1964).

Endicott Johnson's limitation of the jurisdiction defense contrasts sharply with the early inspection cases. Even as late as three years before *Endicott Johnson*, a federal court held that the agency bore the burden of establishing its jurisdiction in each case. *SEC v. Tung Corp. of Am.*, 32 F. Supp. 371, 375 (N.D. Ill. 1940). In *Endicott Johnson*, not only was the Secretary of Labor not required to prove jurisdiction but also the target company was refused the opportunity to present evidence demonstrating the absence of jurisdiction. 317 U.S. at 508-09.

⁵⁵ 327 U.S. 186 (1946).

⁵⁶ 317 U.S. at 507.

⁵⁷ 327 U.S. at 211.

existed to believe that violations had been committed.⁵⁸ In place of these requirements, *Oklahoma Press* erected a more flexible "requirement of reasonableness":⁵⁹ "it is not necessary . . . that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command."⁶⁰

The strongest assertion of the expansive approach to agency inspection powers was *United States v. Morton Salt Co.*,⁶¹ in which the Court upheld an order by the FTC to major salt producers to produce "a 'complete statement' of the 'prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating . . . [prices] . . . after January 1, 1944.'"⁶² Although citing the reasonable relation test of *Oklahoma Press*,⁶³ the *Morton Salt* Court was more emphatic in its phrasing of broad agency inspection powers. The Court began by rejecting the prohibition of "fishing trips":⁶⁴

Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get

⁵⁸ See text accompanying notes 39-41 *supra*.

⁵⁹ 327 U.S. at 209.

⁶⁰ *Id.* at 208-09; see *id.* at 215-16.

Since *Oklahoma Press*, both the Supreme Court and the lower federal courts consistently have refused to consider the jurisdiction and probable-cause-for-violation defenses in administrative subpoena cases. See, e.g., *United States v. Powell*, 379 U.S. 48, 52-58 (1964); *United States v. McKay*, 608 F.2d 830, 832 (10th Cir. 1979); *Link v. NLRB*, 330 F.2d 437, 440 (4th Cir. 1964); *Goldberg v. Truck Drivers Local 299*, 293 F.2d 807, 809-12 (6th Cir.), cert. denied, 368 U.S. 938 (1961) (all dealing with probable cause to believe the existence of a violation of law); *United States v. Di Fonzo*, 603 F.2d 1260, 1265-66 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.), cert. denied, 398 U.S. 958 (1970); *United States v. Marshall Durbin & Co.*, 363 F.2d 1, 5 (5th Cir. 1966); *Freeman v. Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487, 492 (E.D. Pa. 1965); *FCC v. Cohn*, 154 F. Supp. 899, 906 (S.D.N.Y. 1957) (jurisdiction defense cases).

⁶¹ 338 U.S. 632 (1950).

⁶² *Id.* at 637.

⁶³ *Id.* at 652-53.

⁶⁴ See *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-07 (1924), discussed at text accompanying notes 26-31 *supra*.

evidence but can investigate *merely on suspicion* that the law is being violated, *or even just because it wants assurance* that it is not.⁶⁵

Agencies could demand to inspect corporate documents based on "nothing more than official curiosity" and merely "to satisfy themselves that corporate behavior is consistent with the law and the public interest."⁶⁶

In the space of a quarter century, the restrictive approach was entirely overthrown.⁶⁷ The revolution wrought by *Endicott Johnson*, *Oklahoma Press*, and *Morton Salt* operated both doctrinally and philosophically. Doctrinally, the Supreme Court moved from denouncing agency "fishing expeditions" as "contrary to the first principles of justice"⁶⁸ to endorsing agency investigations predicated "merely on

⁶⁵ 338 U.S. at 642-43 (emphasis added); see *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 515 (10th Cir. 1980). The analogy to grand juries is invoked frequently. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946); *FTC v. Standard Am., Inc.*, 306 F.2d 231, 234 (3d Cir. 1962); *FTC v. Carter*, 464 F. Supp. 633, 640 (D.D.C. 1979), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980).

However, the analogy is questionable. Unlike grand juries, composed of members of the community serving on a one-time basis and possessing no general law enforcement powers, regulatory agencies are permanent bodies, part of the executive apparatus of government and imbued with a continuing interest in oversight. Because of these institutional differences, the "guarantee of fairness" implicit in grand jury proceedings cannot be assumed in investigations by regulatory agencies. *Hannah v. Larche*, 363 U.S. 420, 498-99 (1960) (Douglas, J., dissenting).

⁶⁶ 338 U.S. at 652.

Nonetheless, even *Morton Salt* does not stand for plenary access; some limits still exist. "Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* (citing *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)).

Moreover, the peculiar factual context of the case should be recognized. A prior investigation of the salt producers had resulted in an FTC order requiring them to cease and desist from certain pricing, producing, and marketing practices; a federal court of appeals had upheld the order and commanded compliance. The decree directed filing of compliance reports with the FTC and reserved jurisdiction to enter such additional filing requirements as might be needed to ensure compliance. *Id.* at 635-36. The reports sought by the FTC in *Morton Salt* were further reports to show continuing compliance with the decree. *Id.* at 636-37. Thus, one possible reading is that *Morton Salt* allows investigation "merely on suspicion" or "official curiosity" when the target companies have previously been adjudicated in violation of the law and the investigation seeks to determine whether the illegal practices have ceased. Under this reading, the broad language of *Morton Salt* would not authorize agency inspections based on mere curiosity in more usual circumstances. This Note proposes a test for agency document demands which is consistent with this reading of *Morton Salt*. See text accompanying notes 245-76 *infra*. Courts, however, have ignored the unique facts of *Morton Salt*, treating its broad language as statements of general applicability.

⁶⁷ Professor Davis has observed that "[s]eldom are constitutional changes so dramatic as [this revolution in rules governing agency inspections]." K. Davis, *Administrative Law* Text 53 (3d ed. 1972).

⁶⁸ *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).

suspicion" and on "nothing more than official curiosity."⁶⁹ Philosophically, the Court reweighed the principles at stake, determining that the liberty interest that once had predominated now must yield to the need to facilitate public regulation of the economy and society. An explicit policy decision underlies the expansive conception of agency access powers: "those who [are] trying to carry out [regulatory] programs . . . [must] have access to the information that [is] absolutely essential to make the programs effective."⁷⁰

The rubric of this expansive intuition is the reasonable relation rule,⁷¹ which requires that "an [agency's] investigative demand be reasonably definite and reasonably relevant to some proper investigative purpose."⁷² This rule is now followed virtually uniformly in administrative access decisions.⁷³

⁶⁹ *United States v. Morton Salt Co.*, 338 U.S. at 642, 652; see text accompanying notes 64-66 *supra*.

⁷⁰ 1 *Davis II*, *supra* note 38, § 4:2, at 228. For judicial recognitions of this decision, see *In re FTC Line of Business Report Litigation*, 595 F.2d 635, 702-03 (D.C. Cir.) (per curiam), cert. denied, 439 U.S. 958 (1978); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); *FMC v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975); *FTC v. Carter*, 464 F. Supp. 633, 639 (D.D.C. 1979). But see *Burlington N., Inc. v. ICC*, 462 F.2d 280, 286 (D.C. Cir.) (ICC inspection powers should be limited by "a narrow reading of [its statutory authority.]"), cert. denied, 409 U.S. 891 (1972).

⁷¹ Originally developed by case law, this rule now has statutory status. The Administrative Procedure Act (APA) provides that administrative subpoenas shall issue "on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena . . . to the extent that it is found to be in accordance with law." 5 U.S.C. § 555(d) (1976).

The APA introduced one complication. There is indication in the somewhat confused legislative history of § 555(d) that the phrase "in accordance with law" was intended by some to allow district courts to examine agency jurisdiction for the investigation more closely than *Endicott Johnson* permitted, see text accompanying notes 48-54 *supra*. See generally B. Schwartz, *supra* note 3, § 46, at 118-19; Mogel, *The Effect of a Claim of Privilege Upon the Subpoena Power of an Administrative Law Judge*, 28 *Drake L. Rev.* 67, 75-77 (1978). However, decisions have held that the APA was not intended to modify *Endicott Johnson*. See *Tobin v. Banks & Rumbaugh*, 201 F.2d 223, 225-26 (5th Cir.), cert. denied, 345 U.S. 942 (1953); *D.G. Bland Lumber Co. v. NLRB*, 177 F.2d 555, 558 (5th Cir. 1949).

⁷² *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976).

⁷³ *Id.* But see *Burlington N., Inc. v. ICC*, 462 F.2d 280, 288 (D.C. Cir.) (deciding document inspection case without explicitly adverting to reasonable relation rationale, but still noting requirement of relevance), cert. denied, 409 U.S. 891 (1972).

Linguistically, a distinction can be drawn between the "reasonable relation" language of *Oklahoma Press* and *Morton Salt* and the "not plainly incompetent or irrelevant" phrasing of *Endicott Johnson*. The latter might seem to imply a presumption that the request is lawful, one that must be specifically disproved before the courts will refuse to enforce the request. Such a presumption is less clearly implicit in the "reasonable relation" language. However, no decision has turned on this possible distinction; in practice, the terms appear to be used interchangeably. For example, one case relied on both versions within the space of two sentences. See *FMC v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975). If there is a substantive difference between the phrases, it is enough to note that, although many decisions have intoned the not plainly

II

DIFFICULTIES IN THE CURRENT APPLICATION
OF THE REASONABLE RELATION STANDARD

The expansive application of the reasonable relation rule is beset by three serious difficulties: (1) it undervalues the privacy rights of the entities from which the documents are sought; (2) it erodes the principle of delegation of administrative power; and (3) it has proven incapable of consistent application by the courts.

A. *Privacy Interests*1. *Applicability of the Fourth Amendment*

The fourth amendment bars unreasonable searches and seizures.⁷⁴ A threshold question is whether its prohibition applies at all to document inspections by administrative agencies. The early cases were clear that it does. As early as 1886, the Supreme Court stated that the target of a documentary inspection demand by a regulatory agency may assert a privacy interest, even when the target is a corporation, not a natural person, and even though the search is only constructive or figurative, not actual, because the inspectors do not physically enter the corporation's premises.⁷⁵ Subsequent cases confirmed this position.⁷⁶

irrelevant formulation, see, e.g., *FTC v. Feldman*, 532 F.2d 1092, 1098 (7th Cir. 1976); *Moore Business Forms, Inc. v. FTC*, 307 F.2d 188, 189 (D.C. Cir. 1962); *FTC v. Standard Am., Inc.*, 306 F.2d 231, 234-35 (3d Cir. 1962), the majority have spoken instead of reasonable relevance, see, e.g., *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *Southern Ry. v. ICC*, 553 F.2d 1345, 1348 (D.C. Cir. 1977); *Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 461 (9th Cir. 1976); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

⁷⁴ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. Const. amend. IV.

⁷⁵ *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("it is not the breaking of his doors, and the rummaging of his drawers, that constitutes the [violation of the fourth amendment] . . . but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence [against him]") (dictum).

⁷⁶ See, e.g., *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924); *United States v. Louisville & N.R.R.*, 236 U.S. 318, 335-37 (1915); *ICC v. Brimson*, 154 U.S. 447, 479 (1894). Although *American Tobacco* and *Louisville & N.R.R.* were not constitutional decisions, it is clear that in both cases the Court narrowly construed an access-to-information provision in order to avoid declaring it violative of the fourth amendment. See note 37 *supra*; cf. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920); *Hale v. Henkel*, 201 U.S. 43, 75-76 (1906) (both dealing with grand jury subpoenas of documents).

The applicability of the fourth amendment to document inspections was briefly placed in doubt by *Oklahoma Press* and *Morton Salt*. The *Oklahoma Press* Court found the difference between actual and figurative searches to be significant.⁷⁷ Although the Court apparently was unwilling to reject entirely the notion that the two may be profitably analogized, and therefore that figurative searches are entitled to some fourth amendment protection,⁷⁸ a fair implication of *Oklahoma Press* is that the private rights to be balanced against the government's need for information are something other than fourth amendment rights.⁷⁹ *Morton Salt* abandoned this theory,⁸⁰ stressing instead that corporations (the usual targets of agency access demands) have lesser privacy rights than natural persons.⁸¹ Significantly,

⁷⁷ 327 U.S. at 195, 202-03, 204-06. This position had been anticipated in *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 145 (1937); accord, *Porter v. Mueller*, 156 F.2d 278, 280 (3d Cir. 1946).

⁷⁸ 327 U.S. at 208.

⁷⁹ As the Court put it, these private rights

are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. They are rather the interests of men to be free from officious intermeddling Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.

327 U.S. at 213.

This observation is puzzlingly incomplete. If "the interests . . . to be free from officious intermeddling" are not derived from the fourth amendment, why are they legally protectible? The Court only hinted at possible explanations and no later cases have sought to dispel the mystery. The Court, however, may have had any of three possibilities in mind. The interests may have been: (1) subconstitutional, secured under general equitable powers of the judiciary; (2) extraconstitutional, stemming from some variant of the pre-twentieth-century notion of legally enforceable natural rights, see 327 U.S. at 203 n.30 (quoting *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting)); see generally M. Horwitz, *The Transformation of American Law, 1780-1860*, at 4, 7-8 (1977); L. Tribe, *American Constitutional Law* § 8-1, at 427-31 (1978); or (3) constitutional, flowing from a guarantee other than the fourth amendment. One possible location of such another constitutional guarantee might be the due process clauses of the fifth and fourteenth amendments. *Oklahoma Press* itself suggests this source, see 327 U.S. at 207 & n.40 (overly broad subpoena similar to general warrant or writ of assistance, both anathema to Anglo-American notions of "first principles of justice" (quoting *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924))); cf. *Whalen v. Roe*, 429 U.S. 559, 598-600 & n.23 (1977) (right of privacy protects the interest of individuals in both confidentiality ("avoiding disclosure of personal matters") and autonomy ("independence in making certain kinds of important decisions")) (citing with approval *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (right of privacy springs from liberty clause of fourteenth amendment)). At least one jurist believed that the cryptic language of *Oklahoma Press* was an attempt to engage the due process clause. In re Horowitz, 482 F.2d 72, 79 (2d Cir.) (Friendly, J.), cert. denied, 414 U.S. 867 (1973).

⁸⁰ The Court returned to the earlier position that the fourth amendment right to privacy "is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process." 338 U.S. at 651-52 (citations omitted).

⁸¹ Id. at 652. Implicitly, therefore, *Morton Salt* did not dispute the applicability of the fourth amendment when individuals, not corporations, are the subjects of the inspection demands.

though, neither decision held unambiguously that the fourth amendment is inapplicable to document examination demands directed at corporations.⁸²

In the context of later cases, however, the positions of the *Oklahoma Press* and *Morton Salt* Courts on the applicability of the fourth amendment stand as largely aberrational. The distinction made in *Oklahoma Press* was stillborn; few decisions in the last three decades have attempted to resurrect *Oklahoma Press*' intimation that figurative searches are less an object of fourth amendment concern than are actual searches.⁸³ Moreover, recent cases have established decisively that corporations as well as natural persons have substantial fourth amendment rights.⁸⁴ The major strand of these cases is a line of Supreme Court decisions dealing with commercial entities. A pair of 1967 cases—*Camara v. Municipal Court*⁸⁵ and *See v. City of Seattle*⁸⁶—refused on fourth amendment grounds to permit warrantless, nonconsensual inspections by units of local government. Building on *Camara*'s proscription of residential intrusions,⁸⁷ the Court in *See* ruled that businesses and businessmen possess important privacy rights that must be protected from unrestricted agency discretion.⁸⁸ The

Moreover, while the Court held that corporations possess lesser privacy rights than individuals, it did not assert that corporations are entirely bereft of such rights. See *id.* at 652-53. Thus, *Morton Salt* did not speak to the key question: are the fourth amendment rights that corporations do possess, although less than those of natural persons, still great enough to impose substantive limits on administrative investigations? That question is answered affirmatively at text accompanying notes 84-94 *infra*.

⁸² See 338 U.S. at 651-52; 327 U.S. at 208.

⁸³ See *Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 461 n.13 (9th Cir. 1976); *United States v. IBM Corp.*, 83 F.R.D. 97, 101-02 (S.D.N.Y. 1979). As noted, even *Morton Salt* discarded this distinction. See note 80 *supra*. But see *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1054-55 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). The Supreme Court has stated that an administrative document inspection, despite being termed a "constructive" search in *Oklahoma Press*, is subject to fourth amendment limits. See *v. City of Seattle*, 387 U.S. 541, 545 (1967).

⁸⁴ Of course, different corporations—as well as different noncorporate entities—may, because of their particular circumstances, have stronger or weaker privacy rights than others. The circumstantial differences relevant to document inspections by regulatory agencies are discussed in Section III of this Note.

⁸⁵ 387 U.S. 523 (1967) (housing code inspection).

⁸⁶ 387 U.S. 541 (1967) (fire inspection).

⁸⁷ The Court noted the "governing principle" that warrantless, nonconsensual searches of private property are, except in "certain carefully defined classes of cases," per se unreasonable. 387 U.S. at 528. Although administrative inspections may be regarded as "less hostile intrusion[s]" than law enforcement searches, *id.* at 530, they nevertheless represent "significant intrusions" on fourth amendment interests, and so come within the general rule, *id.* at 534.

⁸⁸ 387 U.S. at 543-46. The *See* Court stated flatly: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.* at 543.

culmination of this line of cases was the 1978 decision *Marshall v. Barlow's, Inc.*⁸⁹ Again focusing on business privacy under the fourth amendment, the Court refused to permit warrantless inspection of business premises by Department of Labor agents under the Occupational Health and Safety Act.⁹⁰ Even Justice Stevens in dissent conceded that "businesses are unquestionably entitled to Fourth Amendment protection."⁹¹ In the physical premises inspection cases, the Supreme Court evinced a heightened awareness of the privacy rights of business entities. This same awareness surely extends to document inspection. In *See*, the Court found physical and documentary inspections to serve "analogous investigative functions";⁹² indeed, the Court found the settled applicability of the fourth amendment to document inspection to be "strong support" for its holding on physical inspections.⁹³ And the *Barlow's* Court averred: "Delineating the scope of a search with some care is particularly important where documents are involved."⁹⁴

With the repudiation of *Oklahoma Press'* distinction between figurative and actual searches and of *Morton Salt's* flirtation with denial of corporate fourth amendment rights,⁹⁵ doctrine has come full circle. The position of the early cases that the fourth amendment governs administrative document inspections undoubtedly is the law.

2. *The Reasonable Relation Rule and the Fourth Amendment*

Since fourth amendment guarantees apply to document inspection demands, the next inquiry is what those guarantees require. The

⁸⁹ 436 U.S. 307 (1978).

⁹⁰ *Id.* at 311-15.

In two cases between *Camara-See* and *Barlow's*, the Court had upheld warrantless inspections of businesses involved in pervasively regulated industries historically subject to close governmental control. *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (gun dealer); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (liquor dealer). *Barlow's*, however, made clear that these decisions were "exceptions" to the general rule and "represent[ed] responses to relatively unique circumstances." 436 U.S. at 313; see *Donovan v. Dewey*, 101 S. Ct. 2534, 2538-40 (1981) (arguably extending *Colonnade-Biswell* exception to mining industry).

