

STUDENT COMMENT

AGENCY ACCESS TO CREDIT BUREAU FILES: FEDERAL INVASION OF PRIVACY?

The complexities and demands of modern government have required the collection of enormous amounts of specific and statistical data by government agencies.¹ To facilitate the use of such data, the federal agencies have increased their use of electronic computers.² However, the rapid growth of computer use by federal agencies has concomitantly increased the possibility that almost every aspect of an individual's life will soon be within easy reach of whomever operates the computer console.³ The belief that increased data gathering would lead to widespread government surveillance⁴ was one of the fears underlying the storm of protest that persuaded Congress in 1967 to set aside proposals for a National Data Center to collect and consolidate into one central computerized system all information collected by federal, state and local government.⁵ Opposition centered on the fear that such a center would destroy individual privacy, so that by becoming data rich we would become privacy poor.⁶ Improvements in computer storage⁷ heightened the likelihood that without adequate safeguards, the prospects of government surveillance would be awesome.⁸ Now, with the advent and growth of the commercial credit bureau,⁹ the possibility that a national data center may be developing in private hands has attracted congressional interest.¹⁰

¹ The files of the federal government alone contain over 2.8 billion names, 264.5 billion police records, 342 million medical records, and 79 million psychiatric files. Hearings on Computer Privacy Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess. 2 (1967) [hereinafter cited as Computer Privacy Hearings].

² See Hearings on Data Processing and Management in the Federal Government Before a Subcomm. of the House Comm. on Government Operations, 90th Cong., 1st Sess. 1 (1967) [hereinafter cited as Data Processing Hearings].

³ See A. Westin, *Privacy and Freedom* 163 (1967).

⁴ *Id.* at 158.

⁵ See generally, Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1091, 1129-40 (1968); Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 Harv. L. Rev. 400 (1968).

⁶ See Hearings on Commercial Credit Bureaus Before a Subcomm. of the House Comm. on Government Operations, 90th Cong., 2nd Sess. 2 (1968) (Remarks of Congressman Gallagher) [hereinafter cited as Commercial Credit Bureau Hearings].

⁷ New laser techniques would permit storage of 645 million bits of digital data on one square inch of magnetic tape. Westin, *supra* note 3, at 167.

⁸ *Id.* at 167-68.

⁹ See generally, Commercial Credit Bureau Hearings, *supra* note 6; Comment, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 Geo. L. J. 509 (1969); Miller, *supra* note 5, at 1140-54.

¹⁰ Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Sen. Comm. on Banking and Currency, 91st Cong., 1st Sess. 2 (1969) [hereinafter cited as S. 823 Hearings].

The primary function of the commercial credit bureau is the collection of credit information about individuals in order to assist credit grantors, such as commercial banks, in deciding whether or not to extend credit to a given individual.¹¹ The credit grantors pay a fee to the credit bureau in return for the information in the credit bureau's files.¹² This information provides "a concise and accurate report on a man's past activities in the credit field, his general character, and his ability to undertake a contract."¹³ Special credit reports can be obtained regarding a man's habits, reputation and neighborhood opinions.¹⁴ With this information, the credit grantor has a complete economic profile of an individual.¹⁵

The potential utility of such a broad range of information has been recognized by the agencies of the federal government, and recent years have seen increased use by federal agencies of credit bureau services.¹⁶ These agencies have included the Internal Revenue Service,¹⁷ the FBI¹⁸ and other agencies.¹⁹ The use of private credit bureaus by federal agencies has given rise to the objection that information collected for one purpose is being used for another without the consent of the individuals involved.²⁰ Moreover, such information is acquired by the federal agencies without any pledge of secrecy or any requirement that such information be kept confidential.²¹

Testimony has revealed that federal agencies may acquire credit information from credit bureau files both through voluntary compliance on the part of the credit bureau²² or through service of a subpoena by the federal agency upon the credit bureau.²³ An example of the latter form of acquisition is afforded in the recent decision of *United States v. Davey*,²⁴ which marked the culmination of efforts by one

¹¹ Commercial Credit Bureau Hearings, supra note 6, at 16.

¹² The fees charged by one company ranged from 40 to 63 cents per report, depending upon whether the request for information was handled by telephone or by letter. Commercial Credit Bureau Hearings, supra note 6, at 157.

¹³ Id. at 2.

¹⁴ Id. at 17.

¹⁵ Id. at 49.

¹⁶ Computer Privacy Hearings, supra note 1, at 2; Commercial Credit Bureau Hearings, supra note 6, at 136.

¹⁷ Commercial Credit Bureau Hearings, supra note 6, at 136.

¹⁸ The FBI is one of the largest users of credit bureaus. S. 823 Hearings, supra note 10, at 92.

¹⁹ These include government credit grantors, such as the Federal Housing Administration and the Veterans Administration. Commercial Credit Bureau Hearings, supra note 6, at 90-91.

²⁰ Symposium, The Computerization of Government Files: What Impact on the Individual?, 15 U.C.L.A. L. Rev. 1371, 1428 (1968); See Pipe, Privacy: Establishing Restrictions on Governmental Inquiry, 18 Am. U. L. Rev. 516, 540-41 (1969); Commercial Credit Bureau Hearings, supra note 6, at 135.

²¹ Computer Privacy Hearings, supra note 1, at 2.

²² Commercial Credit Bureau Hearings, supra note 6, at 136; S. 823 Hearings, supra note 10, at 149.

²³ S. 823 Hearings, supra note 10, at 231.

²⁴ 426 F.2d 842 (2d Cir. 1970).

credit bureau to challenge the right of the Internal Revenue Service (IRS) to gain access to its files.

