Catholic University Law Review

Volume 16 | Issue 1 Article 7

1966

Case Notes

Catholic University Law Review

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Catholic University Law Review, *Case Notes*, 16 Cath. U. L. Rev. 96 (1967).
Available at: https://scholarship.law.edu/lawreview/vol16/iss1/7

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Case Notes

Administrative Law and Procedure—Criminal Law—Exclusionary Rule—*Leogrande v. State Liquor Authority*, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966).

IMMEDIATELY OUTSIDE his restaurant-liquor establishment, licensee Frank Leogrande, Jr. was observed by a police officer being approached by four unknown persons who engaged the licensee in conversation as well as handing him money. The police officer also overheard one of the men ask the licensee to "Give me five for a dollar." On the basis of what he had observed and overheard, the officer obtained and returned with a search warrant. The warrant was executed and a search revealed incriminating evidence indicating that the licensee was engaging in professional gambling activities. Criminal action was instituted, but the evidence was ruled inadmissible after the search warrant was controverted. The criminal charges were thereupon dismissed.

About four and one-half months later, a second search warrant was issued, based upon another police officer's observations of one McHugh being approached by several persons and engaging him in conversation, handing him money, and resulting in certain notations on paper. For two consecutive days this was observed and in each case the police officer also saw that McHugh passed the papers and money to the licensee who was sitting outside the licensed premises in a parked automobile. The second search warrant was also executed and again revealed incriminating evidence relating to gambling activities on the part of the licensee. However, the subsequent criminal proceeding was dismissed against Leogrande after the search warrant was controverted and vacated for lack of probable cause.

Even though all criminal charges against Leogrande were dismissed, the New York State Liquor Authority subsequently determined in administrative proceedings that the evidence indicating that Leogrande had engaged in gambling activities was competent and sufficiently ample to warrant cancellation of his restaurant-liquor license. Leogrande petitioned the Supreme Court, Appellate Division, to review the revocation,[1] contending that the evidence used to revoke his license was not competent because it was the product of an illegal search and seizure by police officers. Petitioner argued that the testimony presented by the two police officers in the Authority's administrative proceeding should be ruled incompetent because it resulted from search warrants subsequently vacated for lack of probable cause, and that the evidence, other than that tainted by illegality, was not sufficient to sustain the cancellation. In a decision by the Supreme Court, Appellate Division, First Department, *held,* evidence

[1] C.P.L.R. § 7801.

secured in an illegal search and seizure by public officials is incompetent and should be barred in the administrative proceeding conducted by the State Liquor Authority or any other official proceeding brought to impose forfeitures, penalties, or similar sanctions for violations of regulation or law.[2] Accordingly, the court annulled the cancellation and ordered restoration of the license.

The novel issue in this case—whether the exclusionary rule involving illegally obtained evidence normally applied in criminal proceedings extends to an administrative or civil proceeding brought by public officials—is not one that has been precisely passed upon by the Court of Appeals and rarely by courts of other jurisdictions.[3] Most administrative law and regulation is based on some form of sanction, and with a holding that search and seizure prohibitions, normally only applicable to criminal proceedings, extend to administrative proceedings resting on such sanctions, the decision has broad implications. Noted in the decision, but deemed irrelevant and not passed upon, was the question of the extension of the exclusionary rule to such administrative processes as subsequent and independent applications for licenses, positions in the public service, and other administrative proceedings which might involve penalties, forfeitures, or other sanctions.[4] However, the decision was consistent with the thrust of previous cases handed down by the Court of Appeals and the United States Supreme Court, and it constitutes a befitting recognition of individual rights in a judicial era which seems to emphasize their importance.

While the exclusionary rule is well-recognized in both federal and state jurisdictions,[5] there was some question, at least in New York until the instant case, whether it could be extended to administrative or civil proceedings brought by public officials where evidence unlawfully obtained by public officials is introduced. That there was some question can be traced to *Frank v. Maryland*,[6] probably the leading case on administrative search. There a health inspector of the City of Baltimore was seeking the source of rat infestation at the rear of the appellant's home, discovered evidence of such infestation, and, without a search warrant, asked for and was refused permission to inspect his basement at a reasonable hour of the day. The health inspector was acting under a city ordinance providing that he may demand entry to any house, cellar, or enclosure if the owner or occupier shall refuse or delay entry, in order to determine whether a nuisance had been created.[7] Appellant Frank refused and was subsequently convicted of a misdemeanor involving a small fine. In appealing, it was

[2] Leogrande v. State Liquor Authority, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966).

[3] See also Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1959); District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949).

[4] Leogrande v. State Liquor Authority, *supra* note 2, at 231, 232, 268 N.Y.S. 2d at 440.

[5] See United States v. Rabinowitz, 339 U.S. 56 (1950); McDonald v. United States, 335 U.S. 451 (1948); People v. Rainey, 14 N.Y. 2d 35, 197 N.E. 2d 527, 248 N.Y.S. 2d 33 (1964); People v. Fine, 14 N.Y. 2d 160, 199 N.E. 2d 151, 250 N.Y.S. 2d 47 (1964). Of course protection against search and seizure was considered for a long time in New York as not constitutionally derived but as a creature of statute. In 1938, when the statutory restraint against unreasonable searches and seizures was incorporated into the state constitution, proposals to adopt the exclusionary rule failed. Thus, it was not until Mapp v. Ohio, 367 U.S. 643 (1961), that the exclusionary rule was applied in New York. See Leogrande v. State Liquor Authority, 25 App. Div. 225, 232, 268 N.Y.S. 2d 433, 441 (1966) (Eager, J., dissenting).