The affirmation of corporate privacy rights may not be an isolated phenomenon. The Court now appears to be more receptive to corporate rights under the Bill of Rights generally. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777-86 (1978) (holding corporate free speech protected by the first amendment even when not materially related to the corporation's business).

⁹¹ 436 U.S. at 335 (Stevens, J., dissenting).

⁹² 387 U.S. at 545.

⁹³ *Id.* at 544.

⁹⁴ 436 U.S. at 324 n.22.

⁹⁵ Indeed, even the United States government now concedes that corporations have privacy interests in their premises. See, e.g., *United States v. Cortina*, 630 F.2d 1207, 1215 n.5 (7th Cir. 1980).

administrative subpoena is, in document inspections, the counterpart of the search warrant in physical inspections.⁹⁶ Both are tested against not strict probable cause criteria but the looser requirement of "reasonableness."⁹⁷ The fourth amendment's "reasonableness" clause requires a case-by-case balancing approach. The public interest in the investigation must be balanced against the rights of the target that are to be invaded.⁹⁸

Regrettably, the expansive construction of the reasonable relation rule is a poor vehicle for the balancing of interests and therefore for vindicating the fourth amendment privacy rights of entities subject to document inspection demands. No very precise formulation implementing the reasonable relation rule has commanded universal adherence; different courts have used different language.⁹⁹ The *Morton Salt* elaboration, however, is the one most frequently recited by lower federal courts.¹⁰⁰ Under it, an administrative subpoena will be enforced if three conditions are present: (1) "the inquiry is within the authority of the agency"; (2) "the demand is not too indefinite"; and (3) "the information sought is reasonably relevant" to the agency's inquiry.¹⁰¹ The thrust of these conditions is dual. The first implica-

⁹⁶ A principal safeguard of the search warrant procedure is the necessity that the warrant, to be enforceable, be issued by a "neutral and detached magistrate," *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948) (Jackson, J.)). Similar protection is afforded in the administrative subpoena context by the fact that such a subpoena is not enforceable by the agency itself. Upon refusal of the target entity to obey, an agency must petition a court for enforcement of the subpoena; alternatively, the target itself may sue to prevent enforcement of the subpoena. See notes 8-9 and accompanying text *supra*.

⁹⁷ See, e.g., *See v. City of Seattle*, 387 U.S. at 545.

The text of the fourth amendment can be divided into two parts. The first portion ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .") lays down a reasonableness standard to govern warrantless searches. The second portion ("and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized") prescribes a probable cause requirement for searches under warrants. See *Marshall v. Barlow's, Inc.*, 436 U.S. at 325-26 (Stevens, J., dissenting).

⁹⁸ *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. at 329, 335 (Stevens, J., dissenting); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. at 536-37.

⁹⁹ Indeed, this Note argues that this very lack of specification has been a significant cause of difficulty. See text accompanying notes 174-236 & 243-44 *infra*.

¹⁰⁰ See, e.g., *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir.), cert. denied, 449 U.S. 955 (1980); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *Adams v. FTC*, 296 F.2d 861, 866 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962); *FTC v. Stanley H. Kaplan Educ. Center Ltd.*, 433 F. Supp. 989, 992 (D. Mass. 1977).

¹⁰¹ 338 U.S. at 652. The target of the subpoena, not the agency, bears the burden of proof as to the existence of these conditions. See *FTC v. Standard Am., Inc.*, 306 F.2d 231, 235 (3d Cir.

tion is unexceptionable—the conditions evince a preference that agencies not demand more documents than necessary for their investigative purposes, a preference consistent with the accommodation that balancing seeks to promote.

It is the second implication that contravenes the spirit of balancing: the conditions direct that a valid government interest in production necessarily supersedes private interests in nonproduction. The *Morton Salt* formulation means that once an agency's demand has been shorn of any overbreadth, that demand must be enforced if it links to any valid agency purpose, and countervailing privacy interests must yield. This result is the very antithesis of the case-by-case balancing required by the fourth amendment; instead, it is the permanent subordination of one side of the scale to the other. Not even the strongest privacy interest can ever outweigh even the weakest (but still extant) regulatory interest.¹⁰²

1962). The *Oklahoma Press* formulation also requires the party opposing the subpoena to show its failure to meet the reasonable relation test. 327 U.S. at 218.

Another often encountered formulation is that a demand will be upheld as long as the agency shows "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within [its] possession, and that the administrative steps required . . . have been followed" *United States v. Powell*, 379 U.S. 48, 57-58 (1964), quoted in *CAB v. United Airlines, Inc.*, 542 F.2d 394, 402 n.9 (7th Cir. 1976); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.), cert. denied, 398 U.S. 958 (1970).

¹⁰² There are two possible qualifications to this conclusion. The first relates to privileged materials. Whether materials protected by the common law evidentiary privileges are exempt from production under an otherwise enforceable inspection demand has not been litigated extensively or resolved authoritatively. Although the majority position seems to favor the privileges, the cases offer no unambiguous teaching. Compare *Air Transp. Ass'n of Am.*, 31 C.A.B. 970 (1960) (attorney-client privilege does not exempt documents from production) with *CAB v. Air Transp. Ass'n of Am.*, 201 F. Supp. 318, 318 (D.D.C. 1961) (attorney-client privilege does shield documents sought by agency). See also *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) ("self-evaluative" privilege may exist in private litigation but cannot be asserted against an agency's demand for documents); *Cooper's Express, Inc. v. ICC*, 330 F.2d 338, 341 (1st Cir. 1964); *United States v. Alabama Highway Express, Inc.*, 46 F. Supp. 450, 453 (N.D. Ala. 1942). Given the importance of the relationships the common law privileges seek to protect, the better view is that such privileges should apply to agency demands for document production. See B. Schwartz, *supra* note 3, at 353-54. See generally Mogel, *The Effect of a Claim of Privilege Upon the Subpoena Power of an Administrative Law Judge*, 28 *Drake L. Rev.* 67 (1978).

However, production to the agency of the documents sought may constitute waiver for all purposes of any privilege that otherwise might have been asserted. See *In re Penn Central Comm'l Paper Litigation*, 61 F.R.D. 453, 462-64 (S.D.N.Y. 1973).

Second, targets often have asserted that a subpoena was motivated only by the agency's bad faith or desire to harass, and thus that the subpoena should not be enforced, see, e.g., *United States v. Powell*, 379 U.S. 48, 58 (1964); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 n.39 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555, 561-62, 563 (W.D. Pa. 1979), or that the target should be permitted to engage in discovery, see, e.g., *United States v. Church of Scientology*, 520 F.2d 818, 824 (9th Cir.

Yet the privacy interests at stake in document examination cases may be significant indeed. First, the monetary cost of complying with an agency's demand for production of documents can be quite substantial. Such demands often are extensive.¹⁰³ Sometimes, the agency's inspectors simply rummage through all the target's files, themselves selecting the relevant documents; usually, the target's employees cull the files in search of the relevant material. In either event, the document selected may be examined on the premises, removed by the inspectors, or photocopied. When the document search is conducted by the company or when the company bears the cost of reproduction, the expenses of production can be considerable.¹⁰⁴

Second, production may imperil the interests of target entities in preserving the confidentiality of information. Maintaining the secrecy of customer lists and trade secrets is of obvious importance, but disclosure of other types of information also can be highly prejudicial to commercial interests.¹⁰⁵ Significantly, once data has been produced

1975); *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970). These arguments have enjoyed only limited success, however, because courts uniformly have imposed a "heavy burden" of proof on the target entities, see, e.g., *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978); *United States v. Tesoro Petroleum Corp.*, 503 F. Supp. 868, 873 (D.D.C. 1980); *Ayers v. SEC*, 482 F. Supp. 747, 752 (D. Mont. 1980); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555, 563 (W.D. Pa. 1979).

¹⁰³ For example, in *CAB v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), the CAB demanded immediate access to all records and documents located at United's executive offices, including "(1) reading files, which contain copies of all correspondence arranged in chronological order, (2) subject matter files, which contain correspondence, memoranda, studies, reports, etc., dealing with specific matters, (3) expense reports, . . . and (4) memoranda." *Id.* at 395. In *SEC v. Arthur Young & Co.*, 584 F.2d 1018 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979), the SEC demanded "14 different categories of documents relating to [the company under investigation, a client of the accounting firm that received the subpoena] over a six-year period; and within these 14 categories . . . documents pertaining to 29 individuals and entities, to '[a]ll offices, directors and employees (present and past)' . . . and to 'any special engagements, projects or management consulting services' performed [by the firm for its client]." *Id.* at 1022 (footnotes omitted). Even the court, in upholding the subpoena, termed it "undeniably broad." *Id.*

¹⁰⁴ In *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072 (D.D.C. 1978), the target company estimated that complying with the agency's demand for documents would have required 100,000 man-hours of effort and \$2,000,000 of expense. *Id.* at 1083. Although the possibility always exists that self-interested estimates are inflated, if the true cost had been even 50% of Firestone's estimate, compliance would have cost the company \$1,000,000. In *SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979), the cost of compliance was estimated at \$100,000, *id.* at 1036, although again the accuracy of the estimate was open to question, *id.* at 1036 n.6.

¹⁰⁵ For example, as one commentator observed: the value [of privately generated proprietary information] to the supplier is based upon secrecy. In the hands of the government a detailed analysis of employee dispersal, salary ranges, job categories and recruitment and training plans may insure equal opportunities for minorities. In the hands of a competitor, such data may provide the needed edge in a highly contested market.

to any agency, its further dissemination cannot be cabined. The agency may use the information itself in another investigation,¹⁰⁶ or it may release the information to Congress,¹⁰⁷ the Justice Department,¹⁰⁸ other federal agencies,¹⁰⁹ state and local agencies,¹¹⁰ and even the general public.¹¹¹ Those who are required to submit data to an

Note, *Would Macy's Tell Gimbel's: Government-Controlled Business Information and the Freedom of Information Act*, *Forwards & Backwards*, 6 *Loy. Chi. L.J.* 594, 594-95 (1975).

Experience under the Freedom of Information Act, 5 U.S.C. § 552 (1976), confirms the importance of confidentiality to businesses. The Act was predicated on the belief that "[a]t the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). The volume of "reverse FOIA" suits, in which corporate submitters sued to block the disclosure of information to various groups by federal agencies, has indicated the concern businesses harbor about revelation of their data. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (government contractor sued to prevent disclosure of data submitted to Defense Logistics Agency on employment of women and minorities); *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978) (submitter sought to prevent release of its affirmative action plans to a priest); *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1977) (supplier of services attempted to forestall release of details of its contract with the agency); *Parkridge Hosp., Inc. v. Blue Cross & Blue Shield*, 430 F. Supp. 1093 (E.D. Tenn. 1977) (hospital sought permanent injunction against disclosure of financial data by Blue Cross), vacated sub nom. *Parkridge Hosp., Inc. v. Califano*, 625 F.2d 719 (6th Cir. 1980).

¹⁰⁶ E.g., *FTC v. Anderson*, 631 F.2d 741, 747-48 (D.C. Cir. 1979).

¹⁰⁷ E.g., *id.* at 747.

¹⁰⁸ See *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1385-87 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

¹⁰⁹ Interagency sharing of information gathered from private companies sometimes is explicitly authorized by statute. For example, the Secretary of the Treasury may make available to other federal agencies and departments information reported by banks under the Bank Secrecy Act. 31 U.S.C. § 1061 (1976). Alternatively, the agency may, within its own discretion, decide to share information.

¹¹⁰ In one instance, the FTC had investigated whether a distributor had forced retailers to adhere to fixed prices for a variety of clothing lines. The investigation ended when the distributor signed a consent decree to stop engaging in that practice. Shortly thereafter, several state attorneys general sought from the FTC much of the information gathered during the investigation. In a suit by the distributor to prevent the disclosures, a federal district court ruled that the Commission was free to make the information available to the state officers. *Interco, Inc. v. FTC*, 490 F. Supp. 39, 44-46 (D.D.C. 1979).

¹¹¹ The agency may decide on its own to release information to the public. See B. Schwartz, *supra* note 3, at 125-26 (discussing agency press releases). Section 6(f) of the Federal Trade Commission Act authorizes the Commission "[t]o make public from time to time such portions of the information obtained by it [under the Act]. . . . [T]he Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential" 15 U.S.C.A. § 46(f) (West Cum. Supp. 1981). Moreover, the trade secrets exception has been construed narrowly. See *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 971-72, 973 (D.C. Cir. 1980) (construing 15 U.S.C. § 46(f) (1976) (amended 1980)).

Alternatively, a private party might request release of the data under the Freedom of Information Act, 5 U.S.C. § 552 (1976). While the Act lists a variety of exceptions to its broad requirement of disclosure, see 5 U.S.C. § 552(b) (1976), the exceptions are discretionary only. *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979). Thus, an agency confronted with FOIA

agency have no effective legal means by which to challenge any such dissemination.¹¹²

Third, production in some instances may seriously hamper management in conducting the business of the target entity. When a subpoena is indefinite, open-ended, or far-reaching, the target, or the agency's inspectors, may be compelled to search through all of the company's files to segregate relevant from irrelevant documents. This process may so disrupt the files that the company's activities are impaired.¹¹³ Additionally, when the documents selected as relevant are removed for examination off the premises of the target entity, the company, while it is spared the expense of reproduction, is denied the use of its records for the duration of the investigation.¹¹⁴ Of course,

requests *must* disclose any information in its files from whatever source obtained if it does not fall within a statutory exception, and *may* disclose even that information, which is excepted from mandatory disclosure. *Id.* at 291-92. The private companies or persons from whom information has been obtained may find it difficult to block disclosures under other provisions. In *Chrysler*, the Supreme Court held that the Trade Secrets Act, 18 U.S.C. § 1905 (1976), which imposes criminal sanctions on government employees who make unauthorized disclosures of confidential business information submitted to a government agency, does not afford a private right of action to enjoin disclosures in violation of the statute. 441 U.S. at 316-17. Thus, private submitters of data are relegated to arguing that disclosure is "arbitrary, capricious, [or] an abuse of discretion" under § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976). See generally Note, Protecting Confidential Business Information from Federal Agency Disclosure After *Chrysler Corp. v. Brown*, 80 Colum. L. Rev. 109, 109-24 (1980).

¹¹² In theory, submitters can argue that dissemination would constitute an abuse of discretion under the Administrative Procedure Act. But this is chimerical. Not only is release almost always found within the agency's discretion, but submitters are not entitled even to notice of release and so are not certain to know when objectionable disclosure is likely to occur. See, e.g., *FTC v. Anderson*, 631 F.2d 741, 747-48 (D.C. Cir. 1979) (holding that (1) a 10-day requirement of notice would not be imposed before disclosure of produced documents to Congress; (2) the Commission's refusal to prohibit use of nonconfidential subpoenaed documents in other administrative proceedings did not constitute an abuse of discretion; and (3) "[t]he Commission acted well within its discretion in refusing to issue a blanket order requiring that notice be given . . . before access to subpoenaed documents is given to persons outside the [investigation]"); *Standard Oil Co. v. FTC*, 475 F. Supp. 1261, 1271 (N.D. Ind. 1979) (targets have no legal right to advance notice of FTC's obtaining their business records from other government agencies).

¹¹³ In one case, *FTC v. Carter*, 464 F. Supp. 633 (D.D.C. 1979), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980), the FTC issued 28 subpoenas to major tobacco manufacturers, their advertising agencies, two tobacco research corporations, and the chief executive officers of each. The subpoenas required production of documents as to, *inter alia*, information over the preceding 12 years about "'consumers' or potential consumers' attitudes towards, beliefs about, perceptions or understanding of, or behavior relating to, cigarettes.'" *Id.* at 635-37. The court refused to enforce the subpoenas as to the two research corporations or their officials on the ground that the normal operations of the corporations would have been unduly disrupted by searching all of their files for the material sought by the Commission. *Id.* at 641. However, it was significant to the court that the material could be obtained from the other targets of the subpoena. See *id.*

¹¹⁴ See *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (*per curiam*) (stating that "a mass removal of business records currently in use could have [the] effect" of seriously and unreasonably disrupting the target's business, but concluding that the disruption could be sufficiently minimized in that case). Analogous is *Hale v. Henkel*, 201 U.S. 43 (1906), an early grand jury subpoena case. The subpoena called for production of "all understandings, contracts or corre-

this is especially serious when records that "stand at the heart" of a business are involved.¹¹⁵

Recognizing the harshness of excluding these private interests from formal consideration under the reasonable relation rule as usually elaborated, many cases have considered an additional element: whether complying with the inspection demand would be unduly burdensome.¹¹⁶ To mitigate the burdens of producing documents for agency inspection, courts have sometimes reduced the scope of a subpoena,¹¹⁷ provided that production be made at a site convenient to the target business,¹¹⁸ allocated the expense of production between the agency and the target,¹¹⁹ encouraged schedules of production,¹²⁰ or approved measures to minimize the likelihood of disclosure of confidential business information.¹²¹

Although helpful in appropriate cases, the burdensomeness element falls short of providing the full balancing of interests appropriate to fourth amendment analysis. Consideration of the burdens of compliance is not formally part of the terms of the *Morton Salt* elaboration of the reasonable relation rule.¹²² As a result, the tendency is to minimize the weight assigned to findings of burdensomeness. The

spondence between [the target], and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the [inception of the target], as well as all letters received by [it] since its organization from more than a dozen different companies." *Id.* at 76-77. The Supreme Court denied enforcement of the subpoena because of its potentially devastating effect on the target's ability to carry on its business. *Id.* at 77.

¹¹⁵ See *Burlington N., Inc. v. ICC*, 462 F.2d 280, 288 (D.C. Cir.) (Leventhal, J., dissenting from denial of rehearing en banc) ("The items involved [financial forecasts] are internal papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items."), cert. denied, 409 U.S. 891 (1972).

¹¹⁶ See, e.g., *FTC v. Feldman*, 532 F.2d 1092, 1098 (7th Cir. 1976); *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975); *Genuine Parts Co. v. FTC*, 313 F. Supp. 855, 857-59 (N.D. Ga. 1970), aff'd, 445 F.2d 1382 (5th Cir. 1971); *United States v. Associated Merchandising Corp.*, 261 F. Supp. 553, 560 (S.D.N.Y. 1966).

¹¹⁷ See *Adams v. FTC*, 296 F.2d 861, 867-70 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962); *United States v. First Nat'l Bank*, 173 F. Supp. 716, 720-21 (W.D. Ark. 1959) (subpoena denied when target bank would have been compelled to spend \$30,000 and to transport records away from its own premises and when less burdensome subpoena would have adequately served purpose of investigation).

¹¹⁸ See *FTC v. MacArthur*, 532 F.2d 1135, 1140 (7th Cir. 1976).

¹¹⁹ See *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1033-34 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979).

¹²⁰ See *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975).

¹²¹ See *Exxon Corp. v. Mobil Oil Corp.*, No. 80-1395, slip op. at 3 (D.C. Cir. Sept. 14, 1981); *United States v. Exxon Corp.*, 628 F.2d 70, 77-80 (D.C. Cir.), cert. denied, 446 U.S. 984 (1980); *FTC v. Texaco, Inc.*, 555 F.2d 862, 884-85 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977). But see *FCC v. Schreiber*, 381 U.S. 279, 295-300 (1965); *FTC v. Stanley H. Kaplan Educ. Center Ltd.*, 433 F. Supp. 989, 993-94 (D. Mass. 1977) (both upholding agency refusals to grant confidentiality).

