Conclusion

Because of the vital public interest in a coordinated transportation system, the provisions of the Act relating to motor carriers are certainly desirable. It is considered futile to seek unity in this field by regulating a part of it, while permitting the rest to operate unhindered. To demand a coordinated system is to demand control of all. However, in attempting to achieve this desired result, it is unfortunate that the legislators did not follow more closely the approved Texas statute. By rejecting the tried for the untried, they have raised a legal barrier which may prove difficult to surmount in the event of a constitutional test. In addition, some of the provisions of the Act have a potentiality for contravening the due process requirements of the Fourteenth Amendment, but a well considered course of action on the part of the Commission may prevent these potentialities from becoming realities. Ultimately, then, much of the success of Pennsylvania's regulation of contract carriers will depend upon an administration that is judicious and tempered with practicality.

S. T. M.

NOTES

Taxation of Contributions of Appreciated Property to Partnership Capital in Kind

Because of its anomalous characteristics, the partnership has proved troublesome in the field of taxation as well as in other branches of the law. From an early stage, it has been deemed advisable, for purposes of taxation of income, to disregard the entity theory treating partnerships as juristic persons similar to corporations, and to adopt the aggregate theory piercing the collective form to the individual partners. Thus income to a partnership has been treated in the Revenue Acts as income to the individual partners, and transfers of property as between partnership and partners have been ignored by the Treasury Department for purposes of taxation, since they are deemed analogous to a transfer of a man's property to himself. This treatment has proved satisfactory in the ordinary case of contributions in cash to partnership capital, but serious difficulties have been encountered in the case of contribution of capital in the form of property, the value of which has appreciated over cost or other basis to the transferor at the time of contribution.

For example, A contributes property worth $100,000 to a partnership, the basis of the property in his hands being $50,000. B contributes $100,000 in cash. A and B each receive a half interest in the "capital" contributed and in future earnings. Is A to be taxed on the "pre-partnership" appreciation of

1. The problem of the proper treatment of the partner-partnership relationship has been particularly difficult in connection with the Bankruptcy Act in considering whether discharge of one discharged the other. See Note (1929) 29 Col. L. Rev. 1134.
2. See 4 PAUL & MERTENS, LAW OF FEDERAL INCOME TAXATION (1934) § 33.01.
3. 49 Stat. 1709 (1936), 26 U. S. C. A. § 181 (1934) : "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity." See historical note to the effect that identical or similar provisions have appeared in the Revenue Acts of 1932, 1928, 1926, 1924, 1921, 1918, 1917, 1916, and 1913. The Excess-Profits Tax Act of 1917 (§ 201) imposed a tax on partnerships as such, but was abandoned the following year.
4 PAUL & MERTENS, op. cit. supra note 2, § 33.01, n. 1.
$50,000 at the time he contributes the property to the firm? If not, and the partnership sells the property for $100,000, may the "pre-partnership" appreciation of $50,000 be taxed at that time, or does the partnership have a basis of the value at the time of contribution, so that the "pre-partnership" appreciation escapes taxation until the firm is liquidated and dissolved? These and innumerable related problems have troubled the Treasury Department and the taxpayer for years, and it appears that no solution satisfactory in either the legal or the practical sense has yet been discovered.

The Present Law and Its Application

The Revenue Act of 1936 provides that the basis of property contributed to a partnership "... shall be the same as it would have been in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. ..." The Treasury Department has taken the position that no gain or loss is recognized to the transferor upon such a transfer, because no gain or loss is realized by him at that time. Thus, although the value of the property at the time of contribution to the partnership determines the extent of the transferor's interest in the partnership capital and may at the same time determine the extent of his interest in partnership profits, the Treasury Department disregards the value for purposes of taxation until the property is subsequently sold by the partnership. Upon such disposition, the transferor is taxed upon the whole of the "unrealized" appreciation prior to contribution or upon as much thereof as the partnership "realizes" from the sale, apparently on the theory that by force of the partnership agreement, this part of the gain is the transferor's "distributive share, whether distributed or not, of the net income of the partnership for the taxable year". The alternative, which the Treasury Department apparently has not chosen to adopt, would be to tax the appreciation prior to contribution, insofar as it was "realized" at the time of sale, to all the partners according to their proportionate shares of the earnings. This scheme would more easily fit in with the statutory provision for taxing

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7. U. S. Treas. Reg. 94, Art. 113 (a) (13)-1: "The basis of property contributed in kind by a partner to partnership capital ..., is cost or other basis thereof to the contributing partner." The regulation assumes that no gain or loss is "recognized to the transferor upon such a transfer"; since there is no non-recognition provision in the statute covering this type of case, the ruling must be based on the assumption that no gain or loss is realized, since non-recognition is authorized only where the statute expressly provides for it. See G. C. M. 10092, XI-I Cum. Bull. 114, 115 (1932); Miller, Hendricks & Everett, Reorganizations and Other Exchanges in Income Taxation (1931) 248.
8. See Graham & Katz, Accounting in Law Practice (1932) § 45.
9. U. S. Treas. Reg. 94, Art. 113 (a) (13)-1: "... On sale or other disposition of such contributed property by the partnership the gain or loss, determined on such transferred basis ..., (i.e. basis of the transferor) shall be taxed.
10. U. S. Treas. Reg. 94, Art. 113 (a) (13)-1: The gain ..., shall be prorated in determining the distributive shares of the partners according to their gain or loss ratios on the disposition of a partnership asset under the partnership agreement." The regulation does not make it clear that the contributing partner is to be taxed on all the gain representing appreciation prior to contribution. Such a view was taken by the Treasury Department, however, in explaining a regulation under the 1928 Act which approximated the basis provisions incorporated in § 113 (13) of the Revenue Acts of 1934 and 1936. See G. C. M. 10092, XI-I Cum. Bull. 114, 115 (1932); Min. 4311, XIV-I Cum. Bull. 208 (1935).
13. See (1934) 34 Col. L. Rev. 1562, 1563, to the effect that a literal interpretation of the provisions in the 1934 Act (the same as those in the 1936 Act) would indicate a tax on all the partners.
each partner on his share of partnership income, but its constitutionality under the due process clause is doubtful in view of the Supreme Court's condemnation of taxing one man on another man's income. Further, it seems clear that the present solution is the more equitable although, of course, it too might be open to constitutional objections.