[6] Frank v. Maryland, 359 U.S. 360 (1959).

[7] BALTIMORE, MD., CITY CODE art. 12, § 120 (1950). Cited at 359 U.S. 360, 361 (1959).

contended that his conviction resulted from resisting an inspection of his house which was without a warrant and was obtained in violation of the fourteenth amendment. By a sharply divided court, the United States Supreme Court held that the municipal ordinance permitting the demand for entry was valid and that the conviction for resisting inspection without a warrant was not in violation of the due process clause.[8] The attempted inspection was viewed by the court as pursued solely for the protection of the community's health, not as one where evidence for a criminal prosecution was sought, and to this the constitutional protection against official intrusion was held not to extend.[9] Writing for the majority, Mr. Justice Frankfurter argued that, "inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history."[10]

In distinguishing between what then can be described as an administrative inspection which is an adjunct to a regulatory scheme and a search basically designed to uncover criminal evidence, Mr. Justice Frankfurter set forth the doctrine that two protections arise from the broad constitutional prohibition against public intrusions. The first of these, the right of privacy, is available unless entry on the part of public officials is "under proper authority of law."[11] The second protection is the right to resist unauthorized entry when it has as its purpose the securing of information which might be used against the individual at a later juncture. Under the second protection, evidence of criminal action cannot be seized ordinarily without a judicially issued search warrant. But inasmuch as the inspection in *Frank* was not designed to seek out evidence of criminal action, the second protection was not applicable.

Moreover, regarding the first and intimately related protection, it could not be invoked and applied. The attempted "inspection" was merely to determine whether a *health* nuisance, rat infestation, existed. The maintenance of minimum community standards of health and welfare was sought, not evidence for a criminal prosecution. On this basis, Frank's refusal to permit the health inspector to enter his home can be based not on a right to resist unauthorized entry, having as its purpose the securing of information to be used against him at a later time, but upon a right to be secure from official invasion of one's privacy where that entry is not under proper authority of law.[12] But here there was no right to refuse entry, since it was an inspection designed for the protection of the community's health which was under proper authority of law.[13]

Frank, of course, is potentially applicable to *Leogrande* if the search be deemed to be administrative and as an adjunct to a regulatory scheme for the general welfare,

[8] Frank v. Maryland, *supra* note 6, at 362.

[9] *Id.* at 366.

[10] *Id.* at 367. *But see* the sharp dissent in Frank v. Maryland, 359 U.S. 360, 374 (1959), where Mr. Justice Douglas takes issue with this view.

[11] *Id.* at 365.

[12] *Id.* at 365.

[13] *Id.* at 367-73, where Mr. Justice Frankfurter, writing for the Court, reviews the history of the exercise of similar powers of inspection and concludes that when an inspection is undertaken for legitimate community purposes, e.g., health and safety, it is under proper authority of law and not violative of a right of privacy protected by the fourteenth amendment.

and not as one where the evidence is to be used to form the basis of a criminal prosecution. If that be the case, the evidence which was ruled inadmissible and excluded in criminal proceedings against the petitioner can be used by the Liquor Authority to revoke his license. Both are civil cases—*Frank,* a health inspection aimed at uncovering the source of rodent infestation, and *Leogrande,* a proceeding conducted by the Liquor Authority to consider whether a license should be revoked. Furthermore, neither case directly involved criminal prosecution leading to criminal penalties. However, when a court determines that an administrative or civil search is directed toward such prosecution or penalties, a result different from *Frank* is required.

Such a result was reached in *People v. Laverne,*[14] a recent New York case also concerned with administrative search. There reliance was placed by the prosecution on *Frank v. Maryland.*[15] *Laverne* involved a prosecution for violation of a municipal ordinance[16] prohibiting the operation of a business in a nonbusiness zone. Building inspectors, acting under authority of the ordinance, entered the premises and made observations which formed the basis of subsequent criminal charges against the appellant. Thus a clear question was presented: whether a civil ordinance authorized an administrative official to enter upon private premises without the owner's consent and obtain evidence for a criminal prosecution. The Court of Appeals said no.

Laverne admitted that under *Frank,* an entry into private premises by a public official entering without a search warrant against the resistance of the occupant and in pursuance of the authority of law for the purposes of eliminating a hazard immediately dangerous to public health and welfare is probably "...constitutionally valid if the purpose be summary or other administrative correction, or as a foundation for civil judicial proceedings."[17] But as with *Leogrande, Laverne* was not concerned with administrative inspection leading to administrative correction within the purview of *Frank,* but an official search of private premises without a warrant which led to a subsequent criminal prosecution.[18] For a long time prior to the unauthorized entry by the building inspector in *Laverne,* a controversy had existed between the municipality and the defendant with respect to the right to conduct his business in an area normally excluding business uses. An injunction against the appellant's corporation had been obtained on a date considerably prior to the time when the searches were conducted, so there was strong evidence in the record indicating that the building inspector had not entered to determine whether the ordinance was being violated in order to facilitate administrative correction.[19] Under these conditions, the Court of Appeals felt compelled to declare that to the extent that the searches were for the purposes of criminal prosecution, they were in violation of appellant's constitutional rights.[20] This enabled the Court of Appeals to point out that it was not passing on