In *Davey*, Gerald Davey, the President of Credit Data Corporation of New York, resisted a summons issued by the IRS pursuant to Section 7602 of the Internal Revenue Code of 1954.²⁵ The summons demanded that Credit Data release to IRS all credit information contained in its files concerning credit extended to certain taxpayers by commercial banking institutions or any other credit grantors.²⁶ After Davey refused to grant the IRS request, the IRS sought enforcement of the subpoena in federal district court under Section 7402(b) of the Code.²⁷ The district court granted the enforcement order, but required the government to pay Credit Data 75 cents for each credit report.²⁸ Davey and Credit Data appealed the order to the United States Court of Appeals for the Second Circuit.

Davey and Credit Data raised several issues on appeal,²⁹ including the contention that the summons constituted an unreasonable search and seizure.³⁰ The court rejected all of the appellants' contentions summarily,³¹ and concluded that there was ample evidence to find that the IRS was acting in good faith, and that the summons was proper, appropriate and necessary to the investigation by the IRS into the tax liability of the taxpayers.³² As such, the summons was neither unreasonable nor out of proportion to the ends sought.³³ More importantly, the court added:

The government has the right to require the production of relevant information wherever it may be lodged and regardless of the form in which it is kept and the manner in which it may be retrieved so long as it pays its reasonable share of the costs of retrieval.³⁴

The *Davey* case graphically illustrates the competing interests

²⁵ Int. Rev. Code of 1954, § 7602(2) authorizes the Secretary or his delegate to summon "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . to produce such books, papers, records or other data . . . as may be relevant or material to such inquiry. . . ."

²⁶ 426 F.2d at 843 n.2.

²⁷ Int. Rev. Code of 1954, § 7402(b) provides:

If any person is summoned under the internal revenue laws to appear, to testify or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers or other data.

²⁸ 426 F.2d at 844.

²⁹ Credit Data raised the following issues not here relevant: (1) whether the summons was burdensome; (2) whether compliance would injure its business; (3) whether the work product of Credit Data should be protected; (4) whether or not Credit Data possessed the information sought by the IRS. *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 845.

³⁴ *Id.*

often encountered in attempting to reconcile the legitimate fact-finding function of government agencies with the concept of individual privacy. In apparent response to the *Davey* type situation, legislation intended to bar access to credit bureau files by the IRS and other non-credit granting government agencies is pending in Congress.³⁵ This comment will examine this pending legislation in light of the basis and historical development of the administrative subpoena power, the growing concept of a "right to privacy," and the legitimate investigative needs of government agencies in seeking to fulfill their legislative mandates. The conclusion will suggest a possible means of balancing the often conflicting interests of agency fact finding and individual privacy.

I. THE ADMINISTRATIVE SUBPOENA POWER

A. *Early Restrictions on Government Access to Private Papers*

The clash between government fact finders and the interests of privacy is probably as old as organized government.³⁶ Restrictions on government access to private papers were imposed upon Congress in the early case of *Kilbourn v. Thompson*,³⁷ when the Supreme Court barred Congress from imprisoning one Kilbourn for contempt when he refused to comply with a *subpoena duces tecum* issued by a committee of the House of Representatives. In its opinion, the Court held that the resolutions authorizing the investigation and the imprisonment of Kilbourn were in excess of the power conferred upon the House by the Constitution, and that the House had no authority to compel testimony from a witness beyond what the witness chose to volunteer.³⁸ The Court made clear that neither the House nor the Senate "possesses a general power of making inquiry into the private affairs of the citizen."³⁹

Restriction on the government's access to private papers was made more comprehensive by the later decision of *Boyd v. United States*,⁴⁰ where the Court struck down a statute compelling the production of private papers for use in a criminal prosecution merely upon service of a notice to produce whatever papers were sought. The Court declared that the Fourth Amendment embodied principles applicable to all invasions of individual privacy,⁴¹ and that:

[i]t is not the breaking of his doors and the rummaging of his drawers, that constitutes the offense, . . . but any forcible and compulsory extortion of a man's own testimony or of his

³⁵ S. 823, which is discussed *infra*, at 123. A companion bill, H.R. 10139, is presently pending in the House Banking and Currency Committee.

³⁶ 1 K. Davis, *Administrative Law* § 3.01, at 160 (1958).

³⁷ 103 U.S. 168 (1880).

³⁸ *Id.* at 196.

³⁹ *Id.* at 190.

⁴⁰ 116 U.S. 616 (1886).

⁴¹ *Id.* at 630.

private papers to convict of a crime or forfeit his goods, is within the condemnation of that judgment.⁴²

Therefore, the Court held that the statute constituted not only a violation of the Fifth Amendment, but also an unreasonable search and seizure in violation of the Fourth Amendment.⁴³ By implying that forced production of private papers could constitute an unreasonable search and seizure, the Court cast into doubt both the ability of Congress to issue subpoenas and its power to delegate such authority to the agencies it created.

This doubt was compounded when, in *Harriman v. ICC*,⁴⁴ the Court barred the Interstate Commerce Commission on narrow statutory grounds from conducting general investigations except in response to a specific complaint.⁴⁵ Agency use of subpoena power was further limited in *FTC v. American Tobacco Co.*,⁴⁶ where the Federal Trade Commission was barred from issuing a subpoena without a showing of probable cause. The Court declared that:

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 on the possibility that they may disclose evidence of crime.⁴⁷

In a later case, the Court viewed agency use of the subpoena as arbitrary, without safeguards, and equivalent to the practices of the Star Chamber.⁴⁸ The Court would not adhere to "[t]he philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow. . . ."⁴⁹ Given the Court's fear of wholesale "fishing expeditions," it appeared that the federal agencies would never be able to make broad use of the subpoena power in fulfilling their statutory responsibilities.

B. *Development of the Modern Principles Governing Administrative Subpoena Power*

Notwithstanding the Court's apparent opposition to upholding broad subpoena powers for federal agencies, the proponents of administrative subpoena power continued to challenge this policy. The crucial issue was the ability of government regulatory agencies to con-

⁴² Id.