Validity of the Present Law as Interpreted

It seems clear that the Revenue Act of 1936 as interpreted by the Treasury Department is not a satisfactory solution of the problem of taxing contributions to partnership capital in kind. In the first place, the proposition that a partner individually realizes income not realized by the other partners on sale of partnership property is of doubtful constitutional validity, except in the case where one person contributes all the capital, the other partners having no interest in it when the firm is dissolved. It is a fundamental principle of partnership law that a partner has no individual right to specific partnership property, but rather that all the partners have an interest in all the partnership property. Thus each partner has a right to share in gain or loss derived from all partnership property to an extent determined by the partnership agreement. Any gain from any partnership property must be a gain to all the partners according to their shares, and thus no unshared portion of it can properly be regarded as income to one partner.

It is also questionable whether the interpretation given to the statute by the Treasury Department is justified, even though it is most equitable. Assuming that unrealized appreciation prior to contribution can become income to the partnership when the contributed property is sold, it is doubtful that it could be considered the transferor's "distributive share" within the terms of the statute, not because it is not to be distributed, but because it is difficult to conceive how a portion of profit allocated entirely to one partner can be properly considered a share of partnership income. The Treasury Department early laid down the rule that income from a particular source could not be allocated to any one partner, and the provisions of the present Act do not seem to

14. See supra note 11.
16. See (1934) 34 Col. L. Rev. 1562, 1563, indicating that in view of surtaxes, a tax to all the partners could be only roughly anticipated.
17. In such a case and only in such a case, the provisions of the Revenue Act of 1936 as explained by treasury regulations seem clearly valid. It appears that in this case, the partner and the partnership should be regarded as one, for tax purposes, in the case of transfers of property between them.
18. Uniform Partnership Act, § 25 (2) (a); this law has been adopted in nineteen states. Uniform Laws Ann. (Supp. 1936) 5.
19. Uniform Partnership Act, § 25 (1), referring to this co-ownership as "tenancy in partnership", See Helvering v. Smith, 90 F. (2d) 590, 591 (C. C. A. 2d, 1937) (indicating that the Uniform Act retained the essentials of the common law concepts of partnership); Mecham, Partnership (1899) § 97 (indicating that the common law incidents of partnership property were essentially the same).
23. See Earl v. Commissioner, 38 F. (2d) 565, 567 (C. C. A. 1st, 1930), to the effect that the word "distributive" is used in the sense of proportionate. Under this interpretation, the transferor could only be taxed on his proportionate share of the profit.
authorize a change in this rule. Thus it would be desirable to make some change in the statutory provisions governing these transactions. A provision for taxation at the time property is contributed to a partnership might be a suitable solution, especially since it would hasten the time for taxation.

Proposed Changes in the Present Law

There are compelling reasons to support a theory that when a man transfers property to a partnership as a capital contribution, he realizes income to the extent that the value of the interest in partnership assets which he receives exceeds the cost or other basis of the property which he transfers. In return for the property contributed, in the ordinary case, the contributing partner receives an assignable right to be repaid the amount of his capital contribution or the share of it remaining out of partnership assets before profits and surplus are shared on dissolution. Thus, assuming that other partners contribute to the assets, he receives in exchange for his interest in specific property a proportional interest in all partnership property from which he is entitled to receive on dissolution the amount of capital which he contributed or the proportional share thereof remaining. Unless the partnership agreement otherwise stipulates, a partnership may be dissolved by the express will of any partner at any time. Thus, the right to a return of contributed capital out of partnership capital at the time of dissolution is a thing of very real value, though its value may be lowered by the fact that the right may not ripen until a period of time stipulated in the partnership agreement has elapsed. It seems unnecessary for tax purposes to consider whether a partner's interest in partnership assets is a right against the firm regarded as a legal "entity" or a right against the other partners. The fact remains that the right is property received in exchange for other property, and represents realized gain insofar as its value exceeds the value of the property contributed.

The Supreme Court has decided that where a person exchanges an appreciated asset for other property, he receives income. Thus in *Marr v. United

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26. The suggested rule as to contributions could be changed merely by a change in treasury regulations, but a change in the statute would be more desirable, since new provisions could remove vagueness of the existing law and at the same time prevent the necessity of the Treasury Department's adoption of a theory inconsistent with its present one. But see Langstaff v. Lucas, 9 F. (2d) 691, 693 (W. D. Ky. 1925), to the effect that incorrect treasury regulations do not estop the government from asserting a proper tax.
27. See (1934) 34 Col. L. Rev. 1562, 1563.
28. The interest properly taxable at the time of contribution to assets is the interest in partnership assets, i. e., the right to a share of the assets remaining on dissolution. The right to share in profits which may be given either in return for contribution of capital or for future services (see Graham & Katz, Accounting in Law Practice (1932) § 45) must be considered in valuing the interest in partnership assets, however, since potential profits and losses of the firm to be shared by the partners must of necessity affect partnership capital and hence each partner's interest therein.
29. To the effect that the right is assignable see Uniform Partnership Act, §§ 25 (2) (b) and Comm'r's note thereto, 27 (2) ; Mechem, Partnership (1899) § 99.
30. "Dissolution" is used here and below in the sense of winding up. See Uniform Partnership Act, § 25 (2) (b) and Comm'r's note thereto; Mechem, Partnership (1899) § 98.
31. See Mechem, Partnership (1899) § 97.
32. Uniform Partnership Act, §§ 31 (1) (b), 37.
33. Id. §§ 31 (1) (a), 37. Even where there is a time specified, dissolution may be brought about at any time if all the partners consent, § 31 (1) (c).
34. The Uniform Partnership Act expressly so provides in § 26. The section seems to limit this "interest in the partnership" to the right to share in profits and surplus, but the Comm'r's note to § 25 (2) (b) indicates that it also includes the right to a share of the partnership "capital" on winding up.
35. See Magill, Taxable Income (1936) 116, 118.
States, where shareholders in a New Jersey corporation exchanged their shares for shares in a new Delaware corporation to which the assets of the New Jersey corporation had been transferred, it was held that they received income to the extent that the value of the shares received exceeded the cost or other basis of the old shares. A more striking analogy to the situation in question is found in the cases of exchanges between closed corporations and their shareholders. It has been held that where a man transfers property to a corporation in exchange for all its shares, he may realize taxable gain because he has received new interests which may be treated as income for tax purposes. A gain severed from capital in the strictest sense is no longer a prerequisite to realization of income if the taxpayer receives different interests from those which he formerly possessed. Thus in Burnet v. Commonwealth Improvement Co., the Supreme Court held that where a sole shareholder exchanged debentures for property held by the corporation, a taxable gain resulted since the corporation was a separate entity even though owned by a single shareholder.