[14] People v. Laverne, 14 N.Y. 2d 304, 200 N.E. 2d 441, 251 N.Y.S. 2d 452 (1964).
[15] Frank v. Maryland, *supra* note 6.
[16] LAUREL HOLLOW, N.Y., BUILDING ZONE ORDINANCE art. X. §§ 5.0, 10.2.
[17] People v. Laverne, *supra* note 14, at 305, 200 N.E. 2d at 442, 251 N.Y.S. 2d at 454.
[18] *Id.* at 308, 200 N.E. 2d at 443, 251 N.Y.S. 2d at 455.
[19] *Id.* at 306, 200 N.E. 2d at 442, 251 N.Y.S. 2d at 453.
[20] *Id.* at 308, 200 N.E. 2d at 443, 251 N.Y.S. 2d at 455.

the validity of a search utilized for a civil action, but rather one utilized for a criminal prosecution.[21]

While the Court of Appeals had refused to pass on the question of the validity of a search utilized for administrative or civil action, the result reached in that case encouraged the result reached in *Leogrande* by refusing to uphold an administrative or civil search and excluding evidence obtained in such a search when an individual would be facing criminal proceedings and the usual penalties involved as a result. In *Leogrande,* the State Liquor Authority simply intended to use evidence previously suppressed in a criminal proceeding in an administrative action which had as its purpose the regulation of the liquor industry. But while the Authority's proceeding in *Leogrande* was not criminal in nature, the evidence used was seized in an unlawful criminal search and had official consequences which were considered by the court to be at least as harsh as the criminal sanctions for gambling.[22] Leading to the *Leogrande* decision, this reasoning appears to be a logical extension of the *Laverne* case and is also supported by a recent opinion of the United States Supreme Court.

One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania,[23] a recent Supreme Court case that supports *Leogrande,* also serves to illustrate the policy behind the search and seizure prohibition as it should be applied to an administrative search. Law enforcement officers of the Pennsylvania Liquor Control Board stationed in another state observed a 1958 Plymouth Sedan bearing Pennsylvania registration plates proceeding toward a city in Pennsylvania. Noting that the car was "low in the rear,"[24] they followed it into Pennsylvania, and without a warrant, stopped and searched the automobile and subsequently found thirty-one cases of liquor therein. The car and liquor were then seized and the driver was arrested and charged with violation of illegal transportation of liquor as prohibited by state law.[25] As provided by statute, the state filed a petition for forfeiture of the automobile.[26] After the forfeiture had been affirmed by the Supreme Court of Pennsylvania,[27] *certiorari* was granted by the United States Supreme Court[28] to consider whether the search was lawful and whether the exclusionary rule[29] applied to forfeiture proceedings of the character there involved. In an opinion by Justice Goldberg, the Supreme Court held that even though a criminal proceeding was not directly involved, evidence obtained in violation of the fourth amendment may not be relied upon to sustain a forfeiture.[30]

The court noted that the State Supreme Court had affirmed under the understanding that the search and seizure prohibition applied only to criminal prosecutions

[21] *Ibid.*
[22] *Supra* note 4.
[23] 380 U.S. 693 (1965).
[24] *Id.* at 694.
[25] PURDON'S PA. STAT. ANN. tit. 47, § 4-494(a) (1964 Cum. Supp.). Cited at 380 U.S. 693, 701 n. 9 (1965).
[26] PURDON'S PA. STAT. ANN. tit. 47, § 6-601 (1964 Cum. Supp.). Cited at 380 U.S. 693, 694 n. 2 (1965).
[27] Commonwealth v. One 1958 Plymouth Sedan, 414 Pa. 540, 201 A. 2d 427 (1964), *rev'd,* 380 U.S. 693 (1965).
[28] 379 U.S. 927 (1964).
[29] Under Mapp v. Ohio, 367 U.S. 643 (1961).
[30] One 1958 Plymouth Sedan v. Pennsylvania, *supra* note 23, at 696.

and was not applicable to forfeiture proceedings which the state court deemed civil in nature.[31] Holding to the contrary, that is, that forfeiture proceedings were not exactly civil in nature, led the court to find that the search and seizure prohibition was operative, and as a result, evidence obtained in a search without a warrant or lacking probable cause required that that evidence should be excluded.[32] *One 1958 Plymouth Sedan,* as with *Leogrande,* reverts then to the question whether a distinction can be made between an ordinary criminal proceeding and a civil or administrative proceeding involving penalties, forfeitures, or other sanctions for the violation of law or regulation. In either case, the distinction was not recognized.

Both cases placed strong reliance on *Boyd v. United States,*[33] the landmark Supreme Court case which refused to accept the classification of civil as opposed to criminal in characterizing proceedings involving penalties for the purposes of applying the fourth amendment. While civil or administrative action involving forfeiture does not constitute a criminal proceeding per se, they were characterized in the *Boyd* decision as being quasi-criminal in nature in which the protection of the fourth amendment must be made available. As pointed out in *Boyd,*

> If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—i.e., civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens . . . this cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one . . . as therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution. . . .[34]

Without arguing that the fourth amendment historically was designed to proscribe all searches of private property without judicial warrants,[35] and that evidence obtained as a result should be excluded, regardless of whether the product of the search was utilized for a criminal prosecution or a civil remedy, the holding in *Boyd* alone seems to support the holding in *Leogrande.*

