

EXPLANATORY MEMORANDUM IN SUPPORT OF
RECOMMENDATION 74-1

SUBPENA POWERS IN FORMAL AGENCY PROCEEDINGS

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This recommendation has developed from the Conference's study of the twelve resolutions of the American Bar Association proposing amendments to the Administrative Procedure Act. At its Ninth Plenary Session in June, 1973, the Conference adopted a statement addressed to the twelve proposals. In that portion of the statement directed to Resolution No. 10, the Conference said:

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 USC 554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to sections 554, 556, and 557. * * *

Since the Ninth Plenary Session, the Committee on Compliance and Enforcement Proceedings has been working to perfect a specific legislative proposal to implement the above statement. The proposed recommendation is the result of this effort.

The proposed recommendation calls (1) for amending 5 U.S.C. § 555(d) to require that the power to sign and issue subpoenas be delegated to presiding officers in all proceedings subject to 5 U.S.C. § 556, and (2) for amending 5 U.S.C. § 556 to provide a grant of subpoena power for all agency proceedings subject to that section. The proposal goes beyond the statement adopted at the Ninth Plenary Session in two respects; that statement called for a grant of subpoena power in adjudications subject to 5 U.S.C. § 554, but not in rulemaking subject to section 556; nor did the statement deal with delegation of subpoena power to presiding officers.

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Background of the Proposal

The ABA proposals consist of twelve resolutions adopted by the ABA's House of Delegates in August, 1970, which call in general terms for amendments to the Administrative Procedure Act, and a series of implementing recommendations prepared by the Administrative Law Section of the ABA. In 1972 the resolutions and recommendations were referred to several Conference committees for study with a view to action at the June, 1973 Plenary Session.

ABA Resolution No. 10 would grant authority to all agencies to make subpoenas generally available in adjudicatory proceedings. The implementing language contained in the ABA Recommendation provides that "each agency is authorized to issue subpoenas in every case of adjudication." The Recommendation also directs the agencies to "issue such subpoenas upon request made by any party" and to provide a procedure for quashing or modifying subpoenas on motion.

The Resolution and Recommendation were considered by the Conference's Committee on Compliance and Enforcement Proceedings. It concluded that they raised two significant problems. First, in what category of proceedings should subpoena power be granted? The Administrative Procedure Act does not at present grant subpoena power to any agency, but merely provides that where agency subpoenas are authorized by law, i.e., by the statute governing the agency or program in question, subpoenas shall be made available to parties, 5 U.S.C. § 555(d). "The purpose of [section 555(d)] is to make agency subpoenas available to private parties to the same extent as to agency representatives." Attorney General's Manual on the Administrative Procedure Act 67. The ABA Resolution is not entirely clear as to what it means by "adjudicatory proceedings" but the Recommendation provides for authority to issue subpoenas "in every case of adjudication," language not limited in its applicability to proceedings governed by Section 556 and 557.

The Committee report weighed several possible approaches for providing a grant of subpoena power in the APA. First, granting subpoena power for all adjudications would raise serious legal and practical problems because of the breadth of the term "adjudications" as used in the APA and the informal and unstructured nature of many adjudications.

A narrower approach would be to grant subpoena power in all proceedings subject to Section 554 of the Administrative Procedure Act, that is, on-the-record adjudications. This would be

consistent with paragraph 9 of the Conference's Recommendation No. 70-4, addressed exclusively to such proceedings, which stated that the presiding officer should have power to issue subpoenas at any time during the course of the proceeding. The practical effect of such an amendment to the APA would be somewhat limited, however. The Committee's study disclosed that in only a handful of proceedings clearly subject to Section 554—among them, proceedings in the Postal Service, and public lands contests in the Department of the Interior—does there appear to be a need for a grant of subpoena power or a broadening of existing subpoena power.