It would seem that if a shareholder realizes income from exchanges with a corporation of which he may or may not be sole owner, a partner should realize income from a similar transaction, except in the case where he alone contributes capital and has a right to it on dissolution. In return for his contribution of property, he receives an undivided proportional interest in property contributed by himself and the other partners which he can assert on liquidation, plus a share in partnership profits. Certainly, as a result of his contribution, he receives an interest sufficiently new to constitute income.

However, the Commissioner of Internal Revenue has unsuccessfully asserted such a claim. In Helvering v. Walbridge, it was decided that where a man contributes to a partnership property which has appreciated in value, he realizes no taxable gain at the time of contribution. The principal ground for this decision was that the interest received by the contributor had no "fair market value" as required by the statute. In view of the Treasury Depart-

37. Insurance Title & Guarantee Co. v. Comm' r, 36 F. (2d) 842 (C. C. A. 2d, 1929), cert. denied, 281 U. S. 748 (1926); S. R. Roseburg, 13 B. T. A. 503 (1928); U. S. Treas. Reg. 45, Art. 1566, as amended in T. D. 2924, 1 Cum. Bull. 44. But cf. Tsivoglou v. United States, 31 F. (2d) 706 (C. C. A. 1st, 1929); Schoenheit v. Lucas, 44 F. (2d) 476 (C. C. A. 4th, 1930) (denying that there was a realization of gain or loss on such an exchange because the shares received had no "fair market value" and the change of interest was merely "formal").
38. See Magill, TAXABLE INCOME (1936) 105.
40. Id. at 419.
41. See supra note 28. In the case where one partner contributes all the capital and is alone entitled to it on dissolution, it would seem impossible to arrive at the conclusion that the interest in the partnership capital which he receives is so different from his interest in the property which he contributed that he can be said to have realized income. It would seem unwise to push the analogy to transfer of property to a corporation in return for all its shares this far, since partnerships are not commonly regarded as entities but rather as a group of individuals. Probably the present law and regulations should be continued for this type of case.
42. See supra note 28, indicating that it is necessary to consider this right to share in partnership profits in valuing the interest in partnership capital received for the purpose of taxing the transferor at the time of contribution.
43. 70 F. (2d) 682 (C. C. A. 2d, 1934), cert. denied, 293 U. S. 504 (1934).
44. 40 Stat. 1678 (1926), 26 U. S. C. A. § 111 (b) and note (1934); "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received." The same provision has appeared in every act since 1924. The 1918 Act referred to "fair market value, if any"; the 1921 Act used the expression "readily realizable market value"; see Paul, STUDIES IN FEDERAL TAXATION (1937) 168.
ment's attitude that only in rare cases does property have no fair market value and in light of the realities of the case, the holding of the Walbridge case in this respect seems extremely doubtful. There seems to be no doubt that by virtue of the Revenue Act, the property received must have a "fair market value" for taxable gain to be realized. Whether or not this is a constitutional limitation, it is a necessary administrative prerequisite to determining the extent of the gain realized. The meaning of the expression is vague and has been interpreted as meaning intrinsic value. To avoid unnecessary stress on either the word "fair" or the word "market", the courts have created the fiction of the willing buyer and the willing seller with reasonable knowledge of all the facts as a standard. Determination of value according to this vague standard is a difficult task since many elements must be weighed, but the existence of the difficulty does not indicate the absence of fair market value. It is indeed difficult to see why a right to receive a certain proportion of assets remaining on dissolution and to share in earnings is any less likely to have a fair market value in the case of a partnership than in the case of a corporation, even though partnership interests are less often bought and sold than corporate shares. In the case of shares, if there is no market to establish a price (which in itself is only evidence of "fair market value") courts are willing to look at other indications of value such as the assets and liabilities of the corporation. Further it is not uncommon to regard the value of the property exchanged for the shares as prima facie evidence of the value of the shares themselves. It would seem that similar methods could easily be used in determining the "fair market value" of a partnership interest. Therefore it is submitted that a statutory provision for taxing partners on their gains at the time of contribution of property to the partnership would be valid under the Sixteenth Amendment and feasible from an administrative point of view.

Assuming that income is realized at the time of contribution of property to a partnership, but that it is not desirable to tax it at that time because of the difficulty of determining the "fair market value" of a partnership interest, the partners could be taxed when the partnership sells the property. At that time they could be taxed on their proportional shares of appreciation accruing prior to contribution insofar as it is "realized" on sale and insofar as it represents gain to them over that part of the basis of their partnership interest properly allocable to that property. A statutory provision for non-recognition of gain or loss on contribution of property in exchange for a partnership interest would