⁴³ Id. at 634-35. Although concurring in the result, a contrary view was expressed by one member of the Court who could not agree that a statute authorizing production of evidence in a pending suit could be seen as authorizing an unreasonable search and seizure. Id. at 641.

⁴⁴ 211 U.S. 407 (1908).

⁴⁵ Id. at 419.

⁴⁶ 264 U.S. 298 (1924).

⁴⁷ Id. at 305-06.

⁴⁸ *Jones v. SEC*, 298 U.S. 1, 28 (1936).

⁴⁹ Id. at 27.

duct investigations which were essential to the proper fulfillment of their congressional mandates. In many instances, the conduct of investigations is an agency's most important function. Such investigations often explore broad, basic, policy problems affecting all of the agency's work, including both adjudication and rule-making.⁵⁰ Agency investigations not only aid in adjudication and lead to the development of new rules,⁵¹ but may also provide the basis for recommendations to Congress for additional legislation.⁵² Consequently, the proponents of administrative subpoena power would not acquiesce in the Court's attitude.

As the needs of modern government increased, additional regulatory agencies were created. Correspondingly, the need for more factual data increased,⁵³ and Congress responded with both increased use of the subpoena power itself, and increased grants of such power to federal agencies. Thus, in *McGrain v. Daugherty*,⁵⁴ the Court was again faced with an attempt by Congress to subpoena information and witnesses needed to enable it to exercise efficiently a legislative function under the Constitution.⁵⁵ The Court in *McGrain* concluded that the history of legislative power supported the principle that Congress, through its own process, has the "power of inquiry—with process to enforce it—[as] an essential and appropriate auxiliary to the legislative function."⁵⁶ Although not explicitly overruling *Kilbourn v. Thompson*,⁵⁷ the Court so distinguished that case as to leave little doubt that Congress possessed broad investigatory power in aid of proposed legislation or in aid of general fact finding.⁵⁸ Similarly in *Smith v. ICC*,⁵⁹ the Court upheld legislation expanding the right of the ICC to conduct investigations as an aid to recommending new legislation. In *Smith*, the Court observed:

The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this Court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public.⁶⁰

These cases foreshadowed a progressive diminution of the Court's opposition to agency subpoena power. By 1940, this opposition had all but ceased. In that year, a court of appeals upheld the right of an administrative agency to require the disclosure of information "regardless of whether there is any pre-existing probable cause for believ-

⁵⁰ 1 K. Davis, *Administrative Law* § 3.02, at 164 (1958).

⁵¹ *Id.* at 165.

⁵² *Id.*

⁵³ *Id.* § 3.04 at 174.

⁵⁴ 273 U.S. 135 (1927).

⁵⁵ *Id.* at 160.

⁵⁶ *Id.* at 174.

⁵⁷ Discussed *supra*, at p. 113.

⁵⁸ 273 U.S. at 171.

⁵⁹ 245 U.S. 33 (1917).

⁶⁰ *Id.* at 42.

ing that there has been a violation of the law."⁶¹ The Supreme Court denied certiorari,⁶² thereby further indicating its more liberal attitude toward the use of administrative subpoenas.

Whatever doubts may have remained were put to rest by the Court in subsequent decisions. In *Endicott Johnson Corp. v. Perkins*,⁶³ the Court made clear that a district court's duty was to enforce an administrative subpoena when requested to do so.⁶⁴ Subsequently, in *Oklahoma Press Publishing Co. v. Walling*,⁶⁵ the Court directed its attention to the question of the necessity of showing probable cause to justify the use of a subpoena in administrative investigations. Noting first the confusion that had existed with respect to the Fourth Amendment's role in administrative investigations, the Court observed that, in its opinion, this confusion had developed because cases of actual search and seizure were confused with cases involving constructive searches and seizures.⁶⁶ In reality, the Court concluded, these decisions could be reconciled.⁶⁷ Recognizing the problem of balancing the public interest against individual privacy,⁶⁸ the Court held that in order to justify a subpoena it was not necessary for the agency to affirm that a specific violation of the law existed as is the case in obtaining search warrants.⁶⁹ For an agency subpoena, the Court continued, probable cause is satisfied

by the court's determination that the investigation is authorized by Congress, and is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized" . . . comes down to specification of the documents to be produced be adequate, but not excessive, for the purposes of the relevant inquiry.⁷⁰

In the later case of *United States v. Morton Salt Co.*,⁷¹ the Court's opinion reflected its now more lenient attitude with respect to the "fact-gathering" functions of administrative agencies in fulfilling their statutory responsibilities. The Court emphasized that:

[T]he only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to

⁶¹ *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 390 (7th Cir. 1940).

⁶² 311 U.S. 690 (1941).

⁶³ 317 U.S. 501 (1943).

⁶⁴ *Id.* at 509.

⁶⁵ 327 U.S. 186 (1946).

⁶⁶ *Id.* at 202.

⁶⁷ *Id.* at 202-09.

⁶⁸ *Id.* at 203.

⁶⁹ *Id.* at 208-09.

⁷⁰ *Id.* at 209.

⁷¹ 338 U.S. 632 (1950).