A middle approach would be to grant subpoena power in proceedings, whether or not governed by Section 554, which are structured as adversary proceedings with trial-type hearings. A number of proceedings of this nature are presently conducted without subpoena power, notably contract appeals, debarment cases, and adverse action proceedings for employees in the civil service (see Conference Recommendation No. 72-8). Implementing this approach by amending the APA presents considerable drafting problems, however, largely because of the difficulty in framing an adequate definition of the proceedings to be affected. One possibility would be to grant subpoena power in connection with adjudications required by statute or by agency regulation to be made on the record after hearing. A variation would be to grant subpoena power to administrative law judges in connection with all adjudications over which they preside.

The remaining possible approach would be not to grant subpoena power in the APA at all, but to amend the statute governing each agency program for which subpoena power is desired.

The second major problem considered in connection with Resolution No. 10 arose not from the Resolution itself, but from the Recommendation. The Recommendation would require agencies to issue subpoenas to parties on demand. The subpoena could be challenged after issuance by a motion to quash or modify on the usual grounds. APA § 555(d) now permits the agencies to require by rule that the party applying for a subpoena make an *ex parte* showing before the subpoena is issued, although a motion to quash is also available.

The ABA's Recommendation is consistent with Recommendation No. 13 of the 1962 Administrative Conference. However, of the more than 20 agencies surveyed, only the National Labor Relations Board and the Occupational Safety and Health Review Commission follow the procedure prescribed in the Recommenda-

tion. (In both cases the practice is required by statute.) All other agencies require or permit the issuing officer to require some initial ex parte showing in connection with the issuance of subpoenas duces tecum, although in a few agencies the issuance of subpoenas ad testificandum is well-nigh automatic.

Although the NLRB does not appear to have experienced difficulties in its procedures, comment from the agencies and administrative law judges on this aspect of the ABA Recommendation was generally negative.

On the basis of the Committee study and report the Conference adopted a statement respecting Resolution No. 10, which contained the following major points:

1) The Conference favors amending the APA to provide a grant of subpoena power in connection with all adjudications subject to 5 U.S.C. § 554.

2) The Conference does not favor amending the APA to provide a grant of subpoena power in informal adjudications generally.

3) The Conference favors retention of the provision in section 555(d) permitting agencies to require by rule a statement or showing of general relevance or reasonable scope before issuing a subpoena.

(The text of the Conference statement on Resolution No. 10 is attached as Appendix of this report.)

Discussion of the Proposal

Most agencies which conduct proceedings required by statute to be on-the-record with opportunity for a hearing do have subpoena power; a few do not. The basic purpose of the Committee's proposal is to fill the existing gaps by providing within the APA a grant of subpoena power for all agency proceedings, both rule-making and adjudications, required to be conducted on the record with opportunity for a hearing, that is to say, all proceedings governed by sections 556 and 557 of the APA. The Committee believes that wherever an agency determination is of a nature and importance to justify requiring such formal adjudicatory procedures, all parties to the proceeding ought to have access to compulsory process for the obtaining of evidence.

A brief explanation is in order concerning the Committee's decision to cover formal rulemaking as well as formal adjudication in the proposal. The reasons are that (1) tying the grant of subpoena power to all proceedings subject to section 556 would

eliminate disputes over whether a given proceeding is rulemaking or adjudication;¹ (2) it would pick up certain proceedings of the Food and Drug Administration where both the agency and private parties have complained of the lack of subpoena power; and (3) if the argument for the amendment is sound, it should apply with equal logic to all proceedings requiring trial-type hearings, whether adjudication or rulemaking.

Proceedings Affected by the Grant of Subpena Power. There seem to be at least three agencies where the proposed grant of subpoena power might be significant.

Postal Service. Proceedings under the statute relating to mailability of matter, 39 U.S.C. § 3001, and under the false representations and lottery statute, 39 U.S.C. § 3005, are conducted pursuant to APA § 554. The Postal Service has a partial exemption from the APA, 39 U.S.C. § 410, but the Service believes that section 554 remains applicable to proceedings under these sections. The Postal Service has not asked for a legislative grant of subpoena power, but the Assistant General Counsel for Consumer Protection has informed us that he believes subpoena power would be helpful in § 3005 cases.