The holding was by an inferior state court and appears to be a limited one, and would not appear to apply to all administrative proceedings or civil actions where such proceedings are instituted by public officials and where evidence illegally obtained by public officials is tendered. *Leogrande* observed that the exception of the *Frank* ruling had understandable basis in guarding against health nuisances or dangers to the common good.[36] But in proceedings of the nature encompassed by the instant case, the applicability of the search and seizure prohibition and the exclusionary rule was well-warranted. The court declared that,

[31] Commonwealth, *supra* note 27, at 542, 201 A. 2d at 429.
[32] *Id.* at 702.
[33] Boyd v. United States, 116 U.S. 616 (1886).
[34] *Id.* at 634.
[35] See, *e.g.,* the discussion by Prettyman, J., in District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949).
[36] 25 App. Div. 2d at 232, 268 N.Y.S. 2d at 440.

> . . . illegal activity of the police officers . . . has official consequences more grave in economic terms than those of the criminal sanctions for gambling. The licensee . . . is subject to the loss of his valuable liquor license and to forfeiture of the 'penal sum' of $1,000 on the bond supplied to the administrative agency in connection with this license. The exclusionary rule rests on the theory of deterrence; that policy would not be served if the illegal official activity could be used, despite unavailability in criminal proceedings, to effect parallel sanctions of forfeiture in an administrative proceeding.[37]

The holding that when a civil suit instituted by public officials and involving official penalties is presented, search and seizure protection applies, is not without its problems, because every ordinance, regulation, statute, or law must ultimately depend upon some form of official penalty or sanction.[38] In addition, whether there is a real penalty involved is not always apparent and by no means clear in every case. However, in such decisions as the *Leogrande* decision and the others reviewed above, the courts have resolved these problems by examining the purpose of the search, the circumstances underlying the search, the penalties and consequences they lead to, and other relevant questions. On this basis, the result reached in *Leogrande* appears to be a fair and reasonable approach to the problems posed as well as being supported by previous cases of the Court of Appeals of New York and the United States Supreme Court.

[37] *Ibid.*

[38] *But see* Frank v. Maryland, 359 U.S. 360, 374 (1959) (Douglas, J., dissenting), where requiring a warrant and "the test of 'probable cause' " seems to be advocated for all ordinary searches, a proposal which would appear to eliminate at least one phase of the problem in this respect.

Administrative Law—Procedure—Witness Fees—*United States v. Lemlich,* Civil No. 65-850, S.D .Fla., Jan. 11, 1966.

A SUMMONS WAS ISSUED by the Internal Revenue Service[1] to respondent, a corporate official, compelling his appearance to testify in an examination concerning the withholding tax liability of his corporation.[2] IRS filed a petition pursuant to section

[1] United States v. Lemlich, Civil No. 65-850 Civ., S.D. Fla., Jan. 11, 1966; see also, United States v. Wolff, docket number unavailable, S. D. Fla., Feb. 10, 1966.

[2] INT. REV. CODE OF 1954, § 7602.

§ 7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in

7604 (b) of the IRS Code[3] before a federal district court in the 5th circuit to enforce the summons, and for an order to show cause why the respondent should not be compelled to obey the summons. The court issued an order for the respondent to appear and declared that the summons was not invalid as a violation of the fourth amendment guarantee against unreasonable search and seizure. However, the court *held* that the summons was for an examination which was "a hearing" within the meaning of section 95 (a),[4] the general authorization for payment of fees and expenses of witnesses subpoenaed to appear at federal agency hearings; and the respondent, if compelled to attend the examination, would be entitled to compensation upon appearance.

Although it has not always been so, compensating witnesses is now a recognized procedure in federal and state courts.[5] The common law concept of duty to the community prevailed despite hardship to an uncompensated witness. According to this doctrine, every person owes the state the duty of testifying to the extent of his knowledge when summoned before a court.[6] In *Blair v. United States* the Supreme Court held that the compulsion of witnesses was at the very foundation of our judicial system. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public."[7]

The Court recognized that the act of 1853 provided for mileage and attendance fees.[8] But, in the absence of express statute, the Court held that the common law doctrine applies subject to rare exceptions, such as self-incrimination.[9] Relaxation of this

---

respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[3] INT. REV. CODE OF 1954, § 7604 (b) granting federal district courts authority to compel attendance by appropriate process.

[4] 60 Stat. 809 (1946), 5 U.S.C. 95 (a) (1964).

§ 95 (a). Same; government officers and employees attending department hearings. Whenever a department is authorized by law to hold hearings and to subpoena witnesses for appearance at said hearings, witnesses summoned to and attending such hearings shall be entitled to the same fees and mileage, or expenses in the case of Government officers and employees, as provided by law for witnesses attending in the United States Courts.

[5] NLRB v. Gunaca, 135 F. Supp. 790 (E.D. Wisc. 1955).

[6] Healy v. Hillsboro County, 70 N.H. 588, 49 Atl. 89 (1901); 8 WIGMORE, EVIDENCE § 2175, 2192, 2193 (McNaughton Rev. 1961).

[7] 250 U.S. 273, 281 (1919).

[8] REV. STAT. §§ 848, 855 (1875), 28 U.S.C. §§ 1821, 1825, 1871 (1964).

[9] Blair v. United States, *supra* note 7; United Development Corporation v. State Highway Dept., 133 N.W. 2d 439 (N.D. 1965).

rule was held to abrogate the basic need of compulsion of witnesses. This compulsion to testify was held analogous to the duty of a taxpayer to support the Government.