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, if one chooses to call it that, 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 evidence but can investigate merely on suspicion that the law is being violated or even just because it wants assurance that it is not.⁷²

Thus, for an investigation to be valid, the Court concluded that it is sufficient that (1) the inquiry is within the authority of the agency; (2) the demand is not indefinite; and (3) the information sought is reasonably relevant.⁷³

Although the administrative subpoena power is extensive, such power is not without limits. As the opinion in *Boyd* indicated, a subpoena may constitute an unreasonable search and seizure in violation of the Fourth Amendment. This usually occurs if the subpoena is unduly vague or overly broad.⁷⁴ As such, the essence of the Fourth Amendment's prohibition is that the disclosure sought shall not be unreasonable.⁷⁵

The Court's decision in *CAB v. Hermann*⁷⁶ adequately reflects the Court's attitude toward the defense that a subpoena is unreasonably broad. In that case, the Court reversed a court of appeals decision, and upheld a district court's enforcement of a subpoena served upon the appellees in a proceeding before the CAB. The subpoena called for practically all documents of the appellee accumulated during a 38-month period.⁷⁷ The district court enforced the subpoena on the basis that:

[t]his Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves which this Court is not called upon to do at this stage of the proceedings.⁷⁸

In reversing, the court of appeals concluded that:

[I]n 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

⁷² Id. at 642-43.

⁷³ Id. at 652.

⁷⁴ *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946).

⁷⁵ Id.

⁷⁶ 353 U.S. 322 (1957).

⁷⁷ *Hermann v. CAB*, 237 F.2d 359, 361 (9th Cir. 1956). The district court opinion was not reported.

⁷⁸ Id. at 362.

by the court When the trial court said that, comparing the allegations of the complaint with the demands of the subpoenas, he could not say that any of the documents were irrelevant or immaterial to the proceedings, he failed to pass upon the judicial question presented to him in the case.⁷⁹

In a *per curiam* reversal, the Supreme Court upheld the district court's order finding that the court "duly enforced the Board's right to call for documents relevant to the issues of the Board's complaint, with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents."⁸⁰

The preceding line of cases supports the conclusion that the decision in *United States v. Davey* was correct. Unless the Court should reverse the trend of cases upholding the broad investigative powers of federal agencies, the right and the power of federal administrative agencies to compel the production of documents which the agencies consider relevant to their investigations seems settled in the agencies' favor. However, in recent years the Supreme Court has manifested an awareness of a comprehensive "right to privacy," protected by various constitutional safeguards. The recognition of this "right to privacy" could provide a new basis for challenging administrative subpoenas.

II. PRIVACY AND THE FOURTH AMENDMENT

A. *Historical Development of the Concept of "Right to Privacy"*

The concept of a right to privacy has its origins in the Fourth Amendment, which was the colonial response to the British practice of issuing general warrants permitting wholesale searches and seizures of personal property and effects.⁸¹ So strong was the colonial opposition to this practice that James Otis resigned as Attorney General of Massachusetts rather than bear the responsibility for issuing such warrants.⁸² The primary intent of the Fourth Amendment, accordingly, was preservation of the privacy and security of the people against arbitrary invasions by government officials.⁸³ The tort of invasion of privacy committed by private individuals was first explicated in the famous article by Warren and Brandeis in the *Harvard Law Review*.⁸⁴ The article argued that every individual possesses a funda-

⁷⁹ Id. at 362-63.

⁸⁰ 353 U.S. at 323.

⁸¹ See Comment, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 362-66 (1921). For a brief history of the Fourth Amendment, see Lasson, *The History and Development of the Fourth Amendment* (1937).

⁸² 34 Harv. L. Rev. 361, 364. John Adams believed that the Otis speech in opposition to general warrants was an important step toward the Revolutionary War, and that, "Then and there the Child Independence was born." Id. at 365.

⁸³ *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *McDonald v. United States*, 335 U.S. 451, 455-56 (1949).

⁸⁴ Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The

mental right to privacy which consists of the right to control publicity given to certain aspects of his life.⁸⁵ Despite many decisions based upon this concept, the precise scope of this right to privacy has been difficult to define and its exact meaning is unclear.⁸⁶

Although the right to protection from private invasions of privacy has been recognized,⁸⁷ no comparable protection, other than the Fourth Amendment's prohibition against unreasonable searches and seizures, exists with respect to the government.⁸⁸ With the increased use of government questionnaires, the individual's option to withhold certain aspects of his life has all but disappeared. Refusal to give information might mean the loss of a job⁸⁹ or the denial of welfare benefits⁹⁰ or the inability to procure a driver's license.⁹¹ Since the government acquires most of its information as a precondition to receiving government assistance,⁹² it is very difficult for the citizen applicant to deny the government the information it desires.

However, the Supreme Court's decision in *Griswold v. Connecticut*⁹³ has raised the possibility that the right to freedom from government intrusion extends beyond the limits of ordinary search and seizure. In striking down a Connecticut statute which barred dissemination of contraceptive devices, the Court concluded that various constitutional guarantees created zones of privacy,⁹⁴ and that various cases support the legitimacy of the concept of "right to privacy."⁹⁵ Although the exact implications of *Griswold* are still unclear, the dissenters believed that its potential implications are quite broad. Commenting upon the amorphous nature of the concept of "privacy," Mr. Justice Black declared that:

"[P]rivacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning, but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.⁹⁶

article traced various developments in the law of libel, slander and defamation, and concluded that in reality the courts were striving to protect a different right, the right of privacy, and that such a right should be declared by the courts.

⁸⁵ Id. at 198; *Lopez v. United States*, 373 U.S. 427, 449-50 (1963).

⁸⁶ See Davis, What Do We Mean By "Right to Privacy"?, 4 S.D.L. Rev. 1 (1959); *Griswold*, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

⁸⁷ See generally, W. Prosser, *Handbook of the Law of Torts* 635-44 (2d ed. 1955).

⁸⁸ No tort for invasion of privacy exists under the Federal Tort Claims Act, and, in fact, the torts of defamation and slander are specifically barred. 28 U.S.C. §§ 2671-80 (1964).

⁸⁹ Symposium, The Computerization of Government Files: What Impact on the Individual?, 15 U.C.L.A. L. Rev. 1371, 1427 (1968).

⁹⁰ Id. at 1426.

⁹¹ Id. at 1427.

⁹² Id. at 1426.

⁹³ 381 U.S. 479 (1965).

⁹⁴ Id. at 484.