Interior. The Department of the Interior conducts adversary proceedings relating to the use and disposition of public lands and resources. These disputes arise under a number of statutes, including the Taylor Grazing Act and the general mining laws. The Department's subpoena power in these proceedings, 43 U.S.C. §§ 102-105, is inadequate in a number of respects. Section 554 is applicable to most, but possibly not all, of these proceedings. Lack of effective subpoena power has presented problems in mining contests. Professor Strauss' recent report to the Administrative Conference on the administration of the mining laws points to the agency's deficient subpoena power as contributing to the result that "most cases now reach hearing without any prior opportunity for screening or for making particular the issues for trial." (p. 140).

Interior is proposing to Congress legislation which would give the Department a general grant of subpoena power. This bill would provide such power not only in the proceedings discussed above, but in a number of proceedings, such as contract appeals, not subject to section 556. Naturally, Interior prefers its own bill to the Committee proposal. The Department also expressed the fear that the geographical limitations on its subpoenas contained in existing law might carry over under the Committee's

¹ See, e.g., *Upjohn Co. v Finch*, 422 F.2d 944, 954 (6th Cir., 1970).

proposal, but our proposal has since been revised to make more clear that it is an independent and self-contained grant of subpoena power.

Food and Drug Administration. FDA conducts three kinds of formal proceedings: rulemaking under 21 U.S.C. § 371,² and proceedings for the certification and decertification of new drugs, 21 U.S.C. § 355, and of antibiotic drugs, 21 U.S.C. § 357. The first category of proceeding is clearly rulemaking under both the present APA definition and the change in definition which the Conference and the American Bar Association propose.³ The status of proceedings under sections 355 and 357 is more doubtful. FDA believes that section 357 proceedings are rulemaking under the present definition, but they might be adjudication under the proposed change in definition. Section 355 proceedings appear to be adjudication, but this is not certain. Thus, a grant of subpoena power limited to cases of formal adjudication would have little, if any, impact on FDA proceedings and might be a source of confusion. This was, as we have said, a significant factor in our decision to cover rulemaking as well as adjudication.

FDA officials and practitioners before the agency have complained of the lack of subpoena power, and FDA, like Interior, is sponsoring legislation providing a general grant of such power. FDA's General Counsel has told us that FDA is more interested in having subpoena power for use in investigations than in formal proceedings, and that while he has no objection to granting subpoena power in proceedings governed by §§ 556 and 557, this would not be an adequate substitute for the authority FDA is now seeking from Congress.

Other adjudications. There are a number of other formal adjudications for which subpoena power is lacking.⁴ A sprinkling of proceedings in the Patent Office,⁵ Treasury Department,⁶ and

² Proceedings governed by section 371 are carried on under several statutory grants of authority and cover, generally, the establishment of standards of identity, of quality, and of fill of container for foods and the regulation of packaging and labelling of and the use of additives in foods, drugs, and cosmetics. See Hamilton, Rulemaking on a Record by the Food and Drug Administration, 2 ACUS 448 (1972).

³ Statement of the Administrative Conference on ABA Resolution No. 1, Tenth Plenary Session.

⁴ We have not made an all-inclusive canvass of agency proceedings, but relied on agency comments directed to Recommendation No. 70-4, on examination of recent statutory materials, and on selective inquiry. There are a number of agency proceedings, particularly under recent statutes, which are difficult to classify in terms of APA requirements.

⁵ Proceedings to suspend or exclude from practice, 35 U.S.C. 32; 37 CFR 1.348, 2.16.

⁶ Disciplinary proceedings against customhouse brokers, 19 U.S.C. 1641(b); 19 CFR Part 111, and against practitioners before the Internal Revenue Service, 31 U.S.C. 1026; 31 CFR 10.50 *et seq.* The Director of Practice of the Treasury Department has cited a need for subpoena power in the latter class of proceeding.