46. MAGILL, TAXABLE INCOME (1936) 110.
47. Id. at 203; see also 2 BONBRIGHT, VALUATION OF PROPERTY (1937) 989 (indicating that "fair market value" as interpreted means neither value to the owner nor price at which the property could be sold, but an indefinite value somewhere in between the two).
48. See PAUL, STUDIES IN FEDERAL TAXATION (1937) 193; 2 BONBRIGHT, op. cit. supra note 47, at 60 (criticizing the occasional use of this fiction in order to assume a market that doesn't exist and value property according to worth to the owner).
49. See PAUL, op. cit. supra note 48, at 178.
52. See William Ziegler, Jr., 1 B. T. A. 186, 192 (1924); T. B. Noble, 12 B. T. A. 1419, 1436 (1928). Probably it would be desirable to have a provision to the effect that the value of the property contributed is prima facie evidence of the value of the partnership interest received.
53. This assumption may be ill-founded, although it seems to be sound. But even if it is not warranted, the plan submitted below may still be valid under the theory expounded in the Walbridge case that when the partnership sells the property, the partners realize income to the extent that their share of the proceeds exceeds their share of the original cost. See Helvering v. Walbridge, 70 F. (2d) 683, 695 (C. C. A. 2d, 1934).
be necessary. It could then be provided that the basis to the partnership of contributed property should be the agreed value, or, in the absence of a valuation in the partnership agreement, the fair market value of the property contributed. It could further be provided that when the property is sold by the partnership, the partners should be taxed, as at present, on their distributive shares of partnership income computed on that basis. It is suggested that the partners be given a basis for partnership property contributed in kind different from that of the partnership; this basis would be the same as that given under the present Act to partners who receive property in kind, namely, that part of the basis of their partnership interest properly allocable to such property. This is the true cost of each partner's share in that specific piece of partnership capital. The partners would then be taxed on the difference between this basis and their share of that part of the proceeds of the sale that was not taxed to them as partnership income. This procedure is merely a recognition of the fact that what may be capital to the partnership may be income to the partners. Each partner will thus be taxed on the difference between his distributive share of this partnership "capital" and the cost to him of that share. In Helvering v. Walbridge, it is indicated that it might be within the bounds of the Sixteenth Amendment "to say that a partner had 'realized' a 'gain' based upon the difference between his proportion of the selling price and the same proportion of his original cost", at the time of sale by the partnership of property contributed in kind.

It might be argued against this proposal that it is improper to tax partners on their share of partnership "capital", since it is not distributable until dissolution. But the provision for taxing a distributive share of partnership income whether distributed or not has been upheld even in cases where that share was to be used for partnership "capital". Thus it would seem that a partner can realize a gain from a partnership transaction even though he will not individually receive the proceeds until dissolution of the firm. Assuming that income is realized by the contributing partner when property is contributed, the argument that postponement of a tax on realized income is a denial of due

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55. E. g., A contributes property costing $60,000 at an agreed value of $120,000. B contributes property costing $90,000 at an agreed value of $120,000. C contributes $120,000 in cash. Each partner has a 1/3 interest in capital and profits. A's property is sold by the partnership for $220,000. Of this amount $100,000 represents partnership earnings and would be taxed as such equally to the three partners. The remaining $120,000 is partnership "capital" and represents gain taxable to the individual partners insofar as their proportionate shares of it exceed their proportionate cost for those shares. A's basis as to that property is 1/3 of the cost of his interest or $20,000; his proportionate share is 1/3 of $120,000 or $40,000; hence $20,000 is taxed as gain to A. B's basis as to that property is 1/3 of the cost of his interest or $30,000; his proportionate share is 1/3 of $120,000 or $40,000; hence $10,000 is taxed as gain to B. C's basis as to that property is 1/3 of the cost of his interest or $40,000; his proportionate share is 1/3 of $120,000 or $40,000; hence C has realized no taxable gain. Of course, the basis of each partner's interest would be increased over his original basis to the extent of gain on which he is taxed in this manner, so that he would not be again taxed on that gain when the firm dissolved.

57. Id. at 685. The court apparently felt that the basis of the property sold would be, as to the non-contributing partners, their share either of cost to the contributor or of fair market value at the time of contribution. It is submitted that, conceding that partners can have different bases as to specific firm property, the most satisfactory solution is to allocate the basis of each partner's capital contribution to all property contributed to the firm as has been suggested above. To do this is to treat the transaction realistically. The cost to each partner of his interest in a specific partnership asset contributed in kind is very likely to be different from that of the other partners and of the firm. It is suggested that it is far more desirable to treat each partner individually for this purpose than to attempt the impossible task of working out a fair scheme under some fictional collective basis which can be applied to partners and partnership alike.

process might also be made. But the fact that similar provisions for non-recognition have not been successfully attacked would seem to indicate that the argument is unfounded.\textsuperscript{59}

Inasmuch as the present statutory provisions, as interpreted, are in all probability invalid and the door is thus open for tax avoidance,\textsuperscript{60} it would seem important that a new well-drafted and explicit measure be adopted. Of the two suggested plans, the plan of non-recognition of gain or loss at the time of contribution of property in kind and taxation of the partners at the time of sale by the partnership seems inferior because it delays the tax and because, while it is apparently sounder in legal theory than the present provisions, it fails to eliminate the practical difficulties which they present.\textsuperscript{61} On the other hand, the plan of taxing the contributor at the time of contribution to the partnership seems more desirable since it hastens the time for taxation\textsuperscript{62} and is less difficult to apply. In any event, the theoretical and practical difficulties inherent in the present provisions for taxing contributions of appreciated partnership capital in kind indicate the desirability of discarding legal concepts of partnerships useless for this purpose, and, with due regard for the limitations of the Sixteenth Amendment,\textsuperscript{63} of adopting a plan of taxation that will be most convenient for the government and the taxpayer.\textsuperscript{64}

G. W. R., Jr.

Validity of Subpoenas Duces Tecum Issued by Federal Administrative Bodies

“For three hundred years it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence.”\textsuperscript{1} The power to compel testimony, though absolutely essential to the proper functioning of courts designed to adjudicate conflicting private rights, necessarily involved encroachments upon the individual’s jealously guarded private rights. It is not strange, therefore, that the duty to appear as a witness and testify was once enforceable only before a judicial tribunal,\textsuperscript{2} and that every effort to extend the power of subpoena has met with constant opposition. The attempt to vest


\textsuperscript{61} See Edward B. Archbold, 27 B. T. A. 837, 843 (1933), criticizing the requirement that for tax purposes alone partnership accounts carry complicated computations unconnected with partnership affairs. The suggested provision would require double computations, those to determine partnership gains and those to determine gains of the individual partners.

\textsuperscript{62} See (1934) 34 COL. L. REV. 1562, 1563.