¹²² See text accompanying notes 100-01 *supra*. This conclusion holds true as well for the other common elaboration. See note 101 *supra*.

Supreme Court stated revealingly: "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."¹²³ The implication of this statement is that burdensomeness is not an independent inquiry, but is to be determined by whether the three conditions of the *Morton Salt* elaboration are satisfied.¹²⁴ As previously noted, these three conditions ignore crucial privacy interests.¹²⁵

Submerging these interests within the *Morton Salt* conditions is problematic. These interests are not, as sometimes thought, mere stepchildren of courts' equitable discretion.¹²⁶ Instead, they are entitled to independent constitutional protection. It is established that administrative document inspections are governed by the fourth amendment's test of reasonableness,¹²⁷ and that the relevant standard under this test is a balancing of the interests at hand.¹²⁸ The Supreme Court has stated that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."¹²⁹ Balancing cannot claim to be complete unless *all* factors are weighed. Unless monetary expense, confidentiality, and managerial autonomy are considered, "the invasion which the search entails" is not known in its full amplitude. These factors, then, are of constitutional status within the fourth amendment balancing standard, and the failure to formally recognize them renders the reasonable relation rule, as commonly elaborated, doctrinally incomplete.

¹²³ See *v. City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted).

¹²⁴ Some courts undoubtedly have been influenced by such a perception. For example, in *Colegio Puertorriqueño v. Pesquera de Busquets*, 464 F. Supp. 761, 766-67 (D.P.R. 1979), the court recited the *Morton Salt* formulation and concluded: "As to the Fourth Amendment . . . , except for limitations concerning breadth and relevancy, the Fourth Amendment does not ordinarily restrict an administrative subpoena"

¹²⁵ See text accompanying notes 102-15 *supra*.

¹²⁶ See *FTC v. Rockefeller*, 591 F.2d 182, 191 (2d Cir. 1979) (reimbursement "is a matter of discretion" with the court); *United States v. Friedman*, 532 F.2d 928, 934-38 (3d Cir. 1976) (court may order reimbursement but no constitutional or statutory provision requires it). But see *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1033 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979) (describing the court's power as one of "discretion," but also stating that the power "stems inexorably from congressional entrustment of subpoena enforcement to the judiciary").

¹²⁷ See text accompanying notes 75-95 *supra*.

¹²⁸ See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 329, 335 (1978) (Stevens, J., dissenting); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

¹²⁹ *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

The difficulty is more than merely intellectual, for the failure to accord burdensomeness proper stature has led to haphazard judicial protection of the relevant privacy interests. Many courts, reflecting the current emphasis that administrative power must be made fully effective,¹³⁰ have been quite reluctant to recognize burdensomeness as a limit on investigations meeting the conditions set down in *Morton Salt*. The spirit was expressed well by a recent decision: "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . [Excessive burdensomeness is not easy to find] where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose."¹³¹ Thus, courts usually hold that an administrative subpoena will not be modified unless compliance would "seriously hinder" the business of the target entity;¹³² any lesser disruption than this heavy burden will be disregarded.¹³³

The condition that demands for documents be not excessively burdensome is a weak and only occasional limitation on agency inspections.¹³⁴ Given the trend of recent federal decisions, that condi-

¹³⁰ See note 70 and accompanying text *supra*.

¹³¹ *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir.) (en banc) (footnote omitted), cert. denied, 431 U.S. 974 (1977); see *In re FTC Line of Business Report Litigation*, 595 F.2d 685, 703-04 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); *SEC v. OKC Corp.*, 474 F. Supp. 1031, 1036-37 (N.D. Tex. 1979); *FCC v. Cohn*, 154 F. Supp. 899, 912 (S.D.N.Y. 1957).

Many extremely broad demands have been upheld. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 210 n.46 (1946) (records of all of its trading in interstate commerce during a company's history); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1374 & n.4 (2d Cir.) (all correspondence with management, advertisers and subscribers over four years), cert. denied, 398 U.S. 958 (1970); *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072, 1084 (D.D.C. 1978) (general manufacturing information, including models of tires and production and distribution statistics, as well as consumer complaints and defective products litigation history, all over a four year period).

¹³² *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); see *In re FTC Line of Business Report Litigation*, 595 F.2d 685, 703-04 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978).

¹³³ One court has gone so far as to say: "the law is clear that expense alone does not constitute burdensomeness, where it is a concomitant of a broad, but valid, investigation." *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979) (citation omitted), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980). See also *FTC v. Rockefeller*, 591 F.2d 182, 191 (2d Cir. 1979) (suggesting that only third parties—like banks or accountants—holding records for another may be reimbursed for production costs, not the owners themselves when the records are in their possession).

A decision in the First Circuit relied heavily on the District of Columbia Circuit cases in refusing to impose a confidentiality condition in enforcing an agency demand for commercially sensitive trade information. See *FTC v. Stanley H. Kaplan Educ. Center Ltd.*, 433 F. Supp. 989, 993 & n.1 (D. Mass. 1977).

¹³⁴ As one court concluded: "Respondent in a subpoena enforcement action is hard put to attack an administrative subpoena or special order on the grounds of undue burdensomeness." *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072, 1083 (D.D.C. 1978).

tion does not greatly modify the principle that document inspection demands will be enforced if they relate to a valid governmental investigative purpose. The expansive construction of the reasonable relation rule performs a balancing in which the government side of the scale is more heavily weighted. Undoubtedly, in many cases, more neutral balancing would reach the same ultimate decision as now is reached. But the potential for undervaluing privacy rights is ever-present under the expansive view of reasonable relation.

B. Delegation of Powers

1. Importance of the Delegation Principle

An agency possesses only those powers delegated to it by the legislature. This is "the basic doctrine of administrative law" and "the root principle of administrative power."¹³⁵ Thus, the Supreme Court repeatedly has held that when an agency acts beyond the sphere of its delegation it acts illegally.¹³⁶ In the area of document inspections, the delegation principle retains its full vigor.¹³⁷

¹³⁵ B. Schwartz, *supra* note 3, at 151.

¹³⁶ E.g., *Social Security Bd. v. Neirotko*, 327 U.S. 358, 369 (1946); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); see *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961); accord, *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974); cf. *St. Joseph's Hosp. Health Center v. Blue Cross*, 489 F. Supp. 1052, 1057 (N.D.N.Y.), *aff'd*, 614 F.2d 1290 (2d Cir. 1979); *Liberty Mut. Ins. Co. v. Friedman*, 485 F. Supp. 695, 704 (D. Md. 1979), *rev'd on other grounds*, 639 F.2d 164 (4th Cir. 1981) (both stating that agencies may not issue regulations in excess of their delegations). But cf. *Stallings v. Harris*, 493 F. Supp. 956, 958 (W.D. Tenn. 1980) (citations omitted) ("The power of a federal agency is of course circumscribed by the authority granted by congress. . . . [But] [a]n agency regulation will be upheld even if not within explicit statutory authority if it represents a legitimate, reasonable, and direct adjunct to the power expressly conferred.").

¹³⁷ The demise of the delegation principle has been widely reported. Judge J. Skelly Wright observed: "Today, most scholars rank the delegation doctrine together with substantive due process, nullification, and common law forms of action as arcane notions which inexplicably fascinated an earlier generation but which were given the decent burials they deserved long ago." Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 582 (1972). For three reasons, however, this conclusion does not disturb the importance of the delegation principle to the area of agency access to private documents.

First, as Twain might have said, the reports of the death of the delegation doctrine have been greatly exaggerated. Judge Wright, for example, follows his above statement with a strong affirmation of belief in the continuing vitality of the delegation principle. *Id.* at 582-87; see B. Schwartz, *supra* note 3, at 47. Modern cases continue to insist that administrative power be properly delegated. See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928)); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *Insurers' Action Council, Inc. v. Markman*, 490 F. Supp. 921, 930 (D. Minn. 1980); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 745-47 (D.D.C. 1971).

The importance of the delegation principle is emphasized by the high-universal recognition that agencies' assertions of authority must be subject to effective judicial review. Although agencies' interpretations of their authority are accorded considerable weight,¹³⁸ it is clear that "[a]n agency may not finally decide the limits of its statutory powers. That is a judicial function."¹³⁹ The Administrative Procedure Act (APA) provides for judicial review unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."¹⁴⁰ Moreover, the Supreme Court has directed that the APA's " 'generous review provisions' must be given a 'hospitable' interpretation."¹⁴¹ Thus, "only upon a showing of 'clear and

Second, a quid pro quo for relaxation of delegation rules has been the availability of judicial review to curb untoward assertions of administrative power. See *id.* at 746-47; Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1674-76 (1975). Since the expansive interpretation of the reasonable relation rule undercuts judicial review of agency access demands, see text accompanying notes 130-34 *supra*, the safeguard that could render tolerable lessened attention to delegation is missing in the document inspection area.

The third reason is perhaps the most fundamental. To say that the entire principle of delegation has lost favor would be overly broad. What has diminished is insistence that delegations of authority be accompanied by specific standards to guide agencies in their exercise of that authority. But the core requirement that agencies act only within the spheres delegated to them by statute has never waned. The erosion of the view that delegation must be accompanied by specific standards was begun by Justice Cardozo's dissent in *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). But Justice Cardozo was firm that administrative power may not be applied outside the area delineated by Congress. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (concurring); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 434-35 (1935) (dissenting). Perhaps the most standardless delegation ever upheld was that at issue in *Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (sustaining grant of broad price-fixing authority to wartime Office of Price Administration). Yet even the *Yakus* Court stated:

[T]he only concern of courts [in this type of case] is to ascertain whether the will of Congress has been obeyed. This depends . . . upon the determination whether the definition [of the statutory delegation] sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

Id. at 425. Recent decisions have continued to honor the imperative that administrative action be confined to the area delegated by statute. As Judge Leventhal wrote in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971): "An agency assigned to a task has its freedom of action circumscribed not only by the constitutional limitations that bind Congress but by the perimeters described by the legislature as hedgerows defining areas open to the agency." *Id.* at 745. The great weight of authority suggests, then, that the purported decline of the delegation doctrine, however it may inure us to standardless conferrals of authority, should not lower our vigilance against agency action outside the jurisdiction established by Congress.

¹³⁸ *E.g.*, *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

¹³⁹ *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) (footnote omitted); see *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); J. Honnold, *The Life of the Law* 379 (1964).

¹⁴⁰ 5 U.S.C. § 701(a) (1976).

¹⁴¹ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹⁴²

As is shown by this emphasis, the principle of delegation is more than a nicety to be observed whenever convenient; it is a legal principle of constitutional stature. The delegation doctrine and the related idea of judicial scrutiny are inherent in the constitutional positions of the legislative, executive, and judicial branches of government.¹⁴³

2. *The Reasonable Relation Rule and the Principle of Delegation*

It is no revelation that regulatory agencies sometimes attempt to act beyond their statutory authority. When congressional draftsmanship is imprecise or when new patterns of activity arise that were not envisioned when Congress legislated, even an agency scrupulously concerned with the limits of its power will occasionally read its mandate wrong and exceed its legal demesne. Still, such ultra vires assertions of power are no less impermissible for being innocent. In the real order, however, such innocent transgressions may be less common than knowing extrajurisdictional behavior; zeal often overwhelms discipline, and the desire to tumefy the administrative fiefdom is a constant of bureaucratic life.¹⁴⁴ When overreaching does occur, and is not promptly corrected, harms accrue. Traducing the principle of delegation of administrative power offends the theory of our constitu-

¹⁴² *Id.* (citing *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)); accord, *Celanese Chem. Co. v. United States*, 632 F.2d 568, 575 n.15 (5th Cir. 1980); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1055 (3d Cir. 1980); *Chelsea Community Hosp. v. Michigan Blue Cross Ass'n*, 630 F.2d 1131, 1134 (6th Cir. 1980); *Sherman College of Straight Chiropractic v. United States Comm'r of Educ.*, 493 F. Supp. 976, 979 (D.D.C. 1980). The burden of proving legislative intent of nonreviewability is on the agency. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); accord, *Bullard v. Webster*, 623 F.2d 1042, 1045 (5th Cir. 1980), cert. denied, 101 S. Ct. 1975 (1981).

Moreover, even an explicit statutory prohibition will not bar judicial review when deprivation of constitutional rights is alleged. *E.g.*, *Erika, Inc. v. United States*, 634 F.2d 580, 587 (Ct. Cl. 1980), cert. granted, 101 S. Ct. 2312 (1981) (No. 80-1594).

¹⁴³ See *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

¹⁴⁴ A recent incident at the state level illustrates the temptation to ultra vires regulation that all agencies face. The California State Fish and Game Commission wished to classify two varieties of butterflies as endangered species but lacked jurisdiction over the insects. So, it asserted jurisdiction by classifying the butterflies as fish, creatures within the Commission's jurisdiction. The agency defended its action with this reasoning: since butterflies are invertebrates and some fish are invertebrates, then butterflies can be considered fish. *San Francisco Chronicle*, April 25, 1981, at 32, col. 3. Neither Linnaeus nor Aristotle, it seems, will be permitted to stand in the way of enlightened administration.

There are more stanzas in this saga. The state agency that reviews regulations promulgated by other bureaus invalidated the action of the Fish and Game Commission. To undo this step backward, however, legislation has been introduced in the California Senate to extend the Commission's jurisdiction to butterflies.

tional system, and, pragmatically, requiring compliance with ultra vires document demands illegally foists the burdens of compliance¹⁴⁵ on private entities.

Unfortunately, the current judicial approach to document examination does not adequately protect the delegation principle. In *Endicott Johnson Corp. v. Perkins*,¹⁴⁶ the Supreme Court, in a proceeding to enforce a subpoena by the Secretary of Labor under the Walsh-Healey Public Contracts Act, held that the district court lacked authority to decide whether the target corporation's activities were within the jurisdiction conferred on the Secretary by the Act.¹⁴⁷ The holding was three-part: (1) the Secretary herself was the primary judge of the range of her authority under the Act;¹⁴⁸ (2) the district court could consider the question of coverage only if the material sought by the subpoena was "plainly incompetent or irrelevant to any lawful purpose . . . under the Act";¹⁴⁹ and (3) generally, matters of jurisdiction should be raised in defense against any administrative complaint arising out of the investigation, not against the subpoena that begins the investigation.¹⁵⁰ Confirmed by *Oklahoma Press Publishing Co. v. Walling*¹⁵¹ and followed nearly uniformly by subsequent lower federal court decisions,¹⁵² the refusal to inquire deeply into jurisdiction while hearing subpoena enforcement actions is "the generally-accepted principle" in the federal courts.¹⁵³ In place of careful initial scrutiny, the current approach offers two safeguards:

¹⁴⁵ See text accompanying notes 103-15 *supra*.

¹⁴⁶ 317 U.S. 501 (1943).

¹⁴⁷ *Id.* at 507-09. The case is discussed at text accompanying notes 48-54 *supra*.

¹⁴⁸ 317 U.S. at 507.

¹⁴⁹ *Id.* at 509.

¹⁵⁰ *Id.*

¹⁵¹ 327 U.S. 186, 214 (1946) ("Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation . . ."). This case is discussed at text accompanying notes 55-60 *supra*.

¹⁵² See, e.g., *United States v. Di Fonzo*, 603 F.2d 1260, 1265-66 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980); *FMC v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975); *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975); *FTC v. Gibson*, 460 F.2d 605, 608 (5th Cir. 1972); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.), cert. denied, 398 U.S. 958 (1970); *United States v. Marshall Durbin & Co.*, 363 F.2d 1, 5 (5th Cir. 1966); *Freeman v. Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487, 492 (E.D. Pa. 1965); *FCC v. Cohn*, 154 F. Supp. 899, 906 (S.D.N.Y. 1957).

¹⁵³ *FTC v. Texaco, Inc.*, 555 F.2d 862, 927 (D.C. Cir.) (en banc) (Wilkey, J., dissenting), cert. denied, 431 U.S. 974 (1977). Or, as the majority in this case stated: "As a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding." 555 F.2d at 879; see *SEC v. OKC Corp.*, 474 F. Supp. 1031, 1041 (N.D. Tex. 1979) (stating that due process is satisfied by opportunity to be heard before any final order of agency becomes effective and that investigative findings do not constitute final order).

(1) palpable overreaching by the agency may be challenged before enforcement of the subpoena, and (2) other jurisdictional defects of the document demand may be raised later in defense against any complaint issued by the agency as a result of its investigation.

Neither of these safeguards adequately protects the principle of delegation. By its very terms, the first stage guarantees that relatively minor agency extralegality will survive until later. More seriously, however, major usurpations also are likely to go uncorrected. At the outset of an inquiry, it cannot be said with certainty where matters will lead. Documents on topics plainly outside the agency's statutory sphere may provide leads to activities the agency is empowered to regulate.¹⁵⁴ For two reasons, this murkiness militates against a document demand being declared "palpably" extrajurisdictional. First, the burden of proof is on the target, not the agency, as to the reasonableness of the items demanded by the subpoena.¹⁵⁵ Second, because of the prevailing ethic that administrative power is to be made fully effective,¹⁵⁶ even remotely close calls will be resolved in favor of the agency. For example, one court, after reciting that facial jurisdictional defects may be attacked at the subpoena enforcement proceeding, quickly added: "[H]owever, a court should be reluctant to declare the subpoenaed documents irrelevant. Indeed, the trend in recent cases has been to permit inquiries to whatever extent is neces-

¹⁵⁴ For example, this is the rationale to allow agencies to subpoena documents from targets whose activities the agency could not regulate. See, e.g., *United States v. Marshall Durbin & Co.*, 363 F.2d 1, 5 (5th Cir. 1966); *Freeman v. Brown Bros. Harriman & Co.*, 357 F.2d 741, 742 (2d Cir.), cert. denied, 384 U.S. 933 (1966); *Freeman v. Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487, 492 (E.D. Pa. 1965); *FCC v. Cohn*, 154 F. Supp. 899, 906 (S.D.N.Y. 1957).

But, this rule holds only if the target of the subpoena is not also the intended target of whatever enforcement action is expected to result from the investigation. See *FTC v. Winters Nat'l Bank & Trust Co.*, 601 F.2d 395, 401 (6th Cir. 1979) (if bank which received the subpoena was not the object of the FTC's investigation, the subpoena was proper, as it would be when directed at any third party; if the bank was the object, the Commission exceeded its authority), cert. denied, 444 U.S. 1015 (1980).

¹⁵⁵ E.g., *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). *Contra*, *United States v. Security State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973) (although not heavy, burden does fall on agency to show investigation is lawful and requested information relevant).

¹⁵⁶ See text accompanying notes 67-70 *supra*. A number of decisions have reflected this imperative. One court stated:

It is beyond cavil that the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate the activities of the entities over which it has jurisdiction and the right under the appropriate conditions to have district courts enforce its subpoenas.