Department of Agriculture⁷ involve disciplinary actions against licensees and attorneys practicing before the agency. Whether because of the paucity of actual proceedings or the other means of access to evidence which the agencies possess, there does not seem to be a great demand for subpoena power. There is some doubt as to the present authority of the Department of Labor to issue subpoenas in proceedings to grant variances under the Occupational Safety and Health Act.^{7a} Two kinds of proceeding of somewhat greater potential significance are proceedings under Title VI of the Civil Rights Act to withhold or terminate federal assistance to recipients engaged in discriminatory practices⁸ and proceedings under federal grant statutes to determine whether a grantee's or grant applicant's plan or practices conform to federal standards and conditions.⁹ Both kinds of proceeding have in the past been conducted primarily by the Department of Health, Education, and Welfare, but approximately twenty agencies have programs to which Title VI is applicable, and provision for conformity proceedings is becoming a common feature in statutes establishing programs for grants to or through state and local governments.¹⁰

Rulemaking Proceedings. Those regulatory agencies which use formal rulemaking for setting or approving rates, i.e., Interstate Commerce Commission, Federal Power Commission, Federal Communications Commission, Federal Maritime Commission, Civil Aeronautics Board, Agriculture (Packers and Stockyards Act), or for approving corporate or financial structures, i.e., Securities and Exchange Commission and some of the aforementioned agencies, have adequate subpoena power for those tasks and would not be affected by the proposal. The Postal Rate Commission, however, has no subpoena power in its proceedings regarding rates and classifications for mail. Such proceedings are governed by APA sections 556 and 557¹¹ and would be affected by the proposal. The Commission has endorsed the proposed recommendation.

We have already discussed the effect on FDA proceedings, where the impact of the proposal would be significant and, we believe, favorable. There are, in addition, a few statutes which

⁷ Revocation of a warehouseman's license, 7 U.S.C. 241 et seq. Last year Agriculture stated that there had not been such a proceeding in years.

^{7a} 29 U.S.C. 655, 665.

⁸ 42 U.S.C. 2000d-1.

⁹ E.g., Social Security Act, 42 U.S.C. 304, 604, 707; 45 CFR, Part 213.

¹⁰ See, e.g., Comprehensive Employment and Training Act of 1973, P.L. 93-203, § 108: The Act is administered by the Department of Labor.

¹¹ 39 U.S.C. 3624.

require agencies to use formal on-the-record rulemaking in adopting rules of general applicability and which do not contain a grant of subpoena power. In addition to those administered by the Food and Drug Administration there are the Sugar Act of 1948, 7 U.S.C. § 1100, § 1115 (Agriculture); the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (FTC and FDA); the Metal and Non-Metallic Mine Safety Act, 30 U.S.C. § 721 (Interior); and the Marine Mammal Protection Act, 16 U.S.C. § 1361, § 1373 (Supp. II) (Commerce and Interior).¹² Formal hearings have been extremely rare under these statutes, except the Sugar Act, where in recent years hearings have averaged 3-4 a year.¹³

However, the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, appears to present a special problem. That Act authorizes the Secretary of Agriculture to adopt marketing orders with respect to certain agricultural commodities after notice and opportunity for a hearing and upon the evidence introduced at such hearing, 7 U.S.C. § 608c(3), (4). Hearings are relatively frequent, averaging over 40 a year.¹⁴

Although the procedure followed by the Department and the legal conclusiveness of an order once adopted are somewhat different from what we are accustomed to with other rules made on the record after hearing,¹⁵ these orders do appear to be literally covered by APA §§ 556 and 557 and the Department's procedures do generally comply with these sections.