⁹⁵ Id. at 485.

⁹⁶ 381 U.S. at 509 (Black, J., dissenting opinion).

Later cases have further illustrated the Court's increasing recognition of the comprehensive right to privacy which was first recognized in *Boyd v. United States*.⁹⁷ Privacy has been held to include both a right to anonymity,⁹⁸ and a right to be free from arbitrary and excessive intrusions by government officials.⁹⁹ Furthermore, the Fourth Amendment has been interpreted to protect people, not places,¹⁰⁰ and its protection has been viewed as embodying more than a mere general right of privacy.¹⁰¹ Although the law concerning the constitutional ramifications of the right to privacy is still in a state of flux, this uncertainty, when viewed in light of the preceding cases, suggests that the right to privacy will be the subject of considerable future litigation.

B. *Balancing Government vs. Private Interest*

The protection of the Fourth Amendment is not without limits. Since it proscribes only *unreasonable* searches and seizures, the Fourth Amendment does not shield one from a valid investigation concerning a legitimate government interest. A leading case dealing with the problem of balancing private and government interest is *Camara v. Municipal Court*,¹⁰² where the Supreme Court held that municipal health inspectors must obtain a search warrant before searching a private dwelling for violations of the municipal health code. Further, the Court reaffirmed the rule that probable cause is the standard by which the constitutional requirement of reasonableness is fulfilled.¹⁰³ As such, the need for inspection must be weighed in terms of the reasonable goals of code enforcement.¹⁰⁴ Citing *Oklahoma Press Publishing Co. v. Walling*,¹⁰⁵ the Court reiterated the principle that "if a valid public interest justifies the intrusions contemplated, then there is probable cause to issue a suitably restricted search warrant."¹⁰⁶ More importantly, the Court added that

[s]uch an approach . . . gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.¹⁰⁷

However, it is a judicial officer—a magistrate—not a policeman or

⁹⁷ 116 U.S. 616 (1886); See text at notes 40-43 supra.

⁹⁸ See cases cited in *Lopez v. United States*, 373 U.S. 427, 470 (1963) (Brennen J., dissenting opinion).

⁹⁹ *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

¹⁰⁰ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁰¹ *Id.* at 350.

¹⁰² 387 U.S. 523 (1967).

¹⁰³ *Id.* at 534.

¹⁰⁴ *Id.* at 535.

¹⁰⁵ 327 U.S. 186 (1946).

¹⁰⁶ 387 U.S. at 539.

¹⁰⁷ *Id.*

administrator who determines when the public interest is sufficiently strong as to require private interest to yield.¹⁰⁸ In a housing inspection case, for example, the magistrate can consider the needs of reasonable code enforcement, the passage of time and the condition of the entire area in determining whether the issuance of the warrant is reasonable.¹⁰⁹ In essence, with respect to the balancing of interests in Fourth Amendment cases, the nature of the government interest involved must be weighed against the nature of the intrusion contemplated.¹¹⁰

C. *Application to Subpoenas*

The recent broadening of the concept of privacy casts doubt upon the continuing validity of the decisions upholding broad administrative subpoena power. Arguably, if privacy has the broad limits envisioned by the *Griswold* dissent, then administrative agencies should also be required to observe the same standards of probable cause that were required in *Camara*.¹¹¹ It is submitted, however, that imposition of the requirement that an administrative agency appear before a magistrate and meet the standards of probable cause is not required by the Constitution, and should not be required by the Congress. Such a requirement would serve neither the interests of government nor of the private citizen.

First, as the history of the administrative subpoena power demonstrates, the right of the agencies to issue subpoenas was established only after a long struggle between those who wished to see government unfettered in its quest for information, and those who were willing to surrender their privacy only in the face of a paramount government need. The law governing agency subpoena power, which was finally clarified by the Supreme Court during the 1940's has remained constant to the present.¹¹² The only constitutional issues in determining the propriety of an administrative subpoena are (1) whether the subpoena is authorized by law, and (2) whether the scope of the subpoena is so unlimited as to constitute the equivalent of a search. This view is consistent with both the wording of the Fourth Amendment and its historical origins, since although the Fourth Amendment was designed

¹⁰⁸ *Id.* at 532-33; *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

¹⁰⁹ 387 U.S. at 538.

¹¹⁰ *Id.* at 536-37.

¹¹¹ The *Camara* standard and the standard of probable cause for a criminal search warrant are different with respect to what factors the magistrate must consider. Probable cause for issuing a search warrant requires that reasonable grounds exist for the belief that a crime has been committed. See *Draper v. United States*, 358 U.S. 307, 313 (1959). If an informer is involved, probable cause requires both a statement of the underlying circumstances demonstrating why the informer believes a crime is being committed, and a statement demonstrating the credibility of the informer. See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

¹¹² *United States v. Powell*, 379 U.S. 48, 57-58 (1964), is a most emphatic reiteration of the standards set down in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

to prevent untrammelled access by government officials to private effects, the reasonable needs of government were not to be denied. Thus, as the Court in *Oklahoma Press Publishing Co. v. Walling* asserted, administrative subpoenas involve "no question of actual search and seizure."¹¹³ Under this view, the applicability of the Fourth Amendment is properly limited to government actions which constitute either an actual search or its qualitative equivalent.

Secondly, the view that administrative subpoenas are subject to question only on the grounds of lack of authority or overbreadth, quite adequately meets the needs of modern government. As indicated earlier, agency needs for factual data have increased enormously since the 1940's, and the imposition of more stringent subpoena standards upon the agencies would seriously curtail investigations essential to the process of recommending additional legislation and new rules.