However, with the growth of litigation and the corresponding hardships on witnesses, the need to provide for fees and expenses became apparent. While the courts did not act, the legislature did. By statute, witnesses in either federal or state courts are now entitled to mileage and fees;[10] but the legislature intended to reimburse the witness for expenses incurred and not to compensate the witness for his testimony.[11]

The law now requires that the party who calls the witness must pay the fee.[12] The witness is entitled to this fee even if he does not appear.[13] Included in calculating the reimbursable expenses are the mileage and fees authorized for the respondent.[14] The witness's right to compensation has not grown without certain limitations. A witness who is a party to a suit or has a material interest in the outcome cannot claim compensation for voluntary testimony on his behalf.[15] However, compensation is allowed for a witness with only an incidental interest in a suit such as a witness subject to a combined suit in which he develops material interest, employees of interested parties and stockholders, employees and officers of corporations.[16]

Other collateral rights for witnesses have developed from the unqualified common law compulsion to testify. Today, when a witness is ordered to appear, he has a right to counsel,[17] right to a transcript,[18] a right to cross examine,[19] and the privilege against self-incrimination.[20] But with the development of these rights, a corresponding sanction has developed, i.e., a contempt citation for failing to answer an order to appear.[21]

Compensating witnesses has also been recognized as a procedural requirement in government administrative proceedings.[22] The administrative agency appeared in 1887 as a quasi-legislative and quasi-judicial organization.[23] The requirement for order and fairness in these proceedings has long been recognized. But again, the requirement of a statute is essential before compensation can be authorized.[24] The federal government now conducts hearings and investigations on such a scale that the nature of such proceedings has taken on many of the trappings of their judicial counterparts.

[10] 28 U.S.C. § 1821 (1964); 6 MOORE, FEDERAL PRACTICE ¶ 54.77 (1965).
[11] Starmont v. Cummins, 120 Mich. 629, 79 N.W. 897 (1899).
[12] Vincennes Steel Corp. v. Miller, 94 F.2d 347 (5th Cir. 1938).
[13] Parsons Band Cutter & Self-Feeder Co. v. Sciscoe, 129 Iowa 631, 106 N.W. 164 (1906).
[14] Dep't of Highways v. McWilliams Dredging Co., 83 F. Supp. 132 (W.D. La. 1951), *aff'd*, 187 F.2d 61 (5th Cir. 1951); Modick v. Carvel Stores of New York, Inc., 209 F. Supp. 361 (S.D.N.Y. 1962).
[15] Western Creamery Co. v. Malia, 89 Utah 422, 57 P.2d 743 (1936); Kemart Corp. v. Printing Arts Research Labs, 232 F.2d 897 (9th Cir. 1956).
[16] 97 C.J.S. *Witnesses* § 37 (1966).
[17] In the Matter of Neil, 209 F. Supp. 76 (S. D. W. Va. 1962).
[18] Mott v. MacMahon, 214 F. Supp. 20 (N.D. Cal. 1963).
[19] Wilcoxon v. United States, 231 F.2d 384 (10th Cir. 1956).
[20] *In re* Groban's Petition, 352 U.S. 330 (1957); Emspak v. United States, 349 U.S. 190 (1955); ICC v. Brimson, 154 U.S. 447 (1894).
[21] Duffy v. Brody, 147 F. Supp. 897 (D. Mass. 1957).
[22] NLRB v. Gunaca, *supra* note 5; Dickerson v. Mangham, 194 Ga. 446, 22 S.E. 2d 88 (1942).
[23] Bar Ass'n of D.C., TRIAL TECHNIQUES ON ADMINISTRATIVE PROCEEDINGS 102 (1958).
[24] NLRB v. Gunaca, *supra* note 5.

Early studies in this area reflect the concern for maintaining fairness and due process in the growing administrative proceedings. In 1941, the final report of the Attorney General's Committee on Administrative Procedure reflected the philosophy behind such concern:

> Administrative agencies have been derived by Congress under the pressure of events for the exercise of new powers in new fields. Yet Congress has rarely undertaken to state the principles under which they shall operate. Views as to their proper method of operation range from entire absence of restriction to and beyond the requirement of full judicial procedure, as in jury trials at common law. Not only has Congress given the Agencies themselves little direction, it has given the public and reviewing courts almost no indication of its desire as to their method of operation.
>
> Of course, whatever the procedure or lack of procedure, most citizens aquiesce in the judgment of the Government. Those of modest means or humble interests rarely question a decision by a Federal official. Others feel that no matter what the outcome, their business or their pocketbooks suffer by a contest. Anyone must recognize the uncertainties of such a contest. For these reasons, it is the more necessary to devise methods, and constantly improve them, by which the exercise of the devices and far-reaching power of the national Government will be kept more nearly within those channels of justice which everyone feels to be desirable. At the same time, we must take care that we do not cripple the nation by elaborate routines, which stultify rather than aid the purpose of government.[25]

The Committee proposed that fair procedure should be composed of those devices that would reduce hardships to the citizen, and concluded that these devices are essential to any administrative proceeding.[26] This philosophy was evidenced earlier by Justice Brandeis' statement that "in the development of our liberty, insistence upon procedural regularity has been a large factor."[27]

Later, when Congress enacted the Administrative Procedure Act of 1946, it hoped to give wide latitude for judicial review over administrative proceedings.[28] The purpose of the act was to provide simple and standard procedures for all administrative agencies[29] and to refer questions of law to the courts rather than to administrative agencies.[30] However, its scope as defined by subsequent court decisions, has been limited.[31] The provision for judicial review at the request of "any person suffering a legal wrong because of any administrative action"[32] has not come to fruition.