The Department has subpoena power for the administration of the Agricultural Marketing Agreement Act, 7 U.S.C. § 610(h), but subpoenas are not used in these rulemaking proceedings. We are informed by an attorney in the Department's General Counsel's Office that the Department takes the position that the grant of subpoena power is not applicable to rulemaking proceedings. He added that if subpoenas were to be made available to interested persons in such proceedings, the whole process would become "chaotic." Participation in these hearings is informal and somewhat casual—no pre-hearing procedures, no formal parties—and

¹² Two statutes which do not themselves contain a grant of subpoena power, the Federal Hazardous Substances Act and the Poison Prevention Packaging Act, have been transferred from FDA to the Consumer Product Safety Commission, which has a general grant of subpoena power, 15 U.S.C. 2076, 2079 (Supp. II).

¹³ Hamilton, *Procedures for the Adoption of Rules of General Applicability*, 2 ACUS 834, 837-38 (1972).

¹⁴ *Ibid.*

¹⁵ See, generally, Hamilton, *op. cit.*, 2 ACUS at 851-60 (1972). A very significant difference is that a handler objecting to the order is entitled to a new evidentiary hearing, in which subpoenas are available and which may reexamine some or all of the issues resolved in the rulemaking.

if interested persons were able to demand subpoenas, they could substantially delay and complicate the process.

It is hard to say precisely how our amendment would affect rulemaking proceedings under the Agricultural Marketing Agreement Act. If the Department is correct in taking the position that it has at present no authority to issue subpoenas in such proceedings, notwithstanding the seemingly broad grant in 7 U.S.C. § 610(h), then our amendment would force on the Department authority which it may prefer not to have. On the other hand if the Department does at present have subpoena power available for these proceedings, its present practice may perhaps be defended on some other basis, and would not necessarily be affected by the Committee's proposal. It is, at any rate, the view of the Committee that subpoenas should be available in proceedings governed by section 556, and if this presents problems in some kinds of rulemaking, the proper solution would be to free such rulemaking from the requirements of sections 556 and 557, rather than to shape the provisions of those sections to accommodate proceedings which do not properly call for trial-type procedures. (See Conference Recommendation No. 72-5.)

Delegation of Subpoena Power

The first part of the proposed recommendation would amend section 555(d) of the APA to add the following sentence:

Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpoenas.

The purpose of this amendment is to eliminate any doubt that agencies are required to empower presiding officers in formal proceedings to sign and issue subpoenas. This is probably already the law. Section 556(c) of the APA now provides:

"Subject to published rules of the agency and within its powers, employees presiding at hearings may—

"* * *

"(2) issue subpoenas authorized by law;

"* * *"

The Attorney General's Manual on the Administrative Procedure Act, p. 74, interprets the above language to effect an automatic delegation:

The quoted language automatically vests in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., 'within its powers.' In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without

the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, 'shall have authority', but from the general statutory purpose of enhancing the status and role of hearing officers.¹⁶

The same conclusion was expressed by the Committee on Compliance and Enforcement Proceedings of the 1962 Administrative Conference in its report on Recommendation No. 13. "* * * [I]n hearings governed by sections 7 and 8 of the APA hearing officers automatically have the subpoena power, unless the agency itself lacks the power." S. Doc. No. 24, 88th Cong., 1st Session 215.¹⁷

We have been informed, however, that agency practice has not always been consistent with this conclusion, although current examples of agency failure to delegate are rare. A quick and not exhaustive survey of agency regulations indicates that in 30 regulations of 25 agencies the presiding officer has authority to issue subpoenas. In only one case, Hatch Act proceedings by the Civil Service Commission against State officials, 5 C.F.R. § 151.135, § 151.136, must the subpoena be approved at a higher level. Another possible problem area is the Consumer Product Safety Commission, where there is some question whether a statutory provision withholding the power to delegate authority to issue subpoenas is intended to apply to administrative law judges in procedures subject to section 556.¹⁸ Enactment of the proposed amendment would resolve the doubt by effecting the delegation automatically.¹⁹ Thus, while the proposed amendment to section 555(d) probably does no more than restate existing law, it may serve to clear up some doubts and to educate the agencies to the requirements of the Act.