FMC v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975). To the same effect, see *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 879 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977).

sary to make effective the power of investigation."¹⁵⁷ Thus, the first of the current safeguards is a feeble check.¹⁵⁸

Nor is the second safeguard of the current approach much more formidable. First, if the agency's extralegal jurisdiction action is admonished only after the investigation has culminated in a complaint, ruling, or regulation, the constitutional principle of delegation may have been vindicated but the target individuals or companies have, nonetheless and illegally, been forced to incur the burdens of production.¹⁵⁹ Second, often an investigation terminates without a complaint being filed or other final action being taken. In these instances, ultra vires subpoenas that survive the first stage of review are never rebuked. Third, even when such final action does occur, the target of the document demand may not have standing to challenge it. For example, when documents are demanded from one entity but a complaint, based in part on information in those documents, later issues against a different entity, difficult questions arise. It is not clear either (1) that the target of the document inspection has standing to chal-

¹⁵⁷ SEC v. OKC Corp., 474 F. Supp. 1031, 1036 (N.D. Tex. 1979) (citing SEC v. Arthur Young & Co., 584 F.2d 1018, 1030 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979)). Or, as another court stated: "The court has but a limited role to play in the enforcement of administrative subpoenas. The scope of issues that can be litigated in an enforcement proceeding is narrow, because of the Government's interest in expeditious investigation" United States v. Anacanda Co., 445 F. Supp. 486, 490 (D.D.C. 1977).

¹⁵⁸ The result is to threaten derogation of the notion that the subpoena enforcement "hearing should not be a meaningless formality," United States v. Associated Merchandising Corp., 261 F. Supp. 553, 560 (S.D.N.Y. 1966); cf. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216-17 & n.57 (1946) (courts' role in subpoena enforcement hearings should be "neither minor nor ministerial."); Wearly v. FTC, 616 F.2d 662, 665 (3d Cir.) ("court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding"), cert. denied, 449 U.S. 822 (1980); United States v. Security State Bank & Trust, 473 F.2d 638, 642 (5th Cir. 1973) ("The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.").

A good example of the infirmity of this first safeguard is *FTC v. Crafts*, discussed at text accompanying notes 229-34 *infra*.

¹⁵⁹ These burdens are discussed at text accompanying notes 103-15 *supra*.

Courts have held routinely that mere litigation expenses, no matter how large or unlikely to be recovered, do not constitute the kind of injury that permit suit against agency action. E.g., *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Paskaly v. Scale*, 506 F.2d 1209, 1212 (9th Cir. 1974). This doctrine is not apposite here, however. Target entities would bear the same litigation costs whether the jurisdictional defense could be asserted in subpoena enforcement proceedings or, as now, primarily in suits challenging later substantive agency action. But, allowing the defense to be raised on the earlier occasion would spare the target the expenses of production should the agency's demand exceed its delegated sphere of authority. Cf. *Hardy v. Rossell*, 135 F. Supp. 260, 265 (S.D.N.Y. 1955) (suggesting a similar conclusion with respect to exhaustion of administrative remedies).

lenge the complaint,¹⁶⁰ or (2) that the entity subject to the complaint has standing to raise the illegality of the document search.¹⁶¹

3. *Rigorous Review and Administrative Effectiveness*

The two-tiered process of review currently used inadequately protects the constitutional principle of delegation.¹⁶² Since that process is inspired by the need to facilitate regulation,¹⁶³ the key question is whether this need is sufficient excuse for this inadequacy. Undoubtedly, fuller litigation of jurisdictional matters at the preliminary stage could impede public regulation. Agency jurisdiction often depends on the facts of the particular case. To hold a full evidentiary hearing on a jurisdictional defense would of necessity delay the agency's assertion of its regulatory power. And an agency conducting an extrajurisdictional investigation may discover information that prompts a subsequent investigation that is within its jurisdiction. Disallowing the first, extrajurisdictional investigation would forestall the second, proper investigation.¹⁶⁴

Four considerations mitigate these fears. First, the fact that litigation is expensive would winnow out many frivolous challenges to

¹⁶⁰ In *Craig v. Boren*, 429 U.S. 190 (1976), a licensed beer vendor was allowed to argue that a state statute prohibiting sale of beer to males under 21 and to females under 18 was impermissible gender-based discrimination. The Court held that the vendor had standing because the statute was addressed directly to vendors such as the plaintiff and interfered with the vendor's commercial relationship with his customers. *Id.* at 194. Under these circumstances, the plaintiff could assert the concomitant right of third parties that otherwise "would be 'diluted or adversely affected.'" *Id.* at 195 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

But these circumstances would not be present in the situation posited here. The complaint or other final action would not be directed against the target of the subpoena and no commercial relationship would be interdicted.

¹⁶¹ "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). Thus,

[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. . . . And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, . . . it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

Rakas v. Illinois, 439 U.S. 128, 134 (1978) (citations and footnote omitted); see, e.g., *United States v. Salvucci*, 448 U.S. 83, 86-87 (1980) (*Rakas* extended to possessory offenses).

¹⁶² See text accompanying notes 146-61 *supra*.

¹⁶³ See text accompanying notes 156-57 *supra*.

¹⁶⁴ The *Oklahoma Press* Court was convinced that this is a significant possibility: Testing jurisdiction during subpoena enforcement proceedings "would stop much if not all of investigation in the public interest at the threshold of inquiry This would render substantially impossible [the Administrator's] effective discharge of the duties of investigation and enforcement which Congress has placed upon him." 327 U.S. at 213; see *FTC v. Gibson*, 460 F.2d 605, 608 (5th Cir. 1972).

jurisdiction.¹⁶⁵ Second, those frivolous challenges that are pressed can be dealt with through summary judgment,¹⁶⁶ minimizing the delay of investigations. Third, when the presence or absence of key jurisdictional facts can be ascertained only by investigation, a compromise approach sometimes is available. The agency could be allowed to conduct a limited investigation to determine whether particular practices fall within its jurisdiction; thereafter, should jurisdiction be established, the agency could embark on a full investigation of the legality of the practices. This bifurcated procedure makes sense only when different documents, or a smaller range of documents, need be examined to determine jurisdiction than to ascertain the propriety of the practice. That situation obtained in *SEC v. Savage*.¹⁶⁷ The court held that, in an investigation of whether certain commodity futures contracts conformed with the securities laws, the SEC would not be required at the outset of the inquiry to establish its jurisdiction by proving that the contracts were "securities."¹⁶⁸ But, since presumably the pool of documents needed for characterizing the securities nature of the contracts was not identical with the pool of documents by which the legality of the contracts, if securities, could have been proven, the bifurcated procedure could have been utilized. Although the documents relevant to jurisdiction and to legality sometimes will be inseparable, rendering the procedure infeasible, in cases like *Savage*¹⁶⁹ bifurcation of the subpoena enforcement proceedings would offer greater assurance that an agency's action is within its delegated authority without threatening serious disruption of proper public regulation.¹⁷⁰

¹⁶⁵ See *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

¹⁶⁶ See B. Schwartz, *supra* note 3, at 508.

¹⁶⁷ 513 F.2d 188 (7th Cir. 1975).

¹⁶⁸ *Id.* at 189.

¹⁶⁹ Among other cases in which bifurcation would have been feasible were *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974) (determining first whether whiskey or warehouse receipts are "securities" and second whether any securities laws were violated), and *United States v. Clyde S.S. Co.*, 36 F.2d 691 (2d Cir. 1929) (determining first whether particular rosin shipments were part of a common arrangement for continuous water and rail transportation and therefore within the jurisdiction of the ICC and second whether those shipments were made under a legal tariff).

¹⁷⁰ One court has ruled the fact that bifurcation is not available under the current expansive view of the reasonable relation rule:

Although it might well save time and expense for all concerned if the Administrator first examined such records as were relevant to coverage and then proceeded beyond that only if convinced that appellant were covered, the Oklahoma Press decision makes it plain that the course of the investigation is for the Administrator to determine.

Newmark & Co. v. Wirtz, 330 F.2d 576, 578 (2d Cir. 1964).

Fourth, and perhaps most fundamental, administrative convenience should not be the litmus of constitutional rectitude. The very reason we have a Constitution at all is that we as a polity are prepared to forego some measure of governmental control in favor of assurances that government will not become too powerful. The concept of separation of powers, of which the delegation doctrine is a part,¹⁷¹ is one of those assurances. We should not, in the name of regulatory exigency, too readily surrender such assurances. If tighter judicial scrutiny in subpoena enforcement proceedings might inhibit some lawful regulation, the coin has another side as well. Defending broader review of jurisdiction in subpoena enforcement proceedings, Justice Murphy once observed: "If administrative agencies may be temporarily handicapped in some instances by frivolous objections, the public will be protected in other instances against the needless burden and vexation of [administrative] proceedings which may be instituted without legal justification."¹⁷² Thus, the essential question¹⁷³ has two parts: (1) when are regulatory exigencies so overwhelming that society must accept the unpleasant eventuality that administrative action may exceed the principle of delegated power?, and (2) when are those exigencies sufficiently relaxed that our system may without excessive loss demand stricter control of agency investigations? The flaw of the current approach is that it does not answer these questions; indeed, animated by a pervading sense that the cause of regulation must triumph, it often does not even recognize that the questions must be asked.

C. Inconsistent Results

The law governing administrative inspections of private documents is relatively settled—there is substantial accord that the rule of reasonable relation is the controlling standard,¹⁷⁴ that only palpably defective demands can be corrected at subpoena enforcement pro-

¹⁷¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *L. Tribe*, *supra* note 79, § 5-17.

¹⁷² *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 515 (1943) (dissenting).

To the extent that regulatory exigencies are pleaded also against the fourth amendment rights of target individuals and corporations, see text accompanying notes 74-95 *supra*, the same response is applicable. As the Supreme Court has recognized, "we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement." *Torres v. Puerto Rico*, 442 U.S. 465, 474 (1979) (citations omitted); see *United States v. United States Dist. Court*, 407 U.S. 297, 319-20 (1972).

¹⁷³ See text accompanying notes 162-63 *supra*.

¹⁷⁴ See text accompanying notes 71-73 *supra*.

ceedings,¹⁷⁵ and that these rules should be administered liberally to facilitate governmental regulation.¹⁷⁶ Despite this agreement, decisions actually reached in the area of document inspection have not always been reconcilable.

One example of this inconsistency involves the question whether an agency must disclose the regulatory purpose of its investigation. In *CAB v. United Airlines, Inc.*,¹⁷⁷ CAB agents presented themselves at the executive offices of United demanding "immediate access to all records and documents located on the premises."¹⁷⁸ Although there was some suspicion that one area of interest to the CAB was political contributions by United,¹⁷⁹ the Board, both during its negotiations with United and during the course of the ensuing litigation, steadfastly refused to specify the purpose of its investigation.¹⁸⁰ The circuit court observed that since the case was governed by the reasonable relation rule, the Board had authority "to investigate any subject properly within its jurisdiction and to inspect any carrier records reasonably relevant to such an investigation";¹⁸¹ the CAB was entitled to broad, though not plenary, access to the records and documents of regulated air carriers.¹⁸² The meat of the case was the requirement that the agency disclose the purpose of its inquiry. To the circuit court, this requirement is a necessary inference from the reasonable relation rule. A reviewing court can determine whether the documents sought by the agency are in fact reasonably related to a proper purpose only when the agency has and discloses a specific purpose.¹⁸³

¹⁷⁵ See text accompanying notes 146-53 *supra*.

¹⁷⁶ See text accompanying notes 67-70, 156-57 *supra*.

¹⁷⁷ 542 F.2d 394 (7th Cir. 1976).

¹⁷⁸ *Id.* at 395. The demand subsequently was limited to four categories of documents from six different departments, and was further limited to exclude records protected by the attorney-client privilege and certain nonbusiness records on the premises. *Id.* at 395-96.

¹⁷⁹ See *id.* at 395.

¹⁸⁰ The circuit court framed the CAB's position thusly:

The Board continues to claim the right to search several broad categories of the [air] carrier's records without specifying a purpose and indeed without having any purpose, and it grounds this claim on the proposition that it is entitled to unlimited access to all the carrier's records, with the possible exception of documents subject to the attorney-client privilege.

Id. at 396.

¹⁸¹ *Id.* at 401-02.

¹⁸² *Id.*

¹⁸³ *Id.* at 402. A second reason for disclosure of purpose is to provide notice to the target company or person. Notice can assist the target to decide whether it may lawfully resist production and, especially when the documents sought are not fully particularized, aids a target wishing to comply to produce the documents most likely to be useful to the agency. Cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323-24 (1978) (administrative search warrant "would . . . advise the owner [of the premises] of the scope and objects of the search . . ."); *id.* at 333-34 (Stevens,

Moreover, the obligation to provide an adequate specification "is of course not satisfied by the recital that the purpose of the investigation is to determine compliance with the law. The same could be said for any general warrant."¹⁸⁴ The circuit court denied enforcement of the CAB's subpoena because of the Board's refusal to divulge the purpose of its inquiry.¹⁸⁵

The reasoning of the *United* court strongly influenced *CAB v. Frontier Airlines, Inc.*¹⁸⁶ In the course of a routine examination of Frontier's books of account, the CAB sought access to all minutes of meetings of the Board of Directors and its Executive Audit Committees during a one-year period.¹⁸⁷ Air carriers are required by CAB regulations to keep such minutes.¹⁸⁸ The agency refused to provide any explanation of its purpose in seeking to inspect the minutes, despite Frontier's insistence that the Board comply with *United*.¹⁸⁹ The CAB's position in the ensuing litigation was, as it had been in *United*,¹⁹⁰ that it was entitled to plenary access without having to make its request reasonably specific or to show that the request was reasonably related to a proper purpose.¹⁹¹ Quoting extensively from *United*,¹⁹² the court refused to enforce the CAB's demand, holding that without a disclosed purpose the demand was equivalent to a prohibited general search warrant.¹⁹³

Some other courts, however, have reached different conclusions on the necessity of disclosure of purpose. Some have stated that no

J., dissenting) (warrant enables owner of premises to verify inspector's authority and informs him of lawful scope of search); *United States v. Bithoney*, 631 F.2d 1, 3 (1st. Cir. 1980) (no fourth amendment violation since search warrant sufficiently limited discretion of police officers and provided notice of what officers were entitled to take), cert. denied, 449 U.S. 1083 (1981). Both purposes are noted in *FTC v. Texaco, Inc.*, 555 F.2d 862, 905 (D.C. Cir.) (en banc) (Wilkey, J., dissenting), cert. denied, 431 U.S. 974 (1977).

¹⁸⁴ 542 F.2d at 402 (citation omitted). This position seems incompatible with the statement in *Morton Salt* that an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

¹⁸⁵ 542 F.2d at 403.

¹⁸⁶ 468 F. Supp. 443 (D. Colo. 1979).

¹⁸⁷ Id. at 443-44.

¹⁸⁸ 14 C.F.R. § 249.13 (1981).

¹⁸⁹ 468 F. Supp. at 444. The Board rejected two compromises offered by Frontier. See id. at 444-45.

¹⁹⁰ See note 180 and accompanying text supra.

¹⁹¹ 468 F. Supp. at 445.

¹⁹² See id. at 446.

¹⁹³ Id. at 447. Other courts have reached results similar to *United* and *Frontier*. See *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 154-55 (D.C. Cir. 1961); *Hellenic Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 138, 140 (D.C. Cir. 1961).

such disclosure is necessary;¹⁹⁴ others have upheld access demands without clear articulation of purpose by the agency. *FTC v. Texaco, Inc.*¹⁹⁵ illustrates the second situation. The American Gas Association (AGA), a trade association composed of producers, distributors, and marketers of natural gas, annually estimates proved natural gas reserves.¹⁹⁶ In 1969, for the first time, the AGA reported a decline in the nation's proved reserves.¹⁹⁷ Amid widespread allegations that producers were intentionally underestimating reserves to bid up natural gas prices, the FTC launched an investigation to focus principally on the reporting, estimation, and deployment of natural gas reserves.¹⁹⁸ The FTC issued subpoenas for various records from the AGA and its members; the subpoenas were resisted. The question of the purpose of the investigation was central to the court's evaluation of whether the subpoenas conformed to the reasonable relation rule.¹⁹⁹ The FTC resolution directing issuance of the subpoenas described the purpose of the investigation as: "to develop facts relating to the acts and practices of . . . [certain named corporations] to determine whether said corporations . . . are engaged in conduct . . . which violates Section 5 of the Federal Trade Commission Act."²⁰⁰ In the subpoena enforcement proceedings before the district court, the FTC declined to state the purpose of its investigation in comprehensive terms.²⁰¹ The circuit court believed that the purpose of the investigation was that set forth in the Commission's resolution,²⁰² thus that "[t]he FTC's investigation is for the purpose of enabling it to determine whether the companies' practices constitute an 'unfair method of competition.'"²⁰³ The circuit court found this an adequate

¹⁹⁴ See, e.g., *Westside Ford, Inc. v. United States*, 206 F.2d 627, 631 (9th Cir. 1953); *Shotkin v. Nelson*, 146 F.2d 402, 405 (10th Cir. 1944).

¹⁹⁵ 555 F.2d 862 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977).

¹⁹⁶ *Id.* at 866-67.

¹⁹⁷ *Id.* at 867.

¹⁹⁸ *Id.* at 867-68.

¹⁹⁹ See generally *id.* at 868-78 (majority opinion), 905-20 (dissenting opinion of Wilkey, J., joined by MacKinnon, J.).

²⁰⁰ *Id.* at 868. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976 & Supp. III 1979), is the section under which take place all of the Commission's actions against "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce," *id.* § 45(a)(1).

²⁰¹ See 555 F.2d at 905 n.44, 906 (Wilkey, J., dissenting). Although the district court believed that the purpose of the investigation was to determine whether a conspiracy to underreport reserves existed, see *id.* at 874, the FTC "maintain[ed] that its investigation [could not] be so circumscribed," *id.* at 873. The Commission, however, did not explain what other, broader characterization would have been more appropriate.

²⁰² *Id.* at 874.

²⁰³ *Id.* at 875.

specification of purpose and upheld the subpoenas under the reasonable relation rule.²⁰⁴

It is difficult to believe that the *United* and *Frontier* courts would have reached the conclusion arrived at in *Texaco*. The hinge of the declaration of purpose in *Texaco* was the FTC's authorizing resolution. Yet that resolution said little more than that the Commission wished to see whether the companies were in compliance with section 5 of the FTC Act. Section 5 is extremely broad, encompassing virtually any practices in interstate commerce and providing the source of the FTC's routine power.²⁰⁵ Thus, the purpose as revealed by the authorizing resolution is difficult to distinguish from a mere "recital that the purpose of the investigation is to determine compliance with law," a recital found insufficient by both the *United* and *Frontier* courts.²⁰⁶

A second area of decisional inconsistency involves challenges to administrative subpoenas as excessively broad and including extraneous materials. Even *Morton Salt*, a pillar of the expansive construction of reasonable relation, suggested that subpoenas might properly be challenged on these grounds.²⁰⁷ This seems to imply that the agency bears a burden, albeit not a heavy one in many instances,²⁰⁸ of demonstrating that the particular categories of documents sought may reasonably be expected to contain information useful to the regulatory purpose at hand.²⁰⁹ Many courts have refused to enforce subpoenas

²⁰⁴ Id. at 876.

²⁰⁵ See note 200 supra.