Application of these principles to the Internal Revenue Service has also been lim-

[25] S. Doc. No. 8, 77th Cong., 1st Sess. 215 (1941).
[26] *Id.* at 216.
[27] Burdeau v. McDowell, 256 U.S. 465, 477 (1921).
[28] Administrative Procedure Act § 10, 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1964).
[29] S. Doc. No. 248, 79th Cong., 2d Sess. 241-42 (1946).
[30] S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1955); H. R. Rep. No. 1980, 79th Cong., 2d Sess. 44 (1946).
[31] United States v. Morton Salt Co., 338 U.S. 632 (1950); Heikkila v. Barber, 345 U.S. 229 (1953); United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963).
[32] Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (a) (1964).

ited. The purpose of the IRS is to finance the operation of Government, redistribute income, and foster the growth of industries by granting certain incentives. Thus, because of a concern for the effective operation of this agency, Congress insulated IRS from judicial proceedings thus limiting review of administrative process.[33]

Despite the governmental purpose doctrine, the courts have generally allowed witness compensation in administrative proceedings. The procedural rights given to witnesses in administrative proceedings prevent minor government officials from summoning witnesses and compelling their appearance without compensating them, thereby creating hardships.[34] Witnesses at tax examinations have the right to counsel.[35] A lack of case law exists on the subject of travel costs for witnesses, but writers on the subject indicate that fair dealing would compel their payment.[36]

While the witness in an administrative hearing is usually allowed all the rights given to a witness in law,[37] a distinction has been made for those witnesses subject to administrative investigations. A hearing presupposes a formal proceeding upon notice, adversaries and issues on which evidence may be adduced.[38] In this situation, section 95 (a) has guaranteed the same fees that are paid to witnesses in court. However, the investigation is conducted to determine whether facts justify a hearing. The proceedings involve no determinations or decisions between parties, for there are no parties.[39] Against this background, the Comptroller General of the United States has ruled that, despite the recent 5th circuit decisions,[40] witnesses called pursuant to section 7602 are not entitled to witness fees.[41]

In holding section 95 (a) inapplicable to IRS witnesses the Comptroller General relied on three points: absence of sufficient judicial precedent, absence of conclusive legislative history to establish the intent of Congress, and the equities surrounding appearances of witnesses called to court does not coincide with the obligations of taxpayers summoned to an examination.

The Comptroller General's reliance on lack of judicial precedent was a reference to *Norwegian Nitrogen Co. v. United States.*[42] However, while Justice Cardozo's opinion did hold that precedent should be given great weight, he held that it was not conclusive, and, by itself, might be inadequate.[43] To this the Comptroller General added that there was no legislative history to indicate the Congressional intent. But this argument does not conclusively establish that Congress did not intend to apply the interpretation given by the 5th circuit. In his analysis, the Comptroller General does point out that the enactment of the revenue code only provided for witness fees in

[33] Declaratory Judgment Act, 28 U.S.C. § 2201-02 (1964), excepts tax matters.
[34] United States v. Minker, 350 U.S. 179, 195 (1956).
[35] In the Matter of Neil, *supra* note 17.
[36] Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness,* 60 MICH. L. REV. 169 (1962).
[37] Falsone v. United States, 205 F.2d 734 (5th Cir. 1953).
[38] Albert v. Public Service Commission, 209 Md. 27, 120 A.2d 346 (1956).
[39] *In re* Securities and Exchange Commission, 84 F.2d 316 (2d Cir. 1936).
[40] United States v. Lemlich, *supra* note 1; United States v. Wolff, *supra* note 1.
[41] DECS. COMP. GEN., B-158810, April 26, 1966.
[42] 288 U.S. 294 (1933).
[43] *Id.* at 303.

conjunction with disputes before the tax court.[44] By implication, he concludes, the failure of Congress to act would indicate that section 7602 proceedings do not constitute hearings within the scope of section 95 (a).

The IRS requested an opinion after *Lemlich* and *Wolff* indicated the necessity to pay witness fees. The Assistant Commissioner's letter to the Comptroller General addressed itself to the distinction between administrative hearings and investigations.[45] He contended that the doctrine underlying investigations should apply to examinations conducted under section 7602. The Comptroller General did not decide this point, but conceded that the type of examination under section 7602 may have some elements of a hearing.

The Comptroller General is appointed by law to be the "watchdog for Congress" over federal expenditures.[46] In pursuing this mandate he is responsible to Congress for the investigation of the uses of appropriated funds, that the uses were legitimate, and that they were within the intent of Congress.