¹⁶ Section 7(b) of the APA stated, "officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers. * * *" The language was changed when title 5 was enacted as codified in 1966. Changes of language in the codification were not intended to make substantive changes, and the word "may" is used in the permissive sense, as "is permitted to" and "is authorized to." H. Rept. No. 901, 89th Con., 1st Session 2-3.

¹⁷ I have found only one pertinent judicial decision. In *Lee v. Federal Maritime Board* 284 F.2d 577 (9th Cir. 1960), the court upheld under APA § 7 the authority of a board examiner to issue and sign subpoenas, notwithstanding that the Shipping Act required that subpoenas be signed by a member of the Board. This case, however, did not involve a refusal by the agency to delegate but the validity of a delegation concededly attempted.

¹⁸ Consumer Product Safety Act, § 27(b)(8), 15 U.S.C. 2076(b)(8) (Supp. II).

¹⁹ A number of agencies, while authorizing presiding officers to issue subpoenas, require that the subpoena be signed by or be under the facsimile signature of the head or a member of the agency. See, e.g., Agriculture, 9 C.F.R. 4.19-2, 202.8(d); ICC, 49 C.F.R. 1100.56(b). *Lee v. Federal Maritime Board*, *supra* at note 17, held that the APA permitted delegation of the authority to sign as well as to issue subpoenas. See, also, *F.T.C. v. Gibson*, 460 F.2d 605 (5th Cir. 1972). The proposed amendment would also resolve this minor point.

Analysis of Amendment

1. The first numbered paragraph of the recommendation proposes to amend section 555(d) of the APA to insert a sentence requiring agencies to delegate to presiding officers in all proceedings subject to section 556 the authority to sign and issue subpoenas. Such authority would continue to be exercised "subject to published rules of the agency and within its powers," § 556(c)(2), but the agency could not by such a rule withhold the authority entirely. See Attorney General's Manual on the Administrative Procedure Act 74-75.

2. The phrase "authorized by law" in section 556(c)(2) is deleted as no longer necessary, since in all proceedings subject to section 556 subpoenas will now be authorized by law. The principle that subpoenas must meet ordinary legal standards, such as scope and relevance, would, of course, be preserved in the third sentence of section 555(d).

3. The grant of subpoena power in section 556(d) would apply to any proceeding, adjudication or rulemaking to which sections 556 and 557 were applicable, i.e., to any proceeding "required by statute"²⁰ to be "on the record after opportunity for an agency hearing." It would not apply to proceedings which the agency, as a matter of discretion, conducts on the record with opportunity for a hearing, such as contract appeal cases. The point at which the formal proceeding commences and the grant comes into operation will vary with agency practice, but the subpoena power would not be available for an agency investigation which might lead to the institution of a formal proceeding.

4. It is most important to note that this grant of subpoena power is "in addition to and not in limitation of" any other statutory authority which an agency may have to issue or to enforce subpoenas. Where such other authority is adequate for an agency's purposes, the agency need not rely on this provision and will not be affected by it. Conversely, the subpoena power granted by section 556(d) is independent and self-contained; where an agency has at present a subpoena power which is limited or inadequate in some respect, as in the case of the Department of the Interior, it may rely instead on the power granted by this provision.

5. We have tried to avoid the "laundry list" of items subject to a subpoena duces tecum and instead borrowed the language of Rule 45(b), Federal Rules of Civil Procedure. See also Recommendation 70-4, ¶6.

²⁰ Or by the Constitution, *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950).

6. Under the proposed language agency process will run nationwide. Many subpoena statutes provide that attendance of witnesses and the production of evidence may be required "from any place in the United States." The purpose of such language is presumably to indicate that the agency's process runs nationwide. In a number of cases it has been held that the phrase "from any place in the United States" does not prevent the agency from requiring that a subpoenaed witness produce evidence located abroad, *SEC v. Minas de Artemisa*, 150 F.2d 215 (9th Cir. 1945); *FMC v. De Smedt*, 366 F.2d 464 (2d Cir. 1966) cert. denied, 87 S.Ct. 513 (1966). Nevertheless, since the jurisdictional limits in the rules of civil procedure do not control administrative subpoenas, see *Bowles v. Bay of New York Coal and Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945); *FMC v. De Smedt*, *supra* at 469, and since the phrase "from any place in the United States" has provoked dispute, we have omitted it, relying instead on "at any designated place."