²⁰⁶ See *CAB v. United Airlines, Inc.*, 542 F.2d 394, 402 (7th Cir. 1976); *CAB v. Frontier Airlines, Inc.*, 468 F. Supp. 443, 447 (D. Colo. 1979).

The *Texaco* dissent found the majority's failure to demand a more specific purpose "astounding" and remarked: "this broad resolution could have authorized a subpoena covering virtually any information relating to appellee's oil and gas business. And the majority here never came any closer to defining the purpose and scope of the FTC inquiry than this." 555 F.2d at 905 (Wilkey, J., dissenting).

Even when administrative subpoenas have referred to statutory sections which define more specifically the authority conferred than § 5 of the FTC Act, courts have upheld the subpoenas against challenges based on inadequate disclosure of purpose. See *FTC v. Carter*, 636 F.2d 781, 787 (D.C. Cir. 1980); *Far E. Conf. v. FMC*, 337 F.2d 146, 151 (D.C. Cir. 1964), cert. denied, 379 U.S. 991 (1965); *Pacific Westbound Conf. v. United States*, 332 F.2d 49, 52-53 (9th Cir. 1964).

²⁰⁷ "Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citation omitted).

²⁰⁸ "[I]t is sufficient if . . . the demand is not too indefinite and the information sought is reasonably relevant." Id.

²⁰⁹ More than mere conjecture as to possibilities is required. "[T]he Government may not defend a failure to indicate sufficient relationship of records to the investigation solely on the basis that some chance of relevance exists or some possibility of relation remains . . . [What is

in whole or in part when the agency failed to show in advance the probable relevance to the investigation of all categories of documents sought.²¹⁰ An excellent example of the careful item-by-item analysis characteristic of this approach is *Adams v. FTC*.²¹¹ The FTC had issued complaints against Elmer Adams, Sr., Elmer Adams, Jr., Adams Dairy Company, Adams Dairy, Inc., and three major retail grocery chains for conspiring to fix the sale and distribution of dairy products in restraint of trade.²¹² During the course of a hearing, six administrative subpoenas were issued to various of the parties, calling for essentially similar material.²¹³ Finding the case governed by the criteria of *Morton Salt*,²¹⁴ the circuit court divided the documents demanded into fifteen categories and examined the relevance of each category to the Commission's antitrust investigation. The court enforced the subpoena without modification as to nine of the categories, limited the scope of five others, and ordered production under the remaining category without limitation but subject to a protective condition.²¹⁵

However, other authority appears to reject the propriety of category-by-category testing of the relevance of documents sought by regulatory agencies. Particularly striking are two 1957 per curiam decisions of the Supreme Court, *CAB v. Hermann*²¹⁶ and *FTC v. Crafts*,²¹⁷ both of which reversed cases emanating from the Ninth Circuit Court of Appeals. In *Hermann*, the CAB, in a proceeding against the "Skycoach" air travel system, sought enforcement of ten

required is] an indication of a realistic expectation rather than an idle hope that something may be discovered." *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1968).

²¹⁰ E.g., *Venn v. United States*, 400 F.2d 207, 211-12 (5th Cir. 1968); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968); *Hunt Foods & Indus., Inc. v. FTC*, 286 F.2d 803, 811-12 (9th Cir.), cert. denied, 365 U.S. 877 (1961); *First Nat'l Bank v. United States*, 160 F.2d 532, 533-34 (5th Cir. 1947); *United States v. Tesoro Petroleum Corp.*, 503 F. Supp. 868, 873 (D.D.C. 1980); *United States v. Associated Merchandising Corp.*, 261 F. Supp. 553, 560-61 (S.D.N.Y. 1966).

²¹¹ 296 F.2d 861 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962).

²¹² *Id.* at 862.

²¹³ *Id.*

²¹⁴ See *id.* at 866.

²¹⁵ See *id.* at 867-70. The protective condition governing production of the fifteenth category of documents was that if obtaining the data necessitated an audit of the books of Adams Dairy Company, the audit was to be performed by the FTC, not the company. In addition, the court made production of all categories contingent upon a general protective condition. The Senate Judiciary Committee's Subcommittee on Antitrust and Monopoly previously had investigated the dairy industry, at which time the Adamses had produced documents before that Subcommittee. The court held that the FTC should seek from the Adamses only those documents that the Commission could not obtain from the Subcommittee. *Id.* at 870.

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

²¹⁷ 355 U.S. 9 (1957) (per curiam), rev'g *Crafts v. FTC*, 244 F.2d 882 (9th Cir. 1957).

administrative subpoenas served on a small, nonscheduled airline and its officers and principal employees.²¹⁸ The subpoena comprehended "practically all records, books and documents of or concerning" the carrier over a period of thirty-eight months.²¹⁹ The CAB made little effort to establish the relevance of this extremely broad demand.²²⁰ The Board argued only that the documents "*might* be relevant or material,"²²¹ a contention which would have been insufficient for courts requiring agencies to establish in advance the likely utility of the documents sought.²²² Still, the district court upheld the subpoenas, remarking that it could not "say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant"²²³ and finding itself under no obligation to examine with any particularity the documents and their relationship to the proceedings.²²⁴ The court of appeals reversed, emphatically asserting the necessity of itemized evaluation of relevance:

In order to have the subpoena enforced, the issue as to whether each of the documents subpoenaed is relevant and material is a judicial question which must be passed upon by the court. There are no presumptions that the administrative agency or the hearing officer has subpoenaed only those documents which are relevant and material.²²⁵

On this principle, the district court, in refusing to decide the relevance of the particular documents sought by the CAB, "failed to pass upon the judicial question presented to [it] in the case."²²⁶ With little more than citation of cases, the Supreme Court reversed the circuit court and reinstated the district court's judgment,²²⁷ apparently rejecting the need for particularized findings of relevance.²²⁸

*FTC v. Crafts*²²⁹ unfolded in a similar fashion. As part of an investigation of the insurance industry, the FTC subpoenaed in mass

²¹⁸ 353 U.S. at 322-23.

²¹⁹ 237 F.2d at 361.

²²⁰ *Id.* at 362 ("It seems to be conceded that there was no showing of relevancy or materiality of the documents sought in the administrative subpoenas at any time during the hearings.").

²²¹ *Id.* (emphasis added).

²²² See note 209 *supra*.

²²³ See 237 F.2d at 362.

²²⁴ See *id.*

²²⁵ *Id.* at 362.

²²⁶ *Id.* at 363: "[T]he court should not be required to rubberstamp with approval the administrative subpoenas. 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."

²²⁷ 353 U.S. 322, 323-24 (1957) (*per curiam*).

²²⁸ See B. Schwartz, *supra* note 3, at 124.

²²⁹ 355 U.S. 9 (1957) (*per curiam*).

all books, papers, and records of an indemnity company, including those pertaining to its intrastate as well as interstate business.²³⁰ The district court upheld the subpoena without an examination of the relevance of the material sought to any purpose within the FTC's authority.²³¹ The circuit court refused to enforce the subpoena, stating that "it was incumbent upon [the] agency to establish affirmatively its legal power to act in the field."²³² This the agency had failed to do. The subpoena was extremely broad on its face, and could not "be enforced without regard to the relevance of the testimony sought to the areas over which the Commission has established jurisdiction."²³³ Again, the Supreme Court reversed the circuit court, this time with no explanation beyond mere reference to *Endicott Johnson* and *Oklahoma Press*.²³⁴

So, as to the requirement that an agency show particularized relevance of the documents sought, the course of the law has not been uniform. Many lower federal courts, both before and after 1957,²³⁵ have insisted on the requirement. In *Hermann* and *Crafts*, the Supreme Court appeared to dispense with the condition. And, to muddy the waters yet more, since these cases, the Supreme Court has indicated that the requirement still may be a requirement after all.²³⁶

The "purpose" cases and the "particularized showings of relevance" cases demonstrate that, whatever the justification for the current approach, decisional consistency is not one of its virtues.

D. Roots of the Problems

The early cases, restricting document inspection, seriously undercut effective public regulation.²³⁷ The current expansive approach,

²³⁰ 244 F.2d at 895. The precise contents of the subpoenas are described in *id.* at 885-86.

As a federal agency, the FTC has jurisdiction over only matters involving interstate commerce.

²³¹ *Id.* at 894.

²³² *Id.* at 890-91.

²³³ *Id.* at 895.

²³⁴ 355 U.S. at 9.

²³⁵ See *Venn v. United States*, 400 F.2d 207, 211-12 (5th Cir. 1968); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968); *Hunt Foods & Indus., Inc. v. FTC*, 286 F.2d 803, 811-12 (9th Cir.), cert. denied, 365 U.S. 877 (1961); *First Nat'l Bank v. United States*, 160 F.2d 532, 533-34 (5th Cir. 1947); *United States v. Tesoro Petroleum Corp.*, 503 F. Supp. 868, 873 (D.D.C. 1980); *United States v. Associated Merchandising Corp.*, 261 F. Supp. 553, 560-61 (S.D.N.Y. 1966).

²³⁶ See *See v. City of Seattle*, 387 U.S. 541, 544 (1967) ("It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.") (footnote omitted).

²³⁷ See text accompanying notes 37-46 *supra*.

attempting to correct this imbalance, has been overcorrection. Facilitated public regulation has been accomplished at the price of inadequate recognition of legitimate privacy interests,²³⁸ encouragement of administrative activity beyond the limits of legislative delegation and judicial supervision,²³⁹ and decisional inconsistency.²⁴⁰

The shortcomings of the current approach are at two levels: definition and implementation. First, the reasonable relation rule is structurally deficient. The privacy and delegation problems stem not from sloppy implementation of the rule but from the definition of the rule itself. Privacy difficulties arise because the common formulations of the rule intrinsically tend to the exclusion of factors that properly should be weighed in the fourth amendment balance.²⁴¹ Delegation difficulties arise because of the porous nature of the two-step review procedure now in use.²⁴² Second, the reasonable relation rule is too amorphous. Currently the rule is but a small stage removed from a slogan, its common elaborations²⁴³ providing much less detailed guidance than desirable. Judges, in filling in the blanks, inevitably are influenced by their policy orientations. This has two effects. For one, the possibility of inconsistent decisions is endemic, since different judges with different orientations decide different cases. For the other, the possibility of undervaluing one or the other of the competing sets of principles is ever-present, as indicated by the early cases' slighting of regulation and the current cases' erosion of privacy and delegation safeguards.

The need, then, is for an approach that both better balances the scales between the competing values and provides more detailed and formal criteria for document inspection cases.²⁴⁴ The next section proposes such an approach.

III

SUGGESTED APPROACH

This section proposes a three-part approach to govern document inspection cases. At the subpoena enforcement proceeding, the agency's examination demand should be enforced without modifica-

²³⁸ See text accompanying notes 74-134 *supra*.

²³⁹ See text accompanying notes 146-73 *supra*.

²⁴⁰ See text accompanying notes 174-236 *supra*.

²⁴¹ See text accompanying notes 102-34 *supra*.

²⁴² See text accompanying notes 146-61 *supra*.

²⁴³ See text accompanying notes 100-01 *supra*.

²⁴⁴ Cf. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 10-20 (1959) (describing the desirability of reasoned criteria in constitutional analysis generally).

tion only if: (1) the investigation of which the demand is a part meets a threshold showing of materiality; (2) the demand is not overbroad; and (3) compliance would not be excessively burdensome.

A. *Threshold Showing of Materiality*

*Morton Salt*²⁴⁵ appeared to free agency document inspections from any requirement of probable cause or reasonable suspicion to investigate.²⁴⁶ And surely the rigid materiality criterion of the early cases would stifle a great deal of legitimate regulatory activity.²⁴⁷ But it would be unwise to absolve agencies of any duty to establish the reasons for their inquiries. Document inspection is not insulated from the larger body of search and seizure law, a principle of which is that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure."²⁴⁸ That prerequisite has been dispensed with only when the search conformed with some other objective and reasonable "legislative or administrative standards."²⁴⁹ Since, as will be indicated, no compelling reason for deviation exists in the area,²⁵⁰ these same general principles should govern document inspections.

More specifically, document subpoenas should be enforced only if either of two criteria is met: (1) the agency has some reason, less than criminal probable cause but more than mere conjecture, to believe that a valid regulatory interest would be served by the investigation; or (2) the investigation is part of a general plan of supervision, oversight, or enforcement. This threshold of materiality is consistent with requirements imposed on three other types of searches: (1) interrogation stops near the border, (2) stops for license checks, and (3) administrative inspections of physical premises.

²⁴⁵ *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), discussed at text accompanying notes 61-66 *supra*.

²⁴⁶ The key language is: "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U.S. at 652.

It is not clear, however, that the Court intended this language to establish a general rule for all agency inspections. The singular factual context of the case, see note 66 *supra*, must be borne in mind. What is clear, however, is that subsequent cases did not limit *Morton Salt* to its facts. See *id.*

²⁴⁷ See text accompanying notes 39-44 *supra*.

²⁴⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (citing *Terry v. Ohio*, 392 U.S. 1, 21 & n.18 (1968)); see *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979).

²⁴⁹ *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967); see *Donovan v. Dewey*, 101 S. Ct. 2534, 2540-41 (1981); *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

²⁵⁰ See text accompanying notes 270-74 *infra*.

The key referents of the first of these areas are *Almeida-Sanchez v. United States*,²⁵¹ *United States v. Brignoni-Ponce*,²⁵² and *United States v. Martinez-Fuerte*.²⁵³ In *Almeida-Sanchez*, the Supreme Court, although recognizing an important law enforcement interest, refused to permit roving police patrols to search vehicles for illegal aliens simply because the vehicles were in the general vicinity of the border.²⁵⁴ Fourth amendment privacy interests required either a warrant authorizing random searches in a given area²⁵⁵ or probable cause to believe that the vehicle contained illegal aliens.²⁵⁶ *Brignoni-Ponce*, on the other hand, involved a less intrusive practice, stopping cars in a general area to conduct a brief inquiry into the residence status of its passengers, but no search of the vehicle. The Court held that this "modest" practice²⁵⁷ need not be supported by probable cause; it suffices that the stopping officer is "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion."²⁵⁸ The final case, *Martinez-Fuerte*, involved, unlike its predecessors, not practices directed at individual vehicles but a method of checking all cars at a particular location. The Court held that the routine stopping of vehicles at a reasonably located fixed checkpoint for brief questioning of its occupants is compatible with the fourth amendment even when no individualized suspicion exists.²⁵⁹

The second area—stops for license checks—is governed by *Delaware v. Prouse*.²⁶⁰ The Court held that stopping an automobile and detaining the driver to check his license and registration is impermissible under the fourth amendment unless either: (1) "there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either . . . is otherwise subject to seizure for violation of law";²⁶¹ or (2) all traffic is stopped and questioned at "roadblock-type stops."²⁶²

²⁵¹ 413 U.S. 266 (1973).

²⁵² 422 U.S. 873 (1975).

²⁵³ 428 U.S. 543 (1976).

²⁵⁴ 413 U.S. at 273.

²⁵⁵ *Id.* at 283-85 (Powell, J., concurring).

²⁵⁶ *Id.* at 273; *id.* at 288 (White, J., dissenting).

²⁵⁷ 422 U.S. at 880.

²⁵⁸ *Id.* at 884.

²⁵⁹ 428 U.S. at 556-64.

²⁶⁰ 440 U.S. 648 (1979).

²⁶¹ *Id.* at 663.

²⁶² *Id.* Or, the police may develop other means similarly "that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.*

The final area—administrative inspections of physical facilities²⁶³—is most obviously analogous to administrative document inspections. *Camara v. Municipal Court*²⁶⁴ suggested that the proper standard of materiality is whether “reasonable legislative or administrative standards” for the inspection exist.²⁶⁵ *Marshall v. Barlow’s, Inc.*²⁶⁶ elaborated: “Probable cause in the criminal law sense is not required.”²⁶⁷ Instead, the inspection must be supported by either of two conditions: (1) some “specific evidence of an existing violation,”²⁶⁸ or (2) a “showing that a specific business has been chosen for . . . search on the basis of a general administrative plan for the enforcement of the [relevant] Act derived from neutral sources.”²⁶⁹

In an area as fact-sensitive as fourth amendment balancing, there are, naturally, many points of distinction among these three areas, as there are between these three on the one hand and document inspection on the other. That fact makes all the more striking the considerable similarity of the standards the Supreme Court has forged to govern searches in the three areas. The distillation of the various decisions is that, in any of these areas, a search will be permitted if either: (1) there are specific grounds, short of probable cause but at least “an articulable and reasonable suspicion,” to believe a regulatory concern is involved; or (2) the target has been selected pursuant to a general plan of oversight or enforcement consistent with the agency’s authority. This same rule should constitute the threshold of materiality necessary to sustain agency document inspection.

More than a pleasing simplification of fourth amendment law argues for this result. Two other arguments are compelling. First, the public’s interest in effective regulation is not weaker in the three areas already subject to the criteria than in agency actions involving document examinations. In the “stops near the border” cases, the Government made “a convincing demonstration that the public interest demands effective [regulation],” since illegal aliens “create significant

²⁶³ For discussion of this line of cases, see text accompanying notes 85-94 *supra*.

²⁶⁴ 387 U.S. 523 (1967).

²⁶⁵ *Id.* at 538.

²⁶⁶ 436 U.S. 307 (1978).

²⁶⁷ *Id.* at 320.

²⁶⁸ *Id.* (footnote omitted).

²⁶⁹ *Id.* at 321; see *Donovan v. Dewey*, 101 S. Ct. 2534, 2540-41 (1981); *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1224-25 (D.C. Cir. 1981) (extending *Delaware v. Prouse* requirement of particularized description to INS search of commercial establishment for illegal aliens and refusing to “require the INS to meet a standard of probable cause so unrealistically restrictive as to cripple the statutory mandate to enforce the [Immigration and Nationality] Act”); *Bionic Auto Parts & Sales, Inc. v. Fahner*, 518 F. Supp. 582, 584-86 (N.D. Ill. 1981).

economic and social problems" for the nation.²⁷⁰ In light of the appalling highway death toll, the state was conceded to have "a vital interest" in the license and registration checks at issue in *Prouse*.²⁷¹ And, perhaps most significantly, inspections of physical premises can be essential to the very lives and health of untold numbers of citizens. As was argued in *Camara*, "the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and . . . the only effective means of enforcing such codes is by routine systematized inspection of all physical structures."²⁷² And the OSHA inspections at issue in *Barlow's* were Congress' primary response to its determination that "industrial safety is an urgent federal interest requiring regulation and supervision."²⁷³ Second, the Supreme Court itself finds a strong relationship between physical inspections, governed by the two criteria, and document inspections. In *See v. City of Seattle*, it found the area of document inspections to provide "strong support" for its holding as to physical inspections.²⁷⁴

Some further specification of the criteria as applied to document examinations is in order. The "articulable and reasonable suspicion" short of probable cause would not necessarily be referable to a complaint; it could relate to any of the oversight, supervisory, or nonenforcement functions of the agency. Moreover, as long as such suspicion attached to an entity within the agency's ambit and as long as some other entity had documents bearing on that suspicion, this criterion would not bar agencies from subpoenaing material from individuals or companies that they could not supervise directly.²⁷⁵

The "general plan of administration" criterion would entail three aspects. First, the plan itself would have to be consistent with the authority delegated to the agency. Second, since no individualized suspicion exists, the plan would have to have been devised according to neutral criteria pertinent to the type of regulation involved.²⁷⁶ A

²⁷⁰ *United States v. Brignoni-Ponce*, 422 U.S. at 878.