Over the years the Comptroller General has cut out a unique jurisdiction in exercising his function. His rulings on federal expenditures have been held to be sole and exclusive.[47] Collateral to these rulings on accountability, he has authority under the Dockery Act[48] to pass on questions of law, although the Attorney General is the responsible official within the executive branch to rule on questions of law.[49] Because of vague jurisdictional demarcations, conflict between the two officials has produced opposite rulings.[50] At the present time the Comptroller General is predominant and does not consider himself bound by decisions of the Attorney General or any forum other than the Supreme Court.[51]

The Comptroller General reacted to the IRS request in his traditional role as guardian of the federal purse. However, there are serious questions that arise when this position is extended to statutory interpretation,[52] a question of law, that effectively overrules the decisions of federal courts. The Comptroller General's concern over ill-spent public funds has overriden any jurisprudential approach fostered by the courts to provide a better administration of justice. The position of the witness, inconvenienced by travel at his own expense, compelled by minor government officials to attend secret proceedings, appears inimical to our present trends of justice as recognized in the federal courts and generally accepted in administrative hearings.[53]

[44] INT. REV. CODE OF 1954, § 7457.

[45] Letter from Ass't Commissioner, Internal Revenue Service to Comptroller General, March 28, 1966.

[46] Budget and Accounting Act of 1921, 42 Stat. 20 (1921), 31 U.S.C. § 1 (1964).

[47] McCabe v. United States, 84 Ct. Cl. 291 (1936); Belcher v. United States, 94 Ct. Cl. 137 (1941).

[48] Dockery Act, 1894, ch. 174, 28 Stat. 205 (codified in scattered sections of 5, 22, 25, 31, 41, 42, 43, 44 U.S.C.)

[49] Graybar Electric Co. v. United States, 90 Ct. Cl. 232 (1940).

[50] The Attorney General has also ruled on the subject in the instant case with different results: 17 OPS. ATT'Y. GEN. 247 (1881), 21 OPS. ATT'Y. GEN. 263 (1895).

[51] 27 DECS. COMP. GEN. 655 (1948); 31 DECS. COMP. GEN. 73 (1951); 31 DECS. COMP. GEN. 613 (1952); 33 DECS. COMP. GEN. 66 (1953).

[52] United States v. Wunderlich, 342 U.S. 98 (1951); Climatic Rainwear Co. v. United States, 115 Ct. Cl. 520, 88 F. Supp. 415 (1950).

[53] United States v. Minker, *supra* note 34.

By this ruling the IRS was directed to amend their regulations to disallow the payment of fees, with the result that the Comptroller General's opinion will again prevail over a court decision. It is doubtful that this position will be changed since the courts are hesitant to interfere with administrative decisions.[54] The trend in this area has been to allow even constitutional principles to give way to allow administrative agencies to gather the necessary information to promote the governmental purpose.[55] The Administrative Procedure Act did not increase the scope of judicial review, but, in effect, only followed the policy of the courts by allowing limited review.[56] The only possibility for the institution of witness fees for examinations held pursuant to section 7602 is specific action by Congress or the Supreme Court.

[54] United States v. Morton Salt Co., *supra* note 31; Heikkila v. Barber, *supra* note 31; United States v. Carlo Bianchi & Co., *supra* note 31.
[55] 4 DAVIS, ADMINISTRATIVE LAW § 30.01 (1958).
[56] United States v. Minker, *supra* note 34.

Federal Procedure—Discovery—Plaintiff Allowed to Determine Defendant's Liability Insurance Coverage—*Cook v. Welty*, 253 F. Supp. 875 (D.D.C. 1966).

WILLIE V. COOK BROUGHT SUIT[1] in the District Court for the District of Columbia to recover damages for injuries suffered in an automobile accident. During the taking of depositions, the defendant Elizabeth M. Welty, administratrix of the estate of the owner and driver of the automobile involved in the accident, was asked to disclose the extent of liability insurance carried by the decedent. When the defendant refused to answer the question on the grounds that it was irrelevant to the issues in the case, plaintiff moved to compel response. Judge Alexander Holtzoff granted the motion finding that to allow discovery of liability insurance coverage is "conducive to fair negotiations and to just settlements" and is in line with the objectives of modern reformed procedure.[2]

Although the above case is one of first impression in the District of Columbia, the question of the plaintiff's right to discover the extent of the defendant's insurance coverage is not new.[3] To date there are no less than thirty cases on point.[4] Also, there are problems of interpreting Sec. 26 (b) of the Federal Rules of Civil Procedure[5] or

[1] Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966).
[2] *Id.* at 877.
[3] The first case on point was Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948).
[4] For an exhaustive listing of cases on point see 4 MOORE, FEDERAL PRACTICE ¶ 26.16 [3] (2d ed. 1963).
[5] FED. R. CIV. P. 26 (b), 28 U.S.C.A.

some similar state statute. California, in allowing discovery, felt compelled to look beyond its rules of procedure.[6] The state Supreme Court declared that the Insurance Code[7] created a contractual relationship between the insurer and third parties who might be negligently injured by the insured and therefore ". . . the very pendency of an action by the injured person brought in good faith against the named insured person gives the former a discoverable interest in the policy."[8]

The position taken in California was bolstered by an Illinois decision[9] in which the state Supreme Court found that the state's Insurance Code[10] created an interest in every member of the public who is negligently injured and, thus, through discovery of insurance coverage the plaintiff is apprised of rights of which he may otherwise have been unaware.