A proceeding for judicial enforcement, however, must be brought in a district where the witness is found or resides or transacts business. Most subpoena statutes provide for nationwide service of judicial process; a few do not.²¹ Since the subpoena provision is for a somewhat indefinite class of cases in which Congress has not heretofore granted any subpoena power, the Committee believes that doubts as to the appropriate scope of authority should be resolved in favor of the narrower grant.

In an enforcement proceeding the court can require the witness to appear before the agency at a hearing or deposition outside the judicial district; see *SEC v. Minas de Artemisa*, *supra* at 217.

7. The draft amendment follows the majority rule in permitting proceedings for judicial enforcement to be brought only by the agency, and not by the party requesting the subpoena.²² Where an agency refuses to seek judicial enforcement, the remedy of the

²¹ Statutes of the SEC, 15 U.S.C. 78u; FPC, 16 U.S.C. 825f; and NLRB, 29 U.S.C. 161, specifically provide that agency and judicial process run nationwide. So does the statute of the FMC, though it somewhat inconsistently requires that the enforcement proceedings be instituted in the district of the witness' residence or place of business, 46 U.S.C. 1124(b). The statute of the FTC, 15 U.S.C. 49, has been construed to provide for judicial process to run nationwide. *FTC v. Browning*, 435 F.2d 96, 98-100 (D.C. Cir. 1970). The same reasoning would seem to apply to the Packers and Stockyards Act, 7 U.S.C. 409; and the ICC, 49 U.S.C. 12. On the other hand, while the process of the Atomic Energy Commission and the Social Security Administration runs nationwide, judicial enforcement must be sought in the judicial district where the witness resides or is found, 42 U.S.C. 405.

²² Must subpoena statutes provide that only the agency may seek judicial enforcement, e.g., 15 U.S.C. 78u (SEC); 29 U.S.C. 161 (NLRB). Several statutes permit the party who obtained the subpoena to obtain judicial enforcement, e.g., 47 U.S.C. 409 (FCC); 49 U.S.C. 12(2) (ICC); 49 U.S.C. 1484(c) (CAB and National Transportation Safety Board).

party aggrieved would be to assert the agency failure as a ground for challenging the agency's final action. See *Wilmot v. Doyle*, 403 F.2d 811, 814-15 (9th Cir. 1968).

When an agency seeks judicial enforcement of a subpoena under section 556(d) it must proceed through the Attorney General "unless otherwise authorized by law." This is consistent with the general principle that conduct and supervision of agency litigation is in the Department of Justice "except as otherwise authorized by law," 28 U.S.C. §§516, 519. Some agencies do, of course, have specific authority to conduct their own litigation, see *F.T.C. v. Guignon*, 390 F.2d 323, 324-25 (8th Cir. 1968), and such authority will be applicable in accordance with its terms to subpoena enforcement proceedings. Section 556 is intended neither to grant nor to withhold from the agencies authority to conduct litigation, but merely to refer to existing law.

APPENDIX

STATEMENT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON ABA RESOLUTION No. 10

Resolution No. 10

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 U.S.C. 554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to sections 554, 556 and 557. It is not feasible or desirable, however, to make subpoenas available to either the agencies or the parties in every case of informal adjudication. Thus, amending the Administrative Procedure Act to provide a grant of subpoena power in appropriate cases of informal adjudication will require a definition of the category of proceedings to be covered; since framing a workable definition is exceedingly difficult, it may be found preferable for Congress to make such grants of subpoena power on a less general basis. In any event, we favor retention of that provision of the Administrative Procedure Act (5 U.S.C. 55(d) which permits the agencies to require by rule a statement or showing of general relevance and reasonable scope of the evidence sought before issuance of a subpoena.