²⁷¹ 440 U.S. at 658.

²⁷² 387 U.S. at 533; see *Frank v. Maryland*, 359 U.S. 360, 372 (1959) (such inspections are "of indispensable importance to the maintenance of community health").

²⁷³ 436 U.S. at 339 (Stevens, J., dissenting).

²⁷⁴ 387 U.S. 541, 544 (1967); see *Marshall v. Barlow's, Inc.*, 436 U.S. at 324 n.22 (Stevens, J., dissenting) (observing that the fourth amendment concerns applied by the Court in that case to physical inspections are "particularly important" when documents are involved).

²⁷⁵ In these ways, plus in the fact that agencies could pursue general supervisory plans without any individualized suspicion at all, the threshold purpose here would avoid the stifling of legitimate regulation that was an incident of the early cases. See text accompanying notes 37-44 *supra*.

²⁷⁶ The neutral criteria suggested for OSHA inspection by the *Barlow's* Court were factors like "dispersion of employees in various types of industries across a given area, and the desired

plan would seem to satisfy this condition if it investigated, for example: political contributions by all firms in a particular industry, marketing practices of all retail chains in a particular geographical area, or accounting methods of some firms only as long as germane characteristics of size, markets of operation, type of business, etc., separated the firms subject to the plan from those outside it. An investigation of some practices of, say, only three of the "seven sisters" oil companies would, absent some germane distinction, probably fail this test. Third, to prevent abuse or favoritism, the agency would have to subpoena entities subject to the plan in some routine, rational, and nondiscriminatory manner.

B. Overbreadth

When the agency's document demand satisfies the threshold of materiality, a second level of scrutiny should operate. At this level, there are three questions: (1) how particular must be the description of the documents sought?²⁷⁷ (2) how concrete must be the agency's statement of the purpose of its investigation?²⁷⁸ and (3) how close must be the fit between the documents sought and the purpose announced? Because the public and private interests at stake vary in each case, no single answer to any of these questions can be applied universally. But exhaustive scrutiny of all of the facts of each case also is unappealing. Attempting such scrutiny would turn subpoena enforcement hearings virtually into full trials with briefing, arguments, and even discovery, thereby straining judicial resources and allowing targets to tie up even perfectly legitimate inquiries for protracted periods. The best way to answer the three questions in each case, therefore, is a compromise approach. Courts should advert to the presence or absence of objective factors that (1) rationally relate to and illuminate the public and private interests involved in document inspections, but (2) are facially or summarily ascertainable and thus do not necessitate difficult, detailed factual determinations.

frequency of searches in any of the lesser divisions of the area." 436 U.S. at 321. Those for housing inspections in *Camara* included "the passage of time, the nature of the building . . . , or the condition of the entire area, but [because the plan is general rather than individualized] they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." 387 U.S. at 538.

²⁷⁷ By considering this question in an ad hoc fashion, without regard to the nature of the documents or the status of the target, see text accompanying notes 280-329 *infra*, courts have reached inconsistent and unsatisfactory results, see text accompanying notes 297-36 *supra*.

²⁷⁸ Reviewing courts have failed to answer this question uniformly or adequately. See text accompanying notes 177-206 *supra*.

1. *Relevant Factors*

Four such factors present themselves: (a) are the documents sought records that the target individual or business is required by law to maintain?, (b) is the target of the demand engaged in a traditionally closely regulated industry?, (c) has the target consented by contract to inspection of the documents sought?, and (d) does the target of the demand exert significant control over the market in which it operates?²⁷⁹

a. Required Records—A wide variety of statutes impose record-keeping requirements on companies and individuals. Statutes either may directly specify what records are to be kept or delegate to administrative agencies the authority to delineate the nature and scope of the records required.²⁸⁰ The courts consistently have upheld the constitutionality of both direct and delegated recordkeeping provisions.²⁸¹

Even early access cases treated leniently agency demands to inspect required records. The rationale—now in disrepute²⁸²—of these

²⁷⁹ Other, relevant factors could, of course, be devised. The four presented here enjoy the distinct advantage of being derived from existing case law.

²⁸⁰ See *Shapiro v. United States*, 335 U.S. 1, 51 (1948) (Frankfurter, J., dissenting) ("Virtually every major public law enactment . . . has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations Unquestionably they are enormous in volume.").

Examples of major recordkeeping provisions include § 20(3) of the Interstate Commerce Act (current version at 49 U.S.C.A. § 11142 (1981 West Special Pamph.)) (ICC empowered to prescribe uniform accounting system for rail carriers), § 407(d) of the Federal Aviation Act of 1958, 49 U.S.C. § 1377(d) (1976) (CAB required to prescribe form of accounts, records and memoranda to be kept by air carriers), and the Bank Secrecy Act of 1970, 12 U.S.C. §§ 1730d, 1829b, 1952-1953 (1976 & Supp. III 1979), and 31 U.S.C. §§ 1081 1083, 1101, 1121-1122 (1976) (authority of Secretary of the Treasury to prescribe bank recordkeeping and reporting rules for certain foreign and domestic financial transactions).

²⁸¹ Such requirements have been upheld against challenges based on the due process clause of the fifth amendment, see *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 45-50 (1974); *United States v. Darby*, 312 U.S. 100, 125-26 (1941); *Norfolk & W. Ry. v. United States*, 287 U.S. 134, 142-43 (1932), and the search and seizure and self-incrimination provisions of the fourth and fifth amendments, respectively, see, e.g., *California Bankers Ass'n v. Shultz*, 416 U.S. at 52-55, 59-72; *Shapiro v. United States*, 335 U.S. 1, 7-35 (1948). As to self-incrimination, see generally 1 *Davis II*, *supra* note 38, §§ 4:16-23.

²⁸² The high water mark of the "quasi-public records" notion was World War II and its immediate aftermath. The common case during this period dealt with the ability of the Office of Price Administration to inspect records required of businesses by the Emergency Price Control Act of 1942, ch. 26, § 202, 56 Stat. 23 (1942) (repealed 1966). See, e.g., *Hagen v. Porter*, 156 F.2d 362, 366 (9th Cir.) cert. denied, 329 U.S. 729 (1946); *Porter v. Mueller*, 156 F.2d 278, 280-81 (3d Cir. 1946); *Bowles v. Insel*, 148 F.2d 91, 93-94 (3d Cir. 1945); *Cudmore v. Bowles*, 145 F.2d 697, 698 (D.C. Cir.), cert. denied, 324 U.S. 841 (1945). But the unusual liberty accorded the OPA resulted from the exigencies of wartime. See *Bowles v. Glick Bros. Lumber Co.*, 146 F.2d 566, 570-71 (9th Cir.), cert. denied on other grounds, 325 U.S. 877 (1945); *Bowles v. Chew*, 53 F. Supp. 787, 789-90 (N.D. Cal. 1944). Since the 1940's, cases invoking the

cases was that records compelled by law to be maintained lose their private character; instead, they become "quasi-public documents"²⁸³ bereft of fourth amendment protection against unreasonable searches and seizures.²⁸⁴ The "quasi-public documents" theory makes no useful contribution to access cases. It ignores the substantial privacy interest in the documents. Private companies or individuals expend the effort needed to create the required records and defray the expenses of compilation, storage, and retrieval of the data. Moreover, in at least some cases, the private entity would have developed the same or similar records for use in its business and does in fact use the required documents for some private commercial ends. The "quasi-public records" doctrine, treating such documents as entirely outside fourth amendment protection, failed to recognize the substantial non-governmental aspect of the documents. Harsh results ensued. Some courts held that the fact that the documents sought were "quasi-public" precluded any defense against the administrative subpoena.²⁸⁵ Moreover, the doctrine provided an entering wedge for dangerous expansion of the power of government to conduct actual, not merely constructive, searches. In one case, investigators of the Office of Price Administration were allowed to conduct a warrantless search of the nonpublic parts of business premises because they were able to find there gasoline ration coupons that were public property.²⁸⁶ In principle, there was substantial reason to think that the result would have been the same if quasi-public, not public, documents had been located on the premises.²⁸⁷ Such a result would open "an alarming vista of inroads upon the right of privacy."²⁸⁸

"quasi-public records" doctrine have come up relatively infrequently. See, e.g., *SEC v. Olsen*, 354 F.2d 166, 170 (2d Cir. 1965); *Cooper's Express, Inc. v. ICC*, 330 F.2d 338, 340-41 (1st Cir. 1964); *United States v. Pine Valley Poultry Distribs. Corp.*, 187 F. Supp. 455, 456-57 (S.D.N.Y. 1960).

²⁸³ See, e.g., *Rodgers v. United States*, 138 F.2d 992, 996 (6th Cir. 1943).

²⁸⁴ See, e.g., *Boyd v. United States*, 116 U.S. 616, 623-24 (1886).

²⁸⁵ See, e.g., *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 392 (7th Cir.), cert. denied, 311 U.S. 690 (1940) ("Respondent is required by the [Fair Labor Standards] Act and regulations to have the information available in some form to be determined by the respondent. That is sufficient [to dispose of the challenge to the subpoena].").

²⁸⁶ *Davis v. United States*, 328 U.S. 582, 593-94 (1946).

²⁸⁷ The Government had argued: "Whenever the government validly regulates any business and includes in its regulation a valid requirement that records be kept which shall be open to official inspection, then refusal to produce the records for such inspection authorizes the officers to enter the premises and seize the records." *United States v. Davis*, 151 F.2d 140, 144 (2d Cir. 1945) (Frank, J., concurring), *aff'd*, 328 U.S. 582, 594 (1946). Concern that quasi-public records would be treated like public property also emerged in the *Davis* dissent. See 328 U.S. at 602 (Frankfurter, J., dissenting).

²⁸⁸ 328 U.S. at 602 (Frankfurter, J., dissenting).

Although the "quasi-public records" notion went too far, the fact that the documents sought are ones required by law to be maintained is relevant to determining whether the demand is overly broad. This is so for three reasons. First, only a minimal privacy right exists as to required records. The key issue in fourth amendment analysis is whether the company or person objecting to the government's investigation possesses a reasonable expectation of privacy as to the material subject to the investigation.²⁸⁹ There can be only lesser justifiable reliance on an expectation of privacy when the person or company is warned by statute or regulation that the government is especially likely to order production of the records.²⁹⁰ So, the first reason to restrain administrative inspection of documents, fourth amendment privacy concerns, is less compelling when the documents to be inspected are required records.

The second concern about agency inspection demands, the fear that the agency will overstep the limits of its delegated power, also is less powerful when required records are involved. If the inspection demand is confined to records required to be maintained, and the recordkeeping regulation itself is valid, there is greater assurance that the inspection is within the sphere of the authority delegated by Congress to the agency.²⁹¹ Moreover, recordkeeping requirements define in advance of the inspection demand the area of particular regulatory interest. This definition both enables the target of a production demand to comply more easily and accurately with the demand and permits the reviewing court to ascertain whether the demand was proper.²⁹² Thus, a lesser potential for agency abuse of

²⁸⁹ E.g., *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *United States v. Miller*, 425 U.S. 435, 442 (1976); *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *Couch v. United States*, 409 U.S. 322, 335-36 (1973); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁹⁰ See *United States v. McCoy*, 492 F. Supp. 540, 543-44 (M.D. Fla. 1980) (customshouse broker had minimal expectation of privacy in records required by regulations to be kept); cf. *Katz v. United States*, 389 U.S. 347, 353 (1967) (Harlan, J., concurring) (key question in fourth amendment challenge to bugging of telephone booth was whether caller justifiably relied on the privacy of the booth).

²⁹¹ See *United States v. Tesoro Petroleum Corp.*, 503 F. Supp. 868, 873 (D.D.C. 1980) (enforcing even "unusually broad" subpoena as to all records target was required by regulations to maintain).

²⁹² It is precisely these goals that lie behind the insistence of most courts that the agency's inspection demand be reasonably definite and particular. See text accompanying notes 207-15 *supra*.

There is an additional benefit of the definition that recordkeeping requirements provide. Since target entities can reasonably expect required documents to be examined, they are warned to keep material protected by a common law privilege, see generally note 102 *supra*, physically separate from the required records. As a result, the chance that the privileged matter will be

power inheres in production demands confined to documents required to be maintained.²⁹³

Finally, it can be persuasively argued that the public interest in regulation is more powerful than usual when an agency seeks to inspect required records. A statute that specifies directly which records are to be maintained or that permits an administrative agency to make that specification reflects a legislative judgment that effective regulation necessitates unusually ready access to some kinds of information. When Congress believes that such access is necessary in order that agencies be able to effectively discharge their statutory responsibilities, the courts should be reluctant to dispute that judgment.²⁹⁴

When the objects of an agency's inspection demand are records that statute or regulation mandates the target entity to maintain, the reasons urging restraint of administrative power are weaker than usual and the reasons favoring facilitated governmental activity are stronger. Thus, when this factor is present courts should be loath to find the relevant portion of the document demand to be overly broad; less particularization of documents or of purpose and a looser fit between the two are tolerable.

b. Traditionally Closely Regulated Industries—Historically, firms in particular industries have been subjected to more than normally stringent governmental supervision. When a firm in one of these industries is the target of an agency's demand to inspect documents, the same three reasons are present as countenanced easy agency access to required records.²⁹⁵

First, privacy concerns operate less strongly. There is a three-level hierarchy for fourth amendment purposes. First, historically pervasively regulated industries—apparently only the liquor and gun trades—have only minimal privacy rights. Second, other industries closely regulated—yet less so than alcohol and firearms—have somewhat greater, yet still curtailed, privacy rights. Third, businesses subject to only laws of general applicability have undiminished corporate privacy rights.

inadvertently produced along with the required material, thereby forfeiting the privilege, see *id.*, will be reduced.

²⁹³ Professor Davis has remarked that "regulations of general applicability which prescribe in advance the type of information open to administrative scrutiny may well be regarded as less dangerous than power to command a particular party to disclose information which the agency seeks for special purposes." 1 K. Davis, *Administrative Law Treatise* 177 (1st ed. 1958) [hereinafter Davis I].

²⁹⁴ See, e.g., *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 209-16 (1912); *Baltimore & O.R.R. v. ICC*, 221 U.S. 612, 622 (1911).

²⁹⁵ See text accompanying notes 289-94 *supra*.

As to the first level, in *Colonnade Catering Corp. v. United States*,²⁹⁶ the Supreme Court held that liquor dealers—heavily regulated in both England and America since the seventeenth century²⁹⁷—enjoy, by virtue of this history, only minimal fourth amendment rights.²⁹⁸ Not long after *Colonnade*, the Court, in *United States v. Biswell*,²⁹⁹ deemed the firearms industry to be in the same posture as the alcohol trade.³⁰⁰ In the physical inspection line of decisions,³⁰¹ the Court expressly reaffirmed these conclusions.³⁰² But this first level has room for few tenants. The Supreme Court has never added an industry other than liquor or guns to the list; indeed, it has warned against its extension.³⁰³

Entities subject only to laws of general applicability—level three entities—are entirely unaffected by *Colonnade-Biswell*. The mere fact that firms in an industry are subject to some federal statutes and regulations is insufficient. All companies engaged in interstate commerce must endure federal laws dealing with fair labor standards, securities, occupational health and safety, and the like. The Supreme Court has made it clear that more than laws of general applicability must be involved; a history of stringent supervision exists only when an industry historically has been supervised in all or nearly all of the essential features of its operation.³⁰⁴

Level two thus occupies an intermediate position. Industries like public carriers under the jurisdiction of the ICC or CAB,³⁰⁵ dealers in—but not mere issuers of—stocks and bonds,³⁰⁶ and businesses operating under federal licenses and receiving substantial federal funds³⁰⁷ are subject to considerable vertical regulation.³⁰⁸ Yet the

²⁹⁶ 397 U.S. 72 (1970).

²⁹⁷ See *id.* at 75-76.

²⁹⁸ See *id.* at 77.

²⁹⁹ 406 U.S. 311 (1972).

³⁰⁰ *Id.* at 314-16.

³⁰¹ See text accompanying notes 85-94 *supra*.

³⁰² See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

³⁰³ *Id.* at 313-14; see *Almeida-Sanchez v. United States*, 413 U.S. 266, 270-71 (1973).

³⁰⁴ "The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. [Extending it to all industries subject to the Occupational Health and Safety Act] would make it the rule." *Marshall v. Barlow's, Inc.*, 436 U.S. at 313. Another way of stating the idea is that horizontal regulation—applying broadly across many industrial groupings—is insufficient; intensive vertical regulation—in-depth supervision of one particular industry—is required.

³⁰⁵ See *Cooper's Express, Inc. v. ICC*, 330 F.2d 338, 340-41 (1st Cir. 1964); *United States v. Alabama Highway Express*, 46 F. Supp. 450, 453 (N.D. Ala. 1942); *B. Schwartz*, *supra* note 3, at 123-25.

³⁰⁶ See *United States v. Mahler*, 254 F. Supp. 581, 582-83 (S.D.N.Y. 1966).

³⁰⁷ See *Ray v. United States*, 374 U.S. 638, 641 (5th Cir.), cert. denied, 389 U.S. 833 (1967).

³⁰⁸ Thus, such industries partake of some of the characteristics of pervasive oversight. Anyone entering such a business must be aware of the oversight, see *Marshall v. Barlow's, Inc.*, 436 U.S.

regulation is short of that endured by the alcohol and firearms industries, and so privacy rights are diluted to only a lesser extent.³⁰⁹

A second consideration is that an inspection demand from an agency charged with supervising either a historically pervasively regulated or merely substantially regulated industry (levels one and two) is less likely to exceed the agency's delegated authority. The statutory powers of such an agency are so comprehensive that extrajurisdictional demands are unlikely. As has been noted about one such agency, "[i]n view of the broad power of regulation of interstate public carriers, it is difficult to conceive of a case in which the Interstate Commerce Commission would be seeking to inspect a record or document which would not be relevant to a lawful activity of the Commission."³¹⁰

The third consideration relates to the extent of the public's interest in effective regulation. The very fact of a history of close governmental oversight reflects a judgment by the legislature that an unusually strong regulatory interest exists with respect to the particular industry. Both *Colonnade* and *Biswell* stressed "the evils at hand" in the industry as central to the relaxation of strictures against governmental information-gathering.³¹¹ However, "the evils at hand" vary among the closely regulated industries. Industries subject to economic regulation present less pressing needs for regulation than do industries regulated because of their potential effects on health or safety.³¹² Thus, although easier agency access to private documents is warranted whenever the target of the access demand is a traditionally closely regulated industry,³¹³ such access should be granted less readily

307, 313 (1978), and thus may be said to "accept the burdens as well as the benefits of their trade," *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).

³⁰⁹ See, e.g., *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976) (rejecting extension of the *Colonnade-Biswell* exception to regulated air carriers); *Burlington N., Inc. v. ICC*, 462 F.2d 280, 288 (D.C. Cir.) (Leventhal, J., dissenting from denial of rehearing en banc) ("[S]o long as our [rail] carrier operations are rooted in private enterprise there is a strong element of privacy in [their important internal papers]."), cert. denied, 409 U.S. 891 (1972).