Finally, more rigid subpoena requirements would also serve to overburden the magistrates and the courts. Many magistrates, especially in large cities, have such congested calendars that it is almost impossible for them to subject any but the most extraordinary cases to careful scrutiny.¹¹⁴ The adverse effects of increasing the supervisory responsibility of the district courts for enforcing agency subpoenas or of encouraging increased legal resistance to administrative subpoenas would only serve to aggravate court congestion, which is already reaching crisis proportions.¹¹⁵ Federal investigators alone demanded approximately 20,000 reports from a greater New York credit bureau in one year.¹¹⁶ The repercussions which would have resulted had these investigators been required to approach the magistrates or the courts on each of these requests are evident. Either the federal investigators would have abandoned their attempt to secure information which they considered sufficiently important to be willing to pay to receive, or they would have approached the magistrates or the courts with every request, thus placing a severe strain upon the already overburdened federal judicial machinery. Moreover, since the magistrates and the courts could not begin to cope with so great a volume of subpoena requests, subpoenas would probably be issued as a matter of course, with no meaningful evaluation of the requests. Consequently, the magistrates and the courts would become mere "rubber stamps" for the agencies with nothing more gained than the filing of vast amounts of paper in the court records. For these reasons, as Justice Brennan has

¹¹³ 327 U.S. at 195.

¹¹⁴ Report of the President's Commission on Law Enforcement and the Administration of Justice: *The Challenge of Crime in a Free Society* 10 (1967) [hereinafter cited as *President's Crime Commission Report*].

¹¹⁵ The interval between filing a civil complaint and commencement of trial in the Federal District Court for the Southern District of New York is now approximately 39 months, as compared with an average of 13 months in the rest of the country. *New York Times*, June 5, 1970, at 39, col. 4.

¹¹⁶ Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Sen. Comm. on Banking and Currency, 91st Cong., 1st Sess. 92 (1969) [hereinafter cited as *S. 823 Hearings*].

cautioned, the requirements of the Fourth Amendment should not be reduced to a procedural nicety.¹¹⁷ What is needed instead is legislation which will operate to protect individual privacy, while at the same time permit the agencies to obtain information necessary to the fulfillment of their proper and legitimate functions.

III. PROPOSED FEDERAL LEGISLATION

The first legislative attempt to limit the access of the government agencies to commercial credit bureaus is S. 823¹¹⁸ which was introduced by Senator Proxmire and has already passed the Senate.¹¹⁹ The bill is not a direct attack upon the ability of federal agencies to obtain information from the credit bureaus, but seeks to accomplish this purpose indirectly by limiting the persons to whom credit bureaus may lawfully give information.

Under the Senate bill, employers, bona fide credit grantors, insurance companies, and licensing agencies would be permitted to receive reports from credit bureaus.¹²⁰ Non-credit-granting agencies would be limited to receiving identifying information limited to an individual's name, address, former addresses, and present or former places of employment.¹²¹ Such agencies could receive a full report only with the consent of the individual,¹²² or in response to an application for employment.¹²³ The bill would impose penalties on the credit bureau for willful non-compliance¹²⁴ or for grossly negligent non-compliance¹²⁵ in disclosing information to an unauthorized person. Administrative enforcement would be entrusted to the Federal Trade Commission.¹²⁶ Other provisions limit the type of information that may be kept in the reports and require that certain information be removed from the bureau's files when it becomes "obsolete."¹²⁷

Although the proposed bill has merit in protecting the interests of the individual from excessive private invasions of privacy, it does not provide adequate safeguards against government invasions of privacy. Concomitantly, the bill makes no attempt to balance effectively the competing interests of individual privacy and government needs. First, under the bill a credit bureau is required to disclose its information if served with valid court process.¹²⁸ Although Senator Proxmire has expressed the belief that the bill would bar the IRS and other non-

¹¹⁷ *Ker v. California*, 374 U.S. 23, 49 (1963) (Opinion of Brennan, J.).

¹¹⁸ For the text of the bill, see 115 Cong. Rec. S13901 (daily ed. November 6, 1969). All subsequent citations to S. 823 are to this source.

¹¹⁹ 115 Cong. Rec. S.13910 (daily ed. November 6, 1969).

¹²⁰ S. 823 § 604.

¹²¹ *Id.* §§ 603 and 608.

¹²² *Id.* § 604(2).

¹²³ *Id.* § 604(3)(b).

¹²⁴ *Id.* § 616.

¹²⁵ *Id.* § 617.

¹²⁶ *Id.* § 620.

¹²⁷ *Id.* § 605.

¹²⁸ *Id.* § 604(1).

credit-granting agencies, from obtaining credit bureau files,¹²⁹ the bill neither abrogates nor limits the statutory power of the IRS or other federal agencies to subpoena desired information. Certainly enforcement of a subpoena through the district courts would constitute valid court process. Given the ease of enforcing subpoenas, the bill clearly leaves this avenue of government access open. Secondly, the bill fails to take into account the constant exchange of information which takes place between the federal and state governments as well as among the federal agencies themselves.¹³⁰ The federal government exchanges information with 43 states and the District of Columbia.¹³¹ The FBI, for example, puts all of its information into its National Crime Center for exchange with state and local police forces.¹³² Such exchanges will in all likelihood increase as the recommendation of the President's Commission on Law Enforcement that all criminal information be consolidated and made easily available to local police is implemented.¹³³ If state tax or law enforcement agencies obtain information from credit bureaus, the possibility exists that such information may also become available to the federal government through exchange.

On the federal level, data exchanges have increased substantially in recent years,¹³⁴ with over 64 percent of all government information being available for exchange among the agencies.¹³⁵ Furthermore, intra-governmental exchange of information is encouraged under federal law. Public Law 89-306¹³⁶ specifically permits the General Services Administration to establish a system for the exchange and pooling of government information,¹³⁷ and the GSA has expressed the desire to do so.¹³⁸ Under the Budget and Accounting Act,¹³⁹ authority also exists for developing standard computer codes to be used by all federal agencies in order to facilitate the sharing of information.¹⁴⁰ With the recognition of the desirability of a large common data base,¹⁴¹ the need for a common coding system for all the agencies has also been recognized

¹²⁹ S. 823 Hearings, *supra* note 116, at 161, 432-33 (Remarks of Senator Proxmire).