\textsuperscript{63} Although it seems highly improbable, it is possible that the courts might find that no individual realizes gain or loss at the time of contribution of property to the partnership or at the time of sale by it. If such should be the case, taxation of these gains could only take place when the partner received cash for his interest or for property received by virtue of it.

\textsuperscript{64} See Note (1932) 45 HARv. L. REV. 1072, 1077 (to the effect that the courts emphasize convenience in choosing the proper time for taxation).

1. 4 WIGMORE, Evidence (2d ed. 1923) § 2102.

2. There is no dispute as to the existence of this general duty. See Blair v. United States, 250 U. S. 273, 281 (1919), and authorities cited in 4 WIGMORE, Evidence §§ 2105, 2103.

various administrative agencies of the federal government with this power has proved to be no exception.

The increased demands for government regulation and control of business that followed in the wake of the industrial development of the country gave rise to numerous administrative bodies created to assist in the enactment and enforcement of regulatory statutes. Thus, to carry out the purposes of the Interstate Commerce Act of 1887, the Interstate Commerce Commission was authorized to conduct hearings and investigations, with the power "to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, ... and documents relating to any matter under investigation." 5 To compel a contumacious witness to comply with its subpoena, the Commission may seek the aid of the federal courts; and for non-compliance with the court order, the witness may be cited for contempt. 6 Subsequent regulatory statutes enacted by Congress have rarely failed to provide for similar powers to aid an administrative agency in its duties of regulation and investigation. 7

Since the establishment of the Interstate Commerce Commission, several constitutional objections have been advanced against the validity of administrative subpoenas. It was argued that the courts were without authority to come to the aid of administrative bodies because the issue was not a case or controversy within the meaning of Article III of the Constitution. The use of administrative subpoenas was attacked further on the ground that it violated the constitutionally protected privilege against self-incrimination, 8 while subpoenas duces tecum, requiring the production of documentary evidence, were assailed as constituting unreasonable searches and seizures contrary to the Fourth Amendment. 9

The procedural pattern designed by the framers of the Interstate Commerce Act was declared unconstitutional within one year of its enactment. 10 "Cases" or "controversies" over which the judicial power of the courts extended, said

5. Id. at 383, 49 U. S. C. A. § 11.
6. Id. at 383, 49 U. S. C. A. § 12. Without the aid of the courts, the power of subpoena would be useless in the hands of the commission inasmuch as it is powerless in itself to punish for contempt. See Interstate Commerce Comm. v. Brimson, 154 U. S. 447, 485 (1894). For criticism of this principle, see Pillsbury, Administrative Tribunals (1923) 36 HARV. L. REV. 405, 583, 590. In addition to this means of direct compulsion, other types of administrative sanctions have been given such investigatory bodies. See Note (1937) 51 HARV. L. REV. 312.
8. U. S. CONST. Amend. V.
9. A fourth objection, namely, that such testimonial compulsion by a non-judicial body is a deprivation of liberty or property without due process of law, has occasionally been advanced. The courts have never directly passed upon this question, avoiding it through construction of the statutes involved whenever the issue has been raised. A thorough discussion of the problem and of this treatment by the courts can be found in Handler, Constitutionality of Investigations by the Federal Trade Commission (1928) 28 COL. L. REV. 708, 905, 924; Lilienthal, supra note 3, at 708-720. See also Bartlett Frazier Co. v. Hyde, 65 F. (2d) 350, 352 (C. C. A. 7th, 1933), cert. denied, 290 U. S. 654 (1933), where it was said that "the contention that by requiring these reports and permitting these investigations without first giving an opportunity to be heard is violative of the constitutional 'due process' provision . . . does not appeal to us."
10. In re Pacific Ry. Comm., 32 Fed. 241 (C. C. N. D. Cal. 1887). The commission involved in this case was not the I. C. C. but one created in the same year to investigate certain government aided interstate railroads. See 24 STAT. 488 (1887). The procedure for the enforcement of subpoenas was, however, exactly the same as that provided for in the Interstate Commerce Act.
Justice Field, meant claims of litigants brought for determination by regular judicial proceedings instituted for the “protection or enforcement of rights, or the prevention, redress, or punishment of wrongs”. The provision authorizing the courts to come to the aid of a commission by compelling a recalcitrant witness to obey the subpoena was therefore void inasmuch as the petition of an administrative agency, which was a mere board of inquiry without power to determine rights of those whose affairs it investigated, did not present a claim of a litigant. This objection, however, was disposed of by the Supreme Court in Interstate Commerce Commission v. Brimson, where it was pointed out that the Interstate Commerce Act had imposed upon every citizen a legal duty to appear and testify when summoned by the Commission. If he refuses, and the aid of the courts is sought, there is a case within the meaning of Article III of the Constitution, the issue being “whether the Commission is entitled to the evidence it seeks or whether the refusal of the witness is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted by Congress”. Thus, by judicial decision, this first objection to the extended use of the subpoena was eliminated.

Since regulatory statutes make violations thereof misdemeanors punishable by fine or imprisonment, witnesses summoned by administrative commissions sought to avoid the burden of testifying or of producing the required documents by falling back upon the protection of the Fifth Amendment, which provides that no person shall be compelled to be a witness against himself in any criminal case. In an effort to circumvent this constitutional privilege, which would have been a serious obstacle to the effective execution of its administrative duties, the Interstate Commerce Commission relied at first upon a statute providing that no evidence obtained from a witness in a judicial proceeding should in any manner be used against him in any criminal prosecution. This immunity, however, did not protect a witness from prosecution and conviction through other evidence, discovered indirectly through disclosures made by him in his testimony. Accordingly, this objection was recognized by the Court in Counselman v. Hitchcock, subsequent to which the Interstate Commerce Act was amended in 1893 to provide that “no person shall be prosecuted or subjected to any penalty or forfeiture for . . . any transaction . . . concerning which he may testify or produce evidence before the commission in obedience to its subpoena”. This absolute immunity from future prosecution successfully avoided the objection against disclosure of self-incriminating evidence in proceedings before an administrative commission; consequently such a provision has been incorporated in all subsequent regulatory acts. The privilege, however, still must be claimed, for testimony once given may not be questioned as violative.