³¹⁰ *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 391 (7th Cir.), cert. denied, 311 U.S. 690 (1940), quoted in *Cooper's Express, Inc. v. ICC*, 330 F.2d 338, 341 (1st Cir. 1964).

³¹¹ *Colonnade Catering Corp. v. United States*, 397 U.S. at 76; see *United States v. Biswell*, 406 U.S. at 315-16 ("close scrutiny of [the gun] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. . . . Large interests are at stake, and inspection is a crucial part of the regulatory scheme . . .").

³¹² One circuit court remarked: "We think that 'the evils at hand' . . . in the liquor and gun trades are not sufficiently analogous to the problems which are likely to arise in a public transportation industry to justify reliance here on cases dealing with those trades." *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976) (citation omitted).

³¹³ The reasons for this facilitated access are the privacy, delegation and public regulation considerations discussed in this Note. Two other justifications are less compelling. First, lan-

when the basis of the regulation is economic, not health or safety considerations.

c. Consent by Contract—The federal government annually purchases billions of dollars worth of goods and services from thousands of private-sector suppliers.³¹⁴ Uniformly, federal contracts with private suppliers include provisions controlling the manner in which the contractors are to perform and allowing federal agencies access to the records of the contractors. Both the agency contracting for the goods or services³¹⁵ and the General Accounting Office³¹⁶ customarily are given such access under the terms of the contracts.

guage in some opinions has suggested that "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973). But to speak of consent is to engage in fiction. A closely supervised company may resign itself to regulation as an unpleasant fact of life, but it hardly assents to imposition of the regulation. When significant rights are at stake, the law should be reluctant to make fictional ascriptions of consent. The argument is better couched in terms of privacy, delegation, and the need for regulation.

The second untenable justification for easier access is historical. Some courts adverted to an analogue of the closely regulated industry factor, to wit, whether the target of the inspection demand operates in an industry "affected with a public interest." See *Bartlett Frazier Co. v. Hyde*, 65 F.2d 350, 351-52 (7th Cir.), cert. denied, 290 U.S. 654 (1933); *Cudahy Packing Co. v. United States*, 15 F.2d 133, 136-37 (7th Cir. 1926); *FTC v. Baltimore Grain Co.*, 284 F. 886, 888-89 (D. Md. 1922), aff'd, 267 U.S. 586 (1925). The difficulty with this concept is its elasticity. The more interdependent the national economy becomes, the easier it is to define an industry as invested with a public interest. Thus, the concept could come to justify virtually plenary agency access to corporate documents. See 1 *Davis II*, supra note 38, § 4:21 at 289. However, the concept of business affected with a public interest has now disappeared from federal constitutional law. 1 *Davis I*, supra note 293, at 205; see *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 244-46 (1941); *Nebbia v. New York*, 291 U.S. 502, 531-39 (1934); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 390 (7th Cir.), cert. denied, 311 U.S. 690 (1940).

³¹⁴ In 1964, the federal government purchased \$65.2 billion of goods and services, \$38.2 billion from private contractors. In 1978, its purchases ran to \$154.3 billion, \$84.1 billion from private contractors. Employment and Training Admin., U.S. Dep't of Labor & Office of Human Dev. Servs., U.S. Dep't of HEW, *Employment & Training Report of the President 386* (1979). These contracts involved 2.6 million private sector employees in 1964, and 3.3 million in 1978. *Id.* at 388.

³¹⁵ The first major case espousing the expansive construction of agency access powers, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), arose out of a subpoena issued by the Secretary of Labor for the payroll records of a federal contractor in order to measure the contractor's compliance with the Walsh-Healey Public Contracts Act. For a more recent example, see *Computer Sciences Can Still Bid on Some Defense Agency Jobs*, *Wall St. J.*, Jan. 28, 1981, at 12, col. 3 (Defense Department to receive bids of one contractor only on certification that the company would provide access to its records and facilities).

³¹⁶ 41 U.S.C. § 254(c) (1976), applicable to most federal agencies, provides in relevant part: All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the [GAO] shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. 10 U.S.C. § 2313(b) (1976) makes similar provision for Department of Defense procurement contracts.

Agency demands to inspect the documents of federal contractors should be examined leniently by the courts when those documents bear on the provisions of their contracts with the government. The contractor, in assenting to the provisions of the contract, forfeits any expectation of privacy as to the documents bearing on its performance under those provisions. The Supreme Court has remarked: "[Fourth amendment] rights may be waived. And when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."³¹⁷

There are two instances, however, in which a contractor should be able to avoid production under an agency's document demand. First, enforcement of the contract term might exceed the agency's jurisdictional ambit. Here, the target's lack of a reasonable expectation of privacy would not be controlling; the reason for denying enforcement of the subpoena would be the principle of delegation, not the fourth amendment.³¹⁸ Second, the demand might exceed the scope of the contractual provisions and therefore the target's consent to access. In this circumstance, the target entity's normal fourth amendment rights would be undiminished. In the main, this is a matter of contractual and statutory interpretation not implicating the themes discussed in this Note.³¹⁹ A different question, however, is germane. It is unclear what body is competent to decide when that scope has been exceeded. *Endicott Johnson Corp. v. Perkins*³²⁰ held that determination of an agency's range of access under a contract is

³¹⁷ *Zap v. United States*, 328 U.S. 624, 628 (1946).

³¹⁸ The court in *SmithKline Corp. v. Staats*, 483 F. Supp. 712 (E.D. Pa.), cert. denied, 449 U.S. 1038 (1980), stated: "In determining whether the GAO's purpose in this case was authorized by the statutes, we must look at the source of the GAO's power to examine contractors' records. . . . [A]n agency's power to investigate can be exercised only for the purpose for which the authority was granted." *Id.* at 720. The court held that the fact that the GAO is an agency of Congress, not of the executive branch, did not disturb the applicability of the general principles of administrative law. *Id.*

³¹⁹ Nonetheless, these issues hardly are routine and have generated conflicts among lower federal courts. Compare *Bristol Laboratories Div. v. Staats*, 620 F.2d 17, 18 (2d Cir. 1950) (per curiam), *aff'd per curiam* by an equally divided Court, 101 S. Ct. 2037 (1981), with *United States v. Abbott Laboratories*, 597 F.2d 672, 674 (7th Cir. 1979), and *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 912-14 (7th Cir.), cert. denied, 439 U.S. 959 (1978). Judge Pell's strong dissent in *Eli Lilly*, 574 F.2d at 918, is particularly telling. *Eli Lilly* has occasioned substantial commentary. See, e.g., Case Comment, *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors: Eli Lilly & Co. v. Staats*, 92 Harv. L. Rev. 1148 (1979); Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes*, 74 Nw. U.L. Rev. 122 (1979).

³²⁰ 317 U.S. 501 (1943).

primarily for the agency itself.³²¹ In more recent decisions, though, reviewing courts have assumed that power of determination themselves.³²² Because of the importance of the principle that administrative investigations be subject to effective judicial scrutiny,³²³ the view of the recent cases is preferable.

d. Market Control—The extent of market control exercised by the target of an access demand is relevant to the stringency with which a court should review the demand for overbreadth. First, large corporations are not at the core of concern of the fourth amendment. The Supreme Court has noted that, although corporations have privacy rights, the central mission of the fourth amendment is to protect individuals.³²⁴ The further a case is removed from searches and seizures directed against individuals, the less pressing become fourth amendment concerns. A continuum exists in which privacy interests weaken as the focus shifts from individuals to small businesses to large corporations. Thus, the privacy concern applies with less force when the records of large corporations are sought by federal agencies.³²⁵

³²¹ *Id.* at 507.

³²² See *Bristol Laboratories Div. v. Staats*, 620 F.2d 17, 18 (2d Cir. 1980) (*per curiam*), *aff'd per curiam* by an equally divided Court, 101 S. Ct. 2037 (1981); *United States v. Abbott Laboratories*, 597 F.2d 672, 674 (7th Cir. 1979); *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 912-14 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978); *SmithKline Corp. v. Staats*, 483 F. Supp. 712, 720-23 (E.D. Pa.), *cert. denied*, 449 U.S. 1038 (1980).

³²³ See note 158 and text accompanying notes 138-43 *supra*.

³²⁴ See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 338 n.9 (1978) (Stevens, J., dissenting) ("[A]lthough the Fourth Amendment extends its protection to commercial buildings, the central importance of protecting residential privacy is manifest."); cf. *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places.").

³²⁵ The continuum analysis suggested here derives force by analogy to judicial treatment of the fifth amendment's privilege against self-incrimination. The Supreme Court has held that the privilege is "essentially a personal one, applying only to natural individuals." *United States v. White*, 322 U.S. 694, 698 (1944). But, an organization too may claim the privilege if the institution merely represents "the private or personal interests of its members." *Id.* at 701. In separating institutions that may claim the privilege from those that may not "[t]he test . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or groups interests only." *Id.* Under this test, the records of sole proprietorships and general partnerships have been held privileged, *Schultz v. Yeager*, 293 F. Supp. 794, 800 (D.N.J. 1967), *aff'd per curiam* on other grounds, 403 F.2d 639 (3d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969), while those of limited partnership syndicates, *United States v. Cogan*, 257 F. Supp. 170, 173 (S.D.N.Y. 1966), and corporations, see *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 322 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963), have been found unprotected. This treatment approximates the continuum suggested here for fourth amendment purposes. The analogy between the fourth and fifth amendments is particularly appropriate in light of repeated observations by the Supreme Court that in the area of agency inspection of corporate documents the origins and purposes of "the fourth and fifth amendments run almost into each other." *Boyd v. United States*, 116 U.S. 616, 630 (1886); see *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205 (1946).

Second, there is a compelling public interest in effective oversight of the activities of major corporations. It has become a commonplace that in some respects major corporations exercise virtually as much control over the lives of American citizens as do units of government.³²⁶ The very existence of the antitrust laws, for example, reflects suspicion about the desirability of vast agglomerations of private economic power.³²⁷ The need to ensure adequate public control of the power of such organizations must be included in the balance of interests when large corporations with substantial power over the markets in which they operate³²⁸ are the targets of agency access requests.³²⁹

³²⁶ See Fischer, *The Lost Liberals*, 194 *Harper's Magazine* 385, 392-93 (1947). See also Latham, *Equality & Power in the Maxwell Memorandum*, 40 *U. Det. L.J.* 457, 463-64 (1963).

A substantial body of polling data in recent years has demonstrated considerable public perception of the dangers of large concentrations of private economic power. One review of polling results found "a general suspicion of [corporate] bigness and concentrated power. Public opinion makes a clear distinction between big business and small business, showing sympathy for the latter" *Regulation*, May-June 1979, at 59. Another concluded that "most Americans believe that business institutions are growing larger and perhaps less responsive to the public interest" and that the role of government regulation is the use of "one huge entity to fight another," *Regulation*, Nov.-Dec. 1978, at 11.

³²⁷ Indeed, in recent years, a large number of proposals have been introduced in Congress to strengthen the antitrust laws, this in response to growing concern about corporate abuses of power. See *Regulation*, May-June 1979, at 7-8.

³²⁸ In defining market power, courts might avail themselves of the rich body of antitrust literature on the subject. See generally L. Sullivan, *Handbook of the Law of Antitrust* 74-93 (1977). But, in view of the importance of expedition in deciding subpoena enforcement cases, it would be well to admit only limited empirical evidence, relying more on rough calculation than absolute precision.

³²⁹ In addition to the justifications for the market power factor already noted, two other considerations loom. First, the regulatory agencies may be less likely to use their powers abusively against large corporations than small companies. One commentator has argued that the ICC "has consistently favored the large established trucking companies and insulated them from competition from smaller truckers" and that similar favoritism toward established companies pervades the other federal regulatory commissions as well. Schwartz, *Crisis in the Commissions*, *The Progressive*, Aug. 1959, at 11-13. In the time since that argument was advanced, charges that federal agencies exhibit a massive regulatory bias against competition have not abated. See, e.g., Moore, *Deregulating Surface Freight Transportation*, in *Promoting Competition in Regulated Markets* 68-69 (A. Phillips ed. 1975).

Second, large corporations are better able to bear the monetary burdens of producing documents. Companies endowed with palpable measures of market control may be able to spread the expenses over a broad segment of society by passing costs through to consumers of its products. The possibility of loss spreading has figured in the reasoning of legal scholars in other areas. See, e.g., G. Calabresi, *The Cost of Accidents* 50-54 (1970) (possibility of loss spreading as a factor in allocating losses in tort cases); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. Legal Stud.* 83, 91-92 (1977) (ability of a corporation to self-insure against losses through spreading costs as a factor in deciding which party should bear the loss caused by nonperformance of contracts). But cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729-35 (1977); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S.

2. Application of the Factors

The four factors discussed above are, if present, relevant to determining the extent of overbreadth permissible in a document demand.³³⁰ None of the factors is absolute, however. To illustrate the

481, 489 (1968) (fact that direct purchaser of goods bought at fixed prices passed on extra costs to its customers is irrelevant to computation of damages for violation of Clayton Antitrust Act). In addition, should it be forced to swallow the costs of production itself, the large corporation has the financial wherewithal to absorb the expense with minimum dislocation. This fact was influential to a district court that upheld against a challenge of burdensomeness extensive FTC subpoenas directed at six major tobacco manufacturers. *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979) ("the costs of compliance are minor relative to the financial positions of these corporations"), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980). A consideration of this sort appropriately is part of the determination of burdensomeness, the final part of the approach recommended here. See text accompanying notes 373-79 *infra*.

³³⁰ Three other plausible—but ultimately unsatisfactory—factors should be discussed. First, since the extent of the regulatory interest always is important in document inspection cases, it would be natural to think that a reviewing court should consider in each case the significance of the matter under investigation. However, for courts to do so routinely would subvert the constitutional allocation of responsibilities between the judicial and executive branches of government. Courts should not substitute their own notions of which matters are important and which are not for the judgments of the agencies charged with supervision of particular areas. Moreover, it is not always apparent at the inception of an investigation how great the stakes ultimately may prove to be.

Second, some have ventured that the level of judicial scrutiny should vary with the type of power the investigation is designed to support. For example, according to one commentator:

The analysis in *Morton Salt* [see text accompanying notes 61-66 *supra*] 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. Thus, it can be argued that *Morton Salt's* reasoning is persuasive only when an agency is acting in other than an adjudicative function.

Mogel, *The Effect of a Claim of Privilege Upon the Subpoena Power of an Administrative Law Judge*, 28 Drake L. Rev. 67, 74-75 (1978) (footnote omitted). A suggestion that agency access powers should be broader when the agency contemplates later rulemaking than when it intends later to issue a complaint would be unappealing. For one thing, the same privacy rights and concerns about delegation of authority are present in the investigation regardless of what later action may be taken. Also, an agency may be unsure at the start of the investigation what action it ultimately will take, or even whether it will proceed to later substantive action at all. And, when an agency does have an initial inclination, its intention may change during the inquiry as unexpected information comes to light. See W. Gellhorn, C. Byse & P. Strauss, *Administrative Law: Cases and Comments* 562-65 (7th ed. 1979); 1 Davis I, *supra* note 293, at 165. Finally, investigations often entail multiple purposes, some adjudicatory and some not. *Id.* at 164; see *Association of Nat'l Advertisers v. FTC*, 460 F. Supp. 996, 997 (D.D.C. 1978) (*mem.*), *rev'd on other grounds*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

A third suggestion was offered by Justice Murphy: "If the proposed examination under the subpoena or the proceeding itself would be relatively brief and of a limited scope, any doubt should ordinarily be resolved in favor of the agency's power. If it promises to be protracted and burdensome to the party, a more searching inquiry is indicated." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 516 (1946) (dissenting). This suggestion, for all its appeal to notions of proportionality, has drawbacks. Agencies would be tempted to parcel each large investigation into several smaller ones to achieve minimal review in piecemeal fashion. Moreover, small-scale investigations, as well as large-scale ones, may compromise important privacy rights.

proposed process, it is helpful to reconsider the facts of some important document inspection decisions in light of the factors just adduced. The discussion that follows is concerned with the overbreadth determination only; it presupposes that the threshold of materiality developed earlier in this section has been met.

First, some of the principal "jurisdictional defense" cases are illustrative. In *Endicott Johnson Corp. v. Perkins*,³³¹ the subpoena was addressed to a government contractor. Thus, under the third factor, because the Secretary of Labor is empowered by statute to monitor the performance of the contractor, her demand for documents related to the work done under the contract would likely be upheld. But in *Endicott Johnson* the issue was whether the documents sought were from plants that were doing unrelated work; thus the third factor alone is not helpful. The other factors must be consulted. First, unless the plants in dispute were working on the contract, the company was not obligated by law to maintain the documents sought. Second, footwear manufacturers are not in a traditionally closely regulated industry. Third, although *Endicott Johnson* was a major footwear producer, the market was a relatively competitive one, and beyond the target corporation's control. For these reasons, there was nothing to indicate that concerns about agency abuse, privacy, and delegation of powers were weaker than usual or that the regulatory interest was stronger. The Supreme Court, therefore, in enforcing the subpoena without a demonstration that the plants involved were under the jurisdiction of the Secretary, went too far. It should have allowed the district court to conduct an evidentiary hearing on the question of jurisdiction.

A somewhat harder problem was presented by *SEC v. Brigadoon Scotch Distributing Co.*³³² To determine whether they had violated the securities laws in connection with the sale of whiskey warehouse receipts, the SEC subpoenaed from three whiskey distributors various customer and employee lists, copies of literature and advertising, listings of corporate affiliations and officers and shareholders, financial statements, and names of transactionally involved banks and lenders.³³³ The distributors contended that the SEC lacked jurisdiction because the documents being sold were documents of title to specific casks of scotch whiskey (arguably not covered by the securities laws), not whiskey warehouse receipts (covered by the laws).³³⁴ Al-

³³¹ 317 U.S. 501 (1943), discussed at text accompanying notes 48-54 *supra*.

³³² 480 F.2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

³³³ *Id.* at 1050-51.

³³⁴ *Id.* at 1052.

though conceding that serious jurisdictional questions had been raised,³³⁵ the court, relying in part on *Endicott Johnson*, held that it was for the Commission in the first instance to determine the scope of its authority and therefore enforced the subpoenas.³³⁶

Brigadoon Scotch did not involve required records, government contractors, or firms with substantial market control. The second factor, a tradition of close governmental oversight, arguably was present, however. The Supreme Court has found that traffic in liquor has long been subjected to close public supervision and inspection.³³⁷ Therefore, judicial leniency in review of administrative subpoenas directed at whiskey distributors normally would be expected.³³⁸ However, in *Brigadoon Scotch* the subpoenas did not emanate from one of the agencies charged with the responsibility of moderating "the evils at hand"³³⁹ in the liquor trade.³⁴⁰ Thus, the usual significance of the second factor was substantially diminished in *Brigadoon Scotch*. Although liquor dealers may have little expectation of privacy as to agencies that are part of the regulatory apparatus set up over the industry, they may justifiably entertain a greater expectation as to other agencies. Since the SEC is not part of that apparatus, and since there was serious question whether the target companies were dealing in securities, the possibility of derogation of the principle of delegation of administrative power was greater than in most cases involving closely regulated industries. And, since the investigation did not aim at the health and safety effects of liquor traffic, the special public interest that led to close governmental supervision of liquor dealers was not implicated in the case. On the whole, therefore, the balance of the factors suggests that the leniency of the court's treatment of the subpoenas was not warranted. Before the subpoenas were enforced, the SEC should have been required to demonstrate its jurisdiction over the practices of the distributors. Document inspection should have been authorized only as to those records tending to establish the securities or nonsecurities nature of the documents being sold by the distributors.³⁴¹

³³⁵ *Id.*

³³⁶ *Id.* at 1052-54.