¹³⁰ Hearings on Data Processing and Management in the Federal Government Before a Subcomm. of the House Comm. on Government Operations, 90th Cong., 1st Sess. 2-3 (1969) [hereinafter cited as Data Processing Hearings]; A. Westin, *Privacy and Freedom* 160 (1967); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1091, 1190 (1968) [hereinafter cited as Miller].

¹³¹ S. 823 Hearings, *supra* note 116, at 547.

¹³² Miller, *supra* note 130, at 1191.

¹³³ President's Crime Commission Report, *supra* note 114, at 205-06.

¹³⁴ Data Processing Hearings, *supra* note 130, at 2-3.

¹³⁵ Symposium, *The Computerization of Government Files: What Impact on the Individual?*, 15 U.C.L.A. L. Rev. 1371, 1387-88 (1968).

¹³⁶ 40 U.S.C. § 759 (1964).

¹³⁷ Pub. L. 89-306 § 111(b)(1), 79 Stat. 1127, 40 U.S.C. § 759 (1964).

¹³⁸ Miller, *supra* note 130, at 1134.

¹³⁹ 31 U.S.C. § 1 *et seq.* (1964).

¹⁴⁰ *Id.* § 21.

¹⁴¹ Data Processing Hearings, *supra* note 130, at 5.

as a prerequisite for the most efficient utilization of the government's information.¹⁴² Moreover, since modern computers are able to exchange information automatically with other computer systems, unless some control is imposed, the possibility exists that information in one agency will flow automatically to another. Thus, information lawfully obtained by the Veterans Administration may possibly be acquired by the IRS. Any protection provided by S.823 would be effectively circumvented by any one of these occurrences.

Therefore, although the bill provides some measure of protection against private unauthorized disclosure of information in credit bureau files, S.823 would still permit the IRS and other government agencies to obtain credit bureau information either through administrative subpoena or through the normal course of governmental exchange of information. Future legislation, therefore, should be directed toward the difficult problem of determining just what information the government legitimately needs, and should seek to establish some supervisory control over both the acquisition of that information and its disposition once it is acquired.

IV. SUGGESTED LEGISLATION

A. *The Need for a Computer Agency*

Future legislation should have two objectives: first, recognition of the legitimate needs of government for *certain kinds* of information, and second, recognition of the principle that government has only a *limited* privilege to inquire into the lives of its citizens. It is submitted that the most feasible method of achieving these objectives is through the creation of an independent federal agency, the Data Processing and Management Office (DPMO), which would supervise and coordinate the government's acquisition, storage and release of computerized information.¹⁴³ The different demands of the various federal agencies render it unlikely that a single piece of legislation could encompass the variety of problems each agency faces without becoming massive and unwieldy. The information needs of the Internal Revenue Service will differ greatly from those of the Social Security Administration, and legislation that attempts to limit in one sweep the activities of both could prove totally unworkable. On the other hand, a piecemeal legislative approach will be confusing and, given the nature of the legislative process, may be unable to keep pace with the rapidly developing field of computer technology.

The creation of a Data Processing and Management Office, however, would avoid these problems. The role of the DPMO would be analogous to that of the General Accounting Office. However, instead of being a watchdog over taxpayers' dollars, the DPMO would protect individual privacy against the proclivity of federal agencies for

¹⁴² Id. at 19.

¹⁴³ See Miller, *supra* note 130, at 1238-39.

information collection and exchange. By creating a separate agency, the problem of the DPMO becoming too closely associated with one agency will be avoided, thus insuring that the DPMO will function effectively and impartially.¹⁴⁴

Since agencies view confidentiality requirements as a hindrance to efficient acquisition and use of information,¹⁴⁵ the DPMO would serve an important function by impartially supervising the overall "flow" of information into and out of the federal agencies.

B. Purpose and Function

In enacting the enabling legislation, Congress should declare that the purpose of the DPMO will be to insure the protection of individual privacy while recognizing the legitimate needs of government to obtain required information. This legislation should establish broad standards of confidentiality governing the disclosure and exchange of acquired information, leaving to the DPMO the formulation of precise rules applicable to the respective federal agencies and the multitude of problems peculiar to each agency. Since the DPMO will act as a watchdog on the other agencies, it must necessarily be given access to the records of other government agencies.¹⁴⁶ It will also need the power to promulgate appropriate rules binding upon the other agencies,¹⁴⁷ and adequate power to compel compliance with these rules. Consideration will have to be given to permitting the DPMO to limit the exercise of the subpoena power by other agencies by specifically delineating the types of information which may be gathered by subpoena. Otherwise, any rules promulgated by the DPMO could be circumvented by judicious use of the subpoena power.

The rules promulgated by the agency must protect confidentiality of appropriate information, while not impeding any agency in the fulfillment of its statutory duties. The procedures for promulgating rules should be such as will insure that the DPMO may not act arbitrarily. There must also be adequate provisions for informing the sister agencies and their department heads of the limits placed upon their information gathering and dissemination activities. The DPMO, however, need not be bound by the rule-making procedures set forth in the Administrative Procedure Act,¹⁴⁸ since the agency will be primarily concerned with intra-governmental control and organization,

¹⁴⁴ Hearings on S. 1195 Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary, 89th Cong., 2nd Sess. 1244 (1968).

¹⁴⁵ Hearings on Computer Privacy Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess. 28 (1967) [hereinafter cited as Computer Privacy Hearings].

¹⁴⁶ The Bureau of the Budget already possesses such authority. See 31 U.S.C. § 21 (1964).