15. 142 U. S. 547 (1892).
18. See statutes cited supra note 7.
19. United States v. Skinner, 218 Fed. 870 (S. D. N. Y. 1914); Pandolfo v. Biddle, 8 F. (2d) 142 (C. C. A. 8th, 1925). In the more recent statutes, this principle is included in the immunity clause. See Securities Exchange Act of 1934, 48 Stat. 900 (1934), 15 U. S. C. A. §78u (d) (Supp. 1937). Although it may seem logically inconsistent to say that a privilege which has been removed must still be claimed, this is well-settled. The reason for the requirement is that the legislature intended to protect only those unwilling to testify; an obvious result is a trap for the unsuspecting. See State v. Grosnickle, 189 Wis. 17, 306 N. W. 895 (1926), 3 Wis. L. Rev. 485; 4 Wigmore, Evidence §2282.
of the constitutional privilege so long as an opportunity has been given the witness to claim it.\textsuperscript{20} Furthermore, the immunity extends only to natural persons, the law being well settled that a corporation cannot claim protection against furnishing self-incriminating evidence.\textsuperscript{21}

A still fertile source of litigation is to be found in the power of the administrative tribunal to require the production of documentary evidence. The subpœna duces tecum, a court order through which books and papers are procured, is open to the objection of invading the protection of the Fourth Amendment against unreasonable searches and seizures;\textsuperscript{22} the more common type of subpœna is not concerned with such a problem. Although at first it may not be clear how such an order operates either as a search or seizure, an explanation lies in the history of judicial decisions. The Constitutional prohibition was the offspring of the reaction both in America and England against the use of writs of assistance and general warrants by government officials as an excuse for rummaging through the home or possessions of a suspected lawbreaker in search for incriminating evidence.\textsuperscript{23}

The denunciation of this practice by Lord Camden in the leading case of \emph{Entick v. Carrington} \textsuperscript{24} provided the basis for future decisions concerning "unreasonable searches and seizures". In that case general warrants were condemned as unreasonable because they lacked particularity in the description of the thing to be seized and because they authorized a search for evidentiary matters, which were not amenable to search and seizure even under a warrant inasmuch as such a practice would violate the privilege against self-incrimination. As the Supreme Court in \emph{Boyd v. United States} \textsuperscript{25} and \emph{Hale v. Henkel} \textsuperscript{26} extended the prohibition of the Fourth Amendment to the use of subpoenas duces tecum, the common law limitations surrounding the use of search warrants were extended with it. In the latter case, a subpœna was issued by a grand jury requiring production of all understandings, contracts, or correspondence between a corporation and six other companies. In holding the sweeping terms of the order violative of the Fourth Amendment, the Court pointed out that the substance of the offense being the compulsory production of private papers, "a general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms".\textsuperscript{27} The inference made by the Court, however, was that subpoenas duces tecum describing specifically the documents required would be consistent with the requirements of the Fourth Amendment if material to the matter under investigation. Thus, the Constitutional protection against unreasonable searches and seizures was extended beyond mere physical invasion or trespass, and today subpoenas duces tecum are condemned as unreasonable searches or seizures if they either compel the production of incriminating evidence or are too broad and indefinite in scope. Only the latter, however, stands as an effective restriction on the issuance of these orders by administrative tribunals in view of the established practice of including immunity clauses in the statutes authorizing the use of subpoenas by such bodies.

\textsuperscript{20} United States \textit{ex rel.} Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 113 (1927).
\textsuperscript{21} Hale v. Henkel, 201 U. S. 43 (1906); Wilson v. United States, 221 U. S. 361 (1911).
\textsuperscript{22} U. S. Const. Amend. IV.
\textsuperscript{23} For general discussion of the judicial treatment of the privilege against unreasonable searches and seizures, see Fraenkel, \textit{Concerning Searches and Seizures} (1921) 34 Harv. L. Rev. 361; Fraenkel, \textit{Recent Developments in the Law of Search and Seizure} (1928) 13 Minn. L. Rev. 1; Handler, \textit{supra} note 9, at 910; Note (1935) 44 Yale L. J. 819, 824.
\textsuperscript{24} 19 How. St. Tr. 1029 (1765).
\textsuperscript{25} 116 U. S. 616 (1886). For discussion and criticism of the doctrine of this case in so far as it relates to the admissibility of evidence illegally obtained in violation of the Fourth Amendment, see 4 \textit{Wigmore, Evidence} § 2184.
\textsuperscript{26} 201 U. S. 43 (1906).
\textsuperscript{27} Id. at 77.
The instant problem, therefore, is to determine when the courts will declare invalid a subpoena on the ground that it is too broad or indefinite. In attempting to answer this question, it must be noted that the investigatory functions of an administrative commission fall into two general types: (1) quasi-judicial or those hearings conducted when complaints have been made alleging a violation of the statute, and (2) non-judicial fact-finding inquiries undertaken by the commission either of its own volition or at the instigation of Congress or of the executive department. This distinction has been emphasized by the Courts in determining the validity of administrative subpoenas.

Inasmuch as administrative agencies in the exercise of their quasi-judicial functions are analogous to grand juries investigating specific breaches of the law, a brief survey of the cases involving subpoenas issued by the latter may prove to be helpful. In Consolidated Rendering Co. v. Vermont, decided two years after Hale v. Henkel, it was pointed out that to specify each particular document required would be both impracticable and even impossible, and that a subpoena calling for all books and papers between certain dates would be sufficient. Numerous other subpoenas, following this pattern, were sustained by the courts in subsequent decisions as not unreasonable searches and seizures, provided that the information sought appeared to be relevant to the matter under investigation. And in view of the comprehensiveness of the subpoena declared valid in the recent case of Brown v. United States, it seems clear that the courts intend to deal with the test of reasonableness most liberally, thereby preserving the efficiency of the investigating body.