³³⁷ *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

³³⁸ See generally text accompanying notes 295-313 *supra*.

³³⁹ *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970).

³⁴⁰ By contrast, the physical inspection at issue in *Colonnade Catering* was conducted by the Alcohol and Tobacco Tax Division of the Treasury Department, which has the statutory duty to superintend the administration of federal excise tax laws in the liquor industry, *id.* at 72-73.

³⁴¹ Records relevant to this purpose certainly would have been far fewer than the sum of the records sought in the Commission's subpoenas. See text accompanying notes 167-70 *supra* for discussion of the technique of bifurcated review.

The "purpose" cases also illustrate the application of the factors discussed in this section. In *CAB v. Frontier Airlines, Inc.*,³⁴² the CAB served a subpoena on a small air carrier, seeking production of all of the minutes of meetings of the firm's Board of Directors and Executive Audit Committees over a period of one year.³⁴³ The court refused to enforce the subpoena because the Board never specified the purpose of its investigation.³⁴⁴ Under the principles developed in this Note, this holding was in error. Present were two of the four factors: the records sought were required to be kept by law,³⁴⁵ and the target firm is in an industry long subject to substantial regulation. Both of these circumstances undercut the carrier's expectation of privacy in the records, diminished the likelihood that the investigation was beyond the agency's delegated authority, and reflected more than usually compelling public interests in effective regulation.³⁴⁶ The objectives of the disclosure of purpose requirement³⁴⁷ were met in *Frontier* without disclosure ever occurring: the definition provided by the legal requirement that the minutes be kept coupled with the clarity of the CAB's demand gave Frontier adequate notice of what was sought and, since all the minutes were within the Board's sphere of authority, disclosure of purpose was unnecessary to permit the reviewing court to determine whether the demand was reasonably related to a legitimate regulatory activity of the Board.

However, had the Board's demand been for records other than those required to be maintained, the holding in *Frontier* would have been correct, despite the presence of the closely regulated industry factor. Even a closely regulated industry retains some privacy rights,³⁴⁸ and even an agency regulating such an industry may overstep the bounds of its delegation. Thus, had a history of close supervision been the only factor present in *Frontier*, requiring the CAB to disclose its purpose would have been a reasonable outcome of overbreadth analysis. It is because this factor was compounded by the required records factor that the *Frontier* result was too restrictive.

³⁴² 468 F. Supp. 443 (D. Colo. 1979), discussed at text accompanying notes 186-93 *supra*.

³⁴³ *Id.* at 444.

³⁴⁴ *Id.* at 447.

³⁴⁵ See 14 C.F.R. § 249.13 (1981).

³⁴⁶ See text accompanying notes 289-313 *supra*.

³⁴⁷ See text accompanying note 183 *supra*.

³⁴⁸ See *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976); *Burlington N., Inc. v. ICC*, 462 F.2d 280, 288 (D.C. Cir.) (Leventhal, J., dissenting from denial of rehearing *en banc*), cert. denied, 409 U.S. 891 (1972).

Two other "purpose" cases, *CAB v. United Air Lines, Inc.*³⁴⁹ and *FTC v. Texaco, Inc.*,³⁵⁰ may be considered in tandem. In *United*, the CAB presented a far-reaching subpoena to a large air carrier. The subpoena was not limited to records required to be maintained,³⁵¹ and, beyond some intimations that examination of the carrier's political campaign contributions may have been one of its intentions, the Board refused to disclose the purpose of its investigation.³⁵² Because of this refusal, the court invalidated the subpoena.³⁵³ In *Texaco*, the FTC subpoenaed from major natural gas producers a large volume of material, including background information such as annual reports, subsidiaries, officers, customers, net production, and sales volume, as well as data relating to natural gas reserves, drilling operations, and the relation between proved natural gas reserves and price rates permitted by the Federal Power Commission.³⁵⁴ Although the investigation certainly involved the question whether a conspiracy existed among the producers to underreport proved natural gas reserves, the FTC insisted that the investigation was not inspired solely by this purpose, although the Commission refused to define what additional purposes might have been involved.³⁵⁵ Despite this sketchy explanation of purpose, the court upheld the subpoenas, with only minor modifications.³⁵⁶

Both cases involve in substantial measures the factors discussed in this section. As to a tradition of close regulation, air carriers, of course, are subject to pervasive oversight by the CAB.³⁵⁷ And, at the time of *Texaco*, the Federal Power Commission exercised significant supervision, including rate-making, over the natural gas industry,³⁵⁸

³⁴⁹ 542 F.2d 394 (7th Cir. 1976), discussed at text accompanying notes 177-85 *supra*.

³⁵⁰ 555 F.2d 862 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977), discussed at text accompanying notes 195-204 *supra*.

³⁵¹ See 542 F.2d at 395 for the dimensions of the CAB's subpoena.

³⁵² *Id.* at 395-96.

³⁵³ *Id.* at 402-03.

³⁵⁴ 555 F.2d at 868-69.

³⁵⁵ See *id.* at 874-75.

³⁵⁶ *Id.* at 875-77, 885.

³⁵⁷ This pervasive control is being phased out gradually. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. §§ 1301, 1302, 1305-1308, 1371-1374, 1376, 1378, 1379, 1382, 1384, 1386, 1389, 1461, 1471, 1473, 1482, 1482a, 1490, 1504, 1551, 1552, 1711, 1729 (Supp. III 1979)) (termination of Civil Aeronautics Board and transfer of certain functions to other regulatory bodies, to be completed by December 31, 1985).

³⁵⁸ Indeed, *Texaco* developed out of actions taken in reaction to an earlier FPC ratemaking proceeding. See 555 F.2d at 869-70. Congress has since transferred the FPC's ratemaking power in the area of natural gas to the Department of Energy. Department of Energy Organization Act, Pub. L. No. 95-91, §§ 301(b), 402(a)(1)(C), 91 Stat. 565 (1977) (codified at 42 U.S.C. §§ 7151(b), 7172(a)(1)(C) (Supp. III 1979)).

although its powers were somewhat less than those of the CAB over airlines.³⁵⁹ This shortfall, however, is offset by another factor in *Texaco* arguing for lenient scrutiny of the agency's demand. The FTC's subpoenas included virtually all important producers of natural gas in the United States.³⁶⁰ The market control factor, therefore, was more strongly present in *Texaco* than in most subpoena enforcement cases.³⁶¹

Thus, on the basis of the factors, there is strong justification for viewing at least part of the subpoenas with favor. In each case, production should have been ordered at least to the extent that: (1) the information sought was located in records required by the CAB or the Federal Power Commission, and (2) the documents were related to the intimated purposes of monitoring campaign contributions and checking for possible underestimation of reserves. As to any documents the production of which would not have been required by these guidelines, the circuit courts in the two cases should have remanded to the appropriate district courts to allow the agencies additional oppor-

Much of the complexity of *Texaco* resulted from the fact that the FTC investigation covered much of the same ground that earlier had been traversed by the FPC. An issue of collateral estoppel thus arose, see 555 F.2d at 877-81 (majority opinion) and 923-35 (Wilkey, J., dissenting). This Note does not consider the effects of this issue.

The prior FPC proceedings had concluded that the producers were not underreporting reserves. In allowing the FTC to reexamine that issue, the *Texaco* decision seemed to ignore that the expertise of the FPC was undeniably greater than that of the FTC in the technical aspects of the natural gas industry. See id. at 928 (Wilkey, J., dissenting). *Texaco*, therefore, may illustrate a phenomenon discussed by Professor Richard Stewart. See Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975). Professor Stewart argues that the traditional model of the administrative process, in which expert agencies receive delegated powers from Congress and are subject to judicial review to ensure that the delegation is not exceeded, see id. at 1671-76, is breaking down. It is being replaced, he contends, by a pluralistic model in which all relevant interests are represented in agency proceedings on particular matters, see id. at 1711-813. If the intent of *Texaco* was to broaden the traditional process of regulation of the natural gas industry by allowing consumer interests, through their institutional representative, the FTC, to participate in reserve estimation and therefore (because prices allowed depend in part on reserve estimations) indirectly in rate-setting, the *Texaco* decision may be in the spirit of the pluralistic, interests-representation model described by Professor Stewart.

³⁵⁹ Compare 15 U.S.C. §§ 717-717w (1976) (FPC) (superseded by transfer of ratemaking for natural gas companies to Department of Energy in 1977) with 49 U.S.C. §§ 1321-1325 (1976 & Supp. III 1979) (CAB).

³⁶⁰ See 555 F.2d at 862.

³⁶¹ In addition to the reasons for facilitated agency access usually associated with the market power factor, see text accompanying notes 324-29 *supra*, the fact that the subpoenas in *Texaco* blanketed the important producers means that there was less likelihood that any producer would be harmed, relative to its important competitors, by either production or the possibility of later disclosure by the agency of the information produced.

tunities to explain why the documents were reasonably related to investigations within the agencies' powers.³⁶²

The "particularization of relevance" cases³⁶³ provide a final fertile field for illustrating the application of the factors to be balanced in subpoena enforcement cases. In *Adams v. FTC*,³⁶⁴ the FTC issued administrative subpoenas against a large dairy concern and three retail grocery chains. No required records, closely regulated industry, or government contracts were involved. The companies, although sizable, were not in positions to dominate their markets. Thus, there were no urgent reasons either to discount the privacy and delegation principles or to exalt the need for regulation; the balance of factors demanded strict review of the breadth of the Commission's subpoenas. The court properly examined with care the probable relevance of each category of document sought, limiting or denying enforcement as to those categories for which the Commission had not established a probable need.³⁶⁵

In *CAB v. Hermann*³⁶⁶ and *FTC v. Crafts*,³⁶⁷ the Supreme Court took a different tack, enforcing administrative subpoenas without evaluating the extent to which the agencies had shown the likely relevance of each category of document sought to a regulatory purpose proper for the agency to pursue. Yet, in *Crafts*, none of the four factors triggering relaxed scrutiny was present. Moreover, in that case, the FTC demands were quite broad,³⁶⁸ and there was substantial doubt that the FTC had authority to regulate the industry involved.³⁶⁹ The balance of factors was strongly in favor of more stringent review of the FTC's subpoena than the Supreme Court was prepared to compel. As in *Adams*, the agency should have been held to a burden of proving the probable relevance to a proper purpose of the particular documents it sought to inspect.

³⁶² This was the approach followed in *Southern Ry. v. ICC*, 553 F.2d 1345 (D.C. Cir. 1977). In this case, the ICC sought to examine records, many or all of which were not required by law, of a railroad without disclosing its purpose and without crystallizing the scope of its demand. The circuit court, instead of following *United's* approach of denying enforcement, remanded the case to the district court to afford the Commission another opportunity to explain the relevance of the documents. See *id.* at 1349-50.

³⁶³ See text accompanying notes 207-36 *supra*.

³⁶⁴ 296 F.2d 861 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962), discussed at text accompanying notes 211-15 *supra*.

³⁶⁵ See 296 F.2d at 867-71.

³⁶⁶ 353 U.S. 322 (1957) (per curiam), rev'g *Hermann v. CAB*, 237 F.2d 359 (9th Cir. 1956), discussed at text accompanying notes 218-28 *supra*.

³⁶⁷ 355 U.S. 9 (1957) (per curiam), rev'g *Crafts v. FTC*, 244 F.2d 882 (9th Cir. 1957), discussed at text accompanying notes 229-34 *supra*.

³⁶⁸ See 244 F.2d at 884-86, 894-95.

³⁶⁹ See *id.* at 891-94.

The Court was on somewhat firmer ground in *Hermann*. There, the target company, an air carrier, was in an industry traditionally subject to close economic regulation. And the subpoena, including "practically all records, books and documents" over a 38-month period,³⁷⁰ inevitably embraced some required records. However, some countervailing considerations existed. Although subject to close supervision, the company retained some privacy rights.³⁷¹ Moreover, on the market power criterion, the target company could not dictate behavior in the market or pass on the costs of producing the documents.³⁷² The balancing of these factors performed by the Supreme Court was not sufficiently careful. A better approach would have been to enforce the subpoena as to any required records involved, but to remand the request for other documents to the lower courts with instructions that the CAB be compelled to demonstrate specifically the relevance of these other documents to a regulatory purpose the Board was empowered to pursue.

C. Burdensomeness

Complying with document inspection demands sometimes can impose significant hardship in monetary expense and loss of confidentiality and managerial autonomy on target individuals and companies.³⁷³ To a limited extent, the overbreadth factors discussed in the preceding subsection consider such hardships.³⁷⁴ But a more systematic and comprehensive calculation of these costs than the overbreadth factors alone can provide is necessary. This Note, therefore, proposes a third and residual step of judicial scrutiny in subpoena enforcement proceedings: upon a showing by the target entity that it would suffer real and appreciable hardship were it to comply, the court should order production only subject to adequate protective conditions.

³⁷⁰ 237 F.2d at 361.

³⁷¹ Although the privacy rights of closely regulated companies are limited, they still do exist. See *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976); *Burlington N., Inc. v. ICC*, 462 F.2d 280, 288 (D.C. Cir.) (Leventhal, J., dissenting from denial of rehearing en banc), cert. denied, 409 U.S. 891 (1972).

³⁷² Indeed, the approval of the CAB itself would have been required for any attempt by the airline to revise its rates. 49 U.S.C. § 1373 (1976 & Supp. III 1979).

³⁷³ See text accompanying notes 103-15 supra.

³⁷⁴ See text accompanying notes 244, 1-46 supra. Especially important are the required records, see text accompanying notes 280-94 supra, and market power, see text accompanying notes 324-29 supra, factors.

The proposed step better guards against undue burden than does the reasonable relation rule as currently interpreted. Surely, courts are now able to do anything that they could do under this proposed third step.³⁷⁵ The difference, however, is that the measure suggested here would accord burdensomeness full stature as part of the constitutionally mandated balancing of all interests³⁷⁶ and thus would guarantee its consideration. In contrast, burdensomeness has no formal and assured place in the current reasonable relation rule; at most, it now is a matter of equitable discretion.³⁷⁷ This has two consequences: (1) there is no guarantee that compliance hardships will be considered at all; and (2) when considered, the target often must meet extremely stringent conditions of proof.³⁷⁸

To prevent excessive inhibition of valid regulation, however, the step of scrutiny proposed here would be subject to three limitations. First, the target entity should bear the burden of establishing onerousness.³⁷⁹ Second, the fact that some burden—no matter how small—would be involved would not warrant judicial intervention. To avoid dilatory arguments by target entities, the court should attend to only real and appreciable hardships. Finally, the proper remedy for such hardships would be not to deny enforcement of the subpoena but to condition production on mitigation of the hardships. The remedy should be flexible, fashioned according to the burden. When the concern is financial oppression, cost sharing may be in order. For confidentiality concerns, orders limiting those to whom the agency may further disclose produced documents are appropriate, as may be notice requirements allowing targets to challenge in court any further disclosure. For concerns that document retrieval or removal for exam-

³⁷⁵ See text accompanying notes 117-21 *supra*.

³⁷⁶ See text accompanying notes 127-29 *supra*.

³⁷⁷ See text accompanying notes 122-25 *supra*.

³⁷⁸ See text accompanying notes 131-34 *supra*.

³⁷⁹ The step proposed here would disturb the reasoning of *SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979), but, because the burden of proof would be on the target, not its result. In *OKC*, the target argued that compliance would have cost it \$100,000. *Id.* at 1036. The court rejected the burdensomeness argument in part because "[t]he general rules are well established that expense alone does not render a subpoena unreasonable and that the recipient of a subpoena duces tecum is required to bear the costs of compliance." *Id.* This view, of course, would be vacated by formal adoption of burdensomeness scrutiny, which would make no assumption in advance as to whether sufficient expense, even standing alone, could be unduly burdensome. Yet, *OKC*'s result was correct. The \$100,000 estimate was supported by an affidavit that was so "[l]aced with qualifications that indicate a lack of personal knowledge [that] the affidavit tend[ed] to support the view that OKC itself is not certain how burdensome compliance will be." *Id.* at 1036 n.6. *OKC*, therefore, could not sustain its burden of proof. The burdensomeness scrutiny suggested in this Note is designed to guard against actual oppression, not mere fancy or conjecture.

ination may paralyze management, inspection may be ordered on the target's premises or staggered schedules of production may be imposed.

D. Comparison with Prior Document Inspection Doctrines

In its response to the tension between the regulatory interest on the one hand and the values of privacy and delegation on the other, this Note takes a position between those of the early cases³⁸⁰ and the current decisions.³⁸¹ It better recognizes legitimate public need for regulation by dispensing with the highly inhibiting doctrines³⁸² of the early line of decisions.

The approach recommended here differs from the current expansive application of the reasonable relation rule in two respects. First, it furnishes more detailed elaboration of its general precepts, thus minimizing the likelihood of decisional inconsistency. Second, it better safeguards privacy rights and the principle of delegation. The generally followed elaboration of the reasonable relation rule, the *Morton Salt* formulation,³⁸³ attempts to protect these values in three ways, each of which is achieved as well by the standards proposed here.³⁸⁴ And, the approach suggested in this Note provides three protections unmatched by the current approach. It allows extrajurisdictional or unreasonable document demands to be meaningfully challenged at the subpoena enforcement proceeding, that is, at a stage early enough to avert harms that otherwise would accrue. It affords more precise guidance as to particularization of the request, specification of the purpose, and degree of fit between request and purpose, thereby minimizing the effect of the policy orientation of individual judges. Finally, it guarantees exacting consideration of burdensomeness by elevating that element to formal constitutional stature.

CONCLUSION

The reasonable relation standard is firmly established as the litmus by which the validity of administrative subpoenas for documents is measured. The bare words "reasonable relation," however,

³⁸⁰ See text accompanying notes 19-36 *supra*.

³⁸¹ See text accompanying notes 47-73 *supra*.

³⁸² See text accompanying notes 37-45 *supra*.

³⁸³ See text accompanying notes 100-01 *supra*.

³⁸⁴ The condition that the inquiry be within the agency's authority to undertake is subsumed under the threshold of materiality and also is reflected in the overbreadth factors. The commands that the subpoena be not too indefinite and that the information sought be reasonably relevant are part of the overbreadth analysis.

are empty of content. If used as a mere incantation, the phrase can be employed to justify starkly inconsistent results. And, if invoked to symbolize a rigid philosophy, it can be used to subvert vital public regulatory needs on the one hand or important privacy rights and key restraints on administrative lawlessness on the other.

It is essential, therefore, to give more specific content to the reasonable relation standard. This Note attempts to achieve this end by focusing attention on the presence or absence in each case of a set of factors derived from the underlying interests that must be balanced when federal regulatory agencies attempt to gain access to private documents.

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