¹⁴⁷ By way of analogy, 31 U.S.C. §§ 18(a)-(b) grant to the Bureau of the Budget authority to determine whether information sought by an agency is really necessary to the agency's purpose.

¹⁴⁸ 5 U.S.C. § 1001 et seq. (1964).

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and the APA was designed to guarantee due process in rule-making procedures affecting non-governmental activities.

The rules promulgated by the DPMO should cover at least four principal areas: (1) information collection, (2) disclosure and exchange, (3) destruction of obsolete information, and (4) sanctions for unlawful disclosure.

1. *Collection of Information*

At the present time, federal agencies request from individuals whatever information they desire, and until recently, practically no one has questioned the validity of such requests. However, recent House hearings on the 1970 Census have amply demonstrated that Americans would no longer submit passively to even census questions.¹⁴⁹ The DPMO should independently determine the types of information legitimately required by each agency. Such an approach would not be novel, since statutory authority presently exists for the Bureau of the Budget to make a similar determination for budgetary purposes.¹⁵⁰

In making that determination at least three factors should be considered: (1) necessity for the information, (2) the nature of the information sought, and (3) the intended use of the information. Necessity should be justified by the agency seeking the information and not accepted as a matter of course. If the information is of the opinion or hearsay type concerning a particular individual, such information should be eliminated unless it is absolutely required in carefully defined cases, such as those involving national security. If the information gathered or sought is in the nature of a public opinion survey, or has been gathered for statistical purposes, such as the census, then possibly a broader range of permissible questions may be allowed. On the other hand, information obtained, for example, to determine eligibility for public assistance, should be confined to those questions specifically relevant to the question of eligibility as defined in the pertinent statutes and regulations. The DPMO would possess the expertise and flexibility to develop regulations conducive to these ends, and if required, exceptions could be permitted in cases of exceptional need.

2. *Disclosure and Exchange*

In considering questions of disclosure and exchange, the DPMO should be guided by standards similar to those suggested in connection with determining the propriety of initial data collection. A realistic appraisal of the types of information each agency actually needs in order to fulfill its statutory duties should serve as the basic guideline for determining whether one agency should have access to another

¹⁴⁹ See generally, Hearings on the 1970 Census Questions Before the House Comm. on Post Office and Civil Service, 89th Cong., 2d Sess. (1966).

¹⁵⁰ 31 U.S.C. §§ 18(a)-(b) (1964).

agency's information. Such an appraisal will also have to be made with respect to the various state agencies which are able to utilize information stored in the government's computer banks.

To achieve maximum efficiency of exchange, two multi-agency computer systems have been suggested: the federated system, and the cluster system.¹⁵¹ In a federated system, each agency would have its own computer, and would be free to exchange information with other agencies as circumstances required.¹⁵² In a cluster system, agencies utilizing somewhat similar information, such as the FAA and the CAB, would be grouped on the same central computer system, but there would be no exchange among the various clusters.¹⁵³ The DPMO would have to decide which type of system to adopt after weighing the advantages and disadvantages of each. Lastly, the DPMO will have to regulate the programming of the computer systems in order to prevent the automatic flow of information from one system to another among the various agencies. Although this is a difficult problem, without such a safeguard many advantages inherent in a watchdog agency such as DPMO would be lost.

3. *Destruction of Obsolete Information*

Testimony has already indicated that information may remain in government computer banks long after it has become obsolete. The FHA, for example, has admitted that information may stay in its system for six or seven years after it has become obsolete.¹⁵⁴ The DPMO should prescribe rules designed to combat this problem as effectively as possible. Senator Proxmire's bill makes some provision for this by placing limits on the retention in credit bureau computer banks of bankruptcies, judgments, pending or settled suits, tax liens, uncollectable accounts, and arrest records.¹⁵⁵ These provisions could provide a useful starting point in formulating similar rules for implementation by the DPMO. In any event, some authority other than the federal agencies must be charged with the responsibility of determining what information should be eliminated from agency computer systems, and this authority must also have the power to enforce its decisions.¹⁵⁶

4. *Sanctions*

Finally, provisions will have to be made to provide for sanctions against government employees or anyone else who unlawfully discloses

¹⁵¹ Symposium, *The Computerization of Government Files: What Impact on the Individual?*, 15 U.C.L.A. L. Rev. 1371, 1450-51 (1968).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Hearings on Commercial Credit Bureaus Before a Subcomm. of the House Comm. on Government Operations, 90th Cong., 2d Sess. 39 (1968).

¹⁵⁵ S. 823 § 605.

¹⁵⁶ See 31 U.S.C. §§ 18(a)-(c), 21 (1964) which purport to give the Bureau of the Budget some coordinating authority over information in agency files.

information, whether such disclosure be made willfully or negligently. Creation of a cause of action for unlawful disclosure of information should be considered in order to compensate individuals damaged by a breach of confidentiality. In the alternative, sanction enforcement powers could be vested in the DPMO itself, with provisions for strict liability and fixed fines, thereby relieving injured parties of the difficult problems often encountered in proving damages. Without some sanctions, the temptation would doubtless arise to tap into the government's computer system for private gain.¹⁵⁷

CONCLUSION

The problem of balancing individual privacy against government needs in the area of information gathering is indeed a troublesome one. The legitimate needs of government will not be met if federal agencies are stripped of their subpoena power, and are compelled to seek a court order each time they need information. As shown earlier, the results of such a procedure would have a disastrous impact upon both the private and the public sector.

It is suggested that the government voluntarily limit itself in the area of information gathering and storage, in a manner that will insure both privacy for the individual and flexibility for modern governmental purposes. Vesting supervision and control of the government's computerized information in one supervisory agency provides a means of guaranteeing that the government's needs will be met, while individual privacy is protected from unnecessary and repetitious governmental probing.

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¹⁵⁷ Computer Privacy Hearings, *supra* note 145, at 5.