Nevada, following the same approach, reached an opposite result.[11] The state Supreme Court decided that the Nevada Motor Vehicle Safety-Responsibility Act[12] did not create a contractual relationship between the insurer and the third party, thus, there could be no discoverable interest. Although Montana, like Nevada, did not have an insurance code which could be interpreted as creating a contractual relationship between the insurer and third parties, the federal district court was able to find that such a relationship did in fact exist because many of the insurance contracts contained the direct-action-after-judgment provisions which were mandatory under the California and Illinois statutes.[13]

Not all courts favoring discovery of insurance coverage appeal to other statutes to justify their decisions. Several courts have simply found, with little explanation, that such information is relevant to the subject matter.[14] One case has reasoned that ". . . if the insurance question is relevant to the subject matter after the plaintiff prevails, why is it not relevant while the action pends?".[15] Many courts set forth as a determinative factor the argument that allowing discovery would aid in the settlement of many cases before trial.[16] Such settlements, it has also been argued, would accomplish the basic purpose of the rules of procedure, namely, to reach a "just inexpensive determination"[17] and, therefore, information which would increase the chance for a settlement is relevant.[18] The basic premise of this argument is questioned by several courts which maintain that knowledge of insurance coverage by plaintiff

[6] Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951).
[7] CAL. INS. CODE § 11580.
[8] Superior Ins. Co. v. Superior Court, *supra* note 6, at 754, 235 P.2d at 835.
[9] State *ex rel.* Terry v. Fisher, 12 Ill.2d 231, 145 N.E.2d 588 (1957).
[10] ILL. REV. STAT. ch. 73, § 1000 (1955).
[11] State *ex rel.* Allen v. Second Judicial District Court, 69 Nev. 196, 245 P.2d 999 (1952).
[12] Motor Vehicle Safety-Responsibility Act of 1949, NEV. REV. STAT. tit. 43, § 485.011 (1961).
[13] Johanek v. Aberle, 27 F.D.R. 272 (D. Mont. 1961).
[14] Novak v. Goodwill Grange No. 127, 28 F.R.D. 394 (D. Conn. 1961); Furumizo v. United States, 33 F.R.D. 18 (D. Hawaii 1963); Hurley v. Schmid, 37 F.R.D. 1 (D. Ore. 1965).
[15] Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954) at 942.
[16] State *ex rel.* Terry v. Fisher, *supra* note 9; Brackett v. Woodall Food Product, 12 F.R.D. 4 (E.D. Tenn. 1951).
[17] FED. R. CIV. P. 1.
[18] Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

might impair settlement chances[19] when the insurance coverage was greater than the injury suffered.

The thrust of most arguments against discovery is that insurance coverage is not relevant to the subject matter in the action.[20] Such information is claimed to be outside the scope of questioning because it is not "reasonably calculated to lead to the discovery of admissible evidence."[21] Arguments based on insurance codes and motor vehicle safety-responsibility acts are dismissed as not persuasive because proof of the ability to satisfy a judgment is not related to the issue of liability for negligence.[22]

Another argument advanced against discovery is that allowing plaintiff to determine defendant's insurance assets will lead to allowing discovery of defendant's general assets and, therefore, is the first step in a serious breach of privacy.[23] This argument has been answered by advocates of discovery who distinguish liability insurance from other assets on the ground that the former, unlike the latter, exists solely to satisfy the insured's liability.[24]

The present case, although allowing the discovery of insurance coverage, admits that the arguments against discovery are logically invulnerable, but dismisses them with a charge of narrowness and a quote from Holmes.[25]

The court placed its emphasis on the congested dockets of the courts, arguing that discovery would aid in increasing the number of settlements. The Court quoted the following from *State ex rel. Terry v. Fisher* in support of the relevancy of insurance coverage in the action:

> [A]s far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary.[26]

It is very doubtful that *Cook v. Welty* will ever be considered a highly persuasive case. It adds nothing new to this much overworked area, and it is only a decision on a pre-trial motion. Nevertheless, it is a case of first impression in the District of Columbia, and it provides an example of the utter confusion surrounding the scope of discovery under 26 (b) of the Federal Rules. At the present time, a district court need only choose one of the conflicting arguments set out in Judge Holtzoff's opinion and proceed to interpret 26 (b) with a free hand.

There are no court of appeals decisions on the point.[27] There are even two dis-

[19] Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D.Pa. 1962).

[20] McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952); Langlois v. Allen, 30 F.R.D. 67 (D. Conn. 1962); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955).

[21] MOORE, *supra* note 4.

[22] Langlois v. Allen, *supra* note 20.

[23] Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).

[24] Johanek v. Aberle, *supra* note 13.

[25] HOLMES, THE COMMON LAW 41 (1881), "The life of the law has not been logic, but experience," quoted in Cook v. Welty, *supra* note 1, at 877.

[26] State *ex rel.* Terry v. Fisher, *supra* note 9, at 239; 145 N.E.2d at 593.

[27] Cook v. Welty, *supra* note 1.

tricts which have cases going in both directions.[28] Until there is a court of appeals decision or until § 26 (b) is made more explicit, the only definite statement that can be made concerning the discovery of insurance coverage by a plaintiff is the following:

> There is a clear divergence of opinion on this question . . . there is no clear majority on either side of the question nor any unequivocal discernible trend.[29]

[28] There are decisions both ways in Tennessee, Hillman v. Penny, 29 F.R.D. 159 (D. Tenn. 1962) discovery refused, Brackett v. Woodall Food Products, *supra* note 16, discovery allowed; and Connecticut, Langlois v. Allen, *supra* note 20, discovery refused, and Novak v. Goodwill Grange No. 127, *supra* note 14, discovery allowed.

[29] McDaniel v. Mayle, 30 F.R.D. 399 (N.D. Ohio 1962).