Inasmuch as administrative commissions engaged in the hearing or investigation of formal complaints are acting in a quasi-judicial capacity, it is logical that their subpoenas should be governed by these same principles of relevancy and specificity. The question of relevancy, of course, is determined and delimited by the subject matter of the complaint being investigated; and the courts, following Hale v. Henkel, will not allow “fishing expeditions” into the private affairs of individuals or corporations under the guise of a hearing on a complaint. However, when the documents sought are necessary for the proper disposition of the controversy in issue, and are specified with reasonable definiteness, it has uniformly been held that the requirements of the Fourth Amendment have been satisfied.

Moreover, several recent cases indicate a marked tendency toward liberality in the determination of the relevancy of the material requested by subpoena by these quasi-judicial bodies. In United States v. Union Trust Co. a hearing was being conducted by the Board of Tax Appeals to determine an income tax deficiency. In the course of the proceedings, a subpoena duces tecum was issued directing a bank to produce certain contracts of sale, which it was thought had some bearing on the controversy. In ordering the witness to comply, the dis

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29. 207 U.S. 541 (1908).
31. 276 U.S. 134 (1927) (grand jury ordered the production of practically the entire correspondence of a trade association with its members for three years relating to a list of eighteen different subjects set out in the subpoena).
32. See Langeluttig, Constitutional Limitations on Administrative Power of Investigation (1934) 28 Ill. L. Rev. 508, 509.
strict court asserted that "a witness is not entitled to resist a subpoena for mere incompetency or irrelevancy." To question admissibility, the papers demanded had to be "so manifestly irrelevant as to make it plain that the subpoena was but a step in a fishing expedition, and thus an unreasonable search". The court further intimated that the relevancy requirement would be satisfied even if "a stretch of the imagination were needed to induce a belief that the papers will become evidence".

Though the case is illustrative of the modern trend, it is not suggested that this reasoning is either good logic or good law. A too frequent repetition of such loose interpretation of the relevancy requirement would, in effect, abolish the protection granted by the Fourth Amendment, a result which is neither desirable nor essential to efficient administrative investigation.

Two recent cases involving the validity of subpoenas issued by the Securities Exchange Commission in investigating suspected violations of the Securities Exchange Act, should be considered in conjunction with this opinion. Although in both cases, the documents sought were in the hands of a third party and the controversy was decided on other grounds, the courts, by way of dicta, asserted that in any event the compulsory production of the papers was not open to the objection of an unreasonable search and seizure. In *McMann v. Securities Exchange Comm.*, a subpoena requesting the production of the ledgers of certain brokers was unsuccessfully resisted by one of the broker's customers. The court, through Judge Hand, indicated the desirability of liberal construction in favor of administrative tribunals, yet found it possible to attain this goal without losing sight of its proper limits. A search is unreasonable "only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds". The reaffirmation of this view in *Newfield v. Ryan* strengthens the conjecture that the reasonableness of the subpoenas issued by administrative tribunals will be determined not alone by a consideration of analogous situations in the past but also by balancing the public necessity for the investigations against the inconvenience and hardship caused those who are investigated. Thus, though the limitations of specificity and relevancy remain to protect the individual from violations of his constitutional privilege guaranteed by the Fourth Amendment, the courts realize the necessity for an interpretation of "reasonableness" that will not unduly hinder the ever-increasing number of quasi-judicial tribunals in the effective execution of their duties. As long as the exercise of these functions by administrative bodies casts no greater burden on the citizen than his duty to obey the subpoenas duces tecum of the ordinary courts, there is no reason why the orders of each should not be given the same legal force.

The subpoena powers of administrative commissions are not limited to investigations and hearings relative to specific breaches of the law. Perhaps of even greater importance today is the work of such bodies in conducting investigations of a purely fact-finding character for the purpose of securing information either to serve as a basis for further legislation or to aid in the enforcement of existing law. The provisions of the Federal Trade Commission Act are exceptionally broad in this respect, and equally comprehensive are those of the Securities Exchange Act of 1934. It is conceded that subpoenas issued by

36. Id. at 287.
37. 87 F. (2d) 377 (C. C. A. 2d, 1937), 50 Harv. L. Rev. 698.
38. Id. at 379.
41. 48 Stat. 899 (1934), 15 U. S. C. A. § 78u (Supp. 1937). The Securities Exchange Commission is authorized "to investigate any facts, conditions, practices or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the
these bodies in the course of their non-judicial inquiries must be as specific as those of the courts. Constitutional objections against the unreasonableness of the use of these subpoenas are, therefore, directed mainly against the relevancy of the evidence sought. In view of the wide range of possible inquiry that could be undertaken pursuant to these fact-finding powers, relevancy obviously cannot be determined as easily as it can be in the case of a specific violation of the law.

Early decisions on the subject had the effect of denying altogether the powers of administrative agencies to make use of the subpoenas in these non-judicial activities. In *Harriman v. Interstate Commerce Commission*, on the Commission’s own motion an investigation was launched into the activities of certain carriers suspected of violating the Interstate Commerce Act. An attempt to force a recalcitrant witness to testify was frustrated by the Supreme Court, on the ground that Congress had not authorized the compulsion of testimony except in connection with its quasi-judicial activities. In Justice Holmes’ language, however, there is an unmistakable warning that even had an attempt been made to confer such wide powers upon the Commission, it would have been unavailing. Despite this decision, a similar inquiry, undertaken in response to a Senate resolution and necessitating the production of the books of a common carrier, was upheld nine years later by the same Court. Although distinguishing the cases by pointing out that the Act had been amended since the *Harriman* case, the Court in effect denied that the power of testimonial compulsion was as limited as Holmes had suggested.

Apparently this reversal of opinion with respect to investigations by the I. C. C. was not intended to be followed generally. For the Federal Trade Commission continually has been denied the power to compel the production of books and papers in fact-finding investigations even when undertaken in response to Congressional resolutions. Although the reason given by the courts, as in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates”.


42. 211 U. S. 407 (1908).

43. However, in United States v. Louisville & Nashville R. R., 236 U. S. 318 (1915), although the court denied the right of the I. C. C. to inspect the correspondance of the carrier, the right to inspect the accounts and records was not contested, and there is no intimation that the privilege is limited to situations involving specific breaches of the law.

44. Smith v. Interstate Commerce Comm., 245 U. S. 33 (1917), which is considered as having overruled the *Harriman* case. See Handler, *supra* note 9, at 932.

45. Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298 (1924); United States v. Basic Products Co., 260 Fed. 472 (W. D. Pa. 1919); Federal Trade Comm. v. Baltimore Grain Co., 283 Fed. 886 (D. Md. 1922); Federal Trade Comm. v. Miller’s Nat. Fed., 23 F. (2d) 968 (App. D. C. 1927); Federal Trade Comm. v. Smith, 34 F. (2d) 323 (S. D. N. Y. 1929). For a discussion of several of these cases and the problems raised thereby, see Mechem, *Fishing Expeditions by Commissions* (1924) 22 Mich. L. Rev. 765. With the exception of the *Smith* case, the courts were here dealing with attempts by the Commission to exert its visitorial rather than its subpoena power. See *supra* note 41. The language of the courts is sufficiently broad, however, to induce the belief that the use of subpoenas duces tecum would have been given similar treatment, and the result of the *Smith* case serves to substantiate this belief. With these cases, consider also the decision in Jones v. Securities Exchange Comm., 298 U. S. 1 (1936), 84 U. OF Pa. L. Rev. 1019, 49 Harv. L. Rev. 1369, 34 Mich. L. Rev. 1031.
Harriman case, is that Congress did not intend the exercise of the power in situations of this sort, one usually can find dicta to the effect that even had Congress attempted to confer the power, the attempt would have been ineffectual. It has been pointed out that the distinction between the treatment of the Interstate Commerce and the Federal Trade Commissions can be traced to the element of public interest, and that in the case of common carriers such compulsion is not unreasonable in view of the benefit to be derived by the public from the investigations. Support for this proposition can be found in Federal Trade Commission v. Smith, where a subpoena duces tecum, issued in the course of an inquiry into the activities of interstate carriers of electricity, was held to constitute an unreasonable search and seizure, the court resting its decision on the fact that no formal complaint was being investigated and that Congress had not yet assumed as broad control over carriers of electricity as it had over common carriers. In contrast to these decisions adverse to the Federal Trade Commission are two recent decisions of the lower federal courts which, in effect, upheld the power of the Commission to compel the production of evidence when engaged in investigations undertaken pursuant to Congressional resolutions.

With the case law in this confused state, it is impossible to determine upon what basis the subpoenas of a fact-finding agency will be upheld as reasonable. Inasmuch as subpoenas issued in the course of a non-judicial investigation have occasionally been upheld by the courts, especially in the case of common carriers, it follows that such subpoenas are not unreasonable per se. Yet the authorities have drawn a distinction between the compulsion of testimony to be used in quasi-judicial activities, where a determination of legal rights is involved, and the use of the subpoena in a purely fact-finding inquiry. In the former case, the test of relevancy has been adhered to in considering possible violations of the Fourth Amendment, the only remaining constitutional objection that seems to impress the courts. In the latter type of investigation, however, the test has been rejected, except where the public interest element enters, on the ground that the broad scope of inquiry makes its application impossible.

A possible answer to this objection can be found by analogizing to the investigatory powers exerted by Congress, in respect to which the rule of relevancy has been consistently, though most liberally, applied. An administrative commission engaged in securing information to be used as a basis for future legislation is doing nothing more than Congress itself or one of its committees when conducting a Congressional investigation. Therefore, the limitations on its fact-finding powers should be similar to those imposed upon that branch of the government, and the reasonableness of administrative subpoenas should be governed by the same tests applied to subpoenas issued by Congress. In its investigatory functions, Congress is limited to matters which may permit of legislative action; there must be some legitimate legislative purpose in mind. See Watkins, An Appraisal of the Work of the Federal Trade Commission (1932) 32 Col. L. Rev. 272, 280; Note (1935) 44 Yale L. J. 819, 837. 46. See Langeluttig, supra note 32, at 516-523. This distinction, however, seems to be merely superficial.

47. 34 F. (2d) 323 (S. D. N. Y. 1929).
49. See Langeluttig, supra note 32.
50. McGrain v. Daugherty, 273 U. S. 135 (1927). "The limitation of power of investigation is that it must be germane to some matter concerning which the house conducting the
The power to compel testimony, restricted like that of the courts by the requirement of relevancy, is thus determined by the limits of permissible Congressional action on the subject being investigated. There is no reason why these same principles should not apply to the instant problem. When Congress, by resolution or statute, authorizes an administrative body to conduct an investigation for the purpose of collecting data to be used in enacting future legislation, the scope of the commission's probe is doubly limited. First, it is restricted to the single matter authorized to be investigated; and secondly, it cannot exceed the bounds of possible Congressional action on that matter. Here, then, are two guides for determining the relevancy of the information sought through the use of subpoenas. The demand for documentary evidence would thus seem not to be violative of the Fourth Amendment if the information requested is relevant to matters within this field of permissible inquiry. Likewise, if the commission is engaged in a fact-finding expedition with a view to the establishment of rules and regulations, a subpoena would be equally unobjectionable if the material desired were germane to matters over which the body could legitimately prescribe such rules and regulations.

The analogy is not without defects. The restriction with respect to Congress has been loosely applied, and it is possible that equal latitude would result in the case of administrative agencies if analogous precedents were followed. However, the restrictive requirement can always be seized upon by the courts, and there is a strong likelihood that the laxity prevalent in tests of Congressional subpoenas would disappear in the determination of the validity of administrative subpoenas. A proper application of this test of relevancy to determine whether the Fourth Amendment's requirement of "reasonableness" is satisfied at least would provide the courts with a workable principle, thereby eliminating the jumble of conflicting decisions that has arisen from past consideration of the validity of administrative non-judicial inquiries. Although the range of possible inquiry may still be much broader than that of a commission acting quasi-judicially, the practical necessity for having an adequate fact basis for Congressional legislation and administrative regulation affords a justification for any sacrifice of privacy entailed by the extended exercise of this power of testimonial compulsion.

T. P. G.


52. "The view, thus, that only judicial bodies or agencies acting in a judicial capacity require the power of testimonial compulsion can find no basis in the practical realities of modern government." Handler, supra note 9, at 930.