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The Civil Investigative Demand: A Constitutional Analysis and Model Proposal

I. INTRODUCTION

On March 28, 1980, in *State ex. rel. Shriver v. Leech*¹ the Court of Appeals for the Middle Section of Tennessee declared unconstitutional the state's civil investigative demand (CID) statute.² Judge Henry Todd, writing for the majority, held that the process issued pursuant to the statute constituted an unreasonable search and seizure, and that the discovery provided for by the statute violated the due process and equal protection clauses of both the state and federal constitutions.³

The civil investigative demand is a precomplaint compulsory process used by state or federal attorneys general to gather information to ascertain whether any violation of law has occurred or whether further investigation is warranted.⁴ The Tennessee ruling is the latest of a number of decisions from various jurisdictions challenging the CID on constitutional grounds. Contrary to *Shriver*, however, most of these decisions have upheld the challenged demand statutes. Therefore, the Tennessee court's acceptance of constitutional arguments previously rejected by other courts provides an excellent impetus for a new examination of CID statutes. This Note first traces the initial judicial reaction to administrative demands for information and administrative investigations and delineates the constitutional requirement set forth therein. The Note next examines the development of CIDs and analyzes decisions upholding their constitutionality. This Note contends that most courts either have incorrectly applied current administrative standards to the CID or have failed to apply such standards altogether. The analysis is broken down into six parts, each dealing with a separate constitutional basis for a CID challenge. Because most suits that contest CIDs are based on fourth amendment search and seizure issues, the bulk of this Note is

1. No. 79-761 (Tenn. Ct. App. Mar. 28, 1980).

2. TENN. CODE ANN. § 8-6-402 (1980).

3. *State ex rel. Shriver v. Leech*, No. 79-761, slip op. at 18 (Tenn. Ct. App. Mar. 28, 1980). The court found further that the statute's provision for contempt proceedings in the Chancery Court did not cure these constitutional infirmities. *Id.*

4. Perry & Simon, *The Civil Investigative Demand: New Fact-Finding Powers For The Antitrust Division*, 58 MICH. L. REV. 855, 855-56 (1960).

dedicated to a discussion of this area. CIDs, however, do have utility as investigative devices when proper safeguards are afforded the demandee. Therefore, this Note concludes by presenting a proposed model civil investigative demand statute designed to meet the constitutional objections outlined herein.

II. FOURTH AMENDMENT SEARCH AND SEIZURE

A. *Administrative Demands for Information: Oklahoma Press, Morton Salt, and their Progeny*

Administrative investigations are inquisitorial proceedings that are designed to gather information from businesses and individuals.⁵ Such investigations may require oral testimony under oath, inspection of documents and records, submission of reports, or inspections of premises.⁶ Two devices commonly used to compel the production of information are the administrative subpoena⁷ and the civil investigative demand.⁸ These devices often are used to determine whether a law is being violated or whether further investigation or other action is warranted.⁹

Initially, the Supreme Court adopted a cautious approach to administrative demands for information, particularly in light of fourth amendment considerations.¹⁰ For instance, in *Boyd v. United States*¹¹ the Court addressed the constitutionality of a revenue statute¹² authorizing a court, on motion of a government at-

5. 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 19.01, at 19-2 (1980).

6. *Id.* § 19.02, at 19-25 & n.1. On-site administrative inspections are discussed in Part VII *infra*.

7. The authority to issue subpoenas inherently resides in the courts. 8 J. WIGMORE, EVIDENCE § 2195 (J. McNaughton rev. ed. 1961). Thus, courts originally declined to support an agency's power to issue subpoenas. *See* B. MEZINES, J. STEIN & J. GRUFF, *supra* note 5, § 20.01 [1], at 20-3. Eventually, however, the Supreme Court abrogated this rule and held that if an agency has subpoena authority conferred by statute, then it can validly issue subpoenas. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

8. For a discussion of the historical development of the CID, see notes 39 to 45 *infra* and accompanying text.

9. For a full discussion of the many purposes of administrative investigations, *see* B. MEZINES, J. STEIN & J. GRUFF, *supra* note 5, § 19.01[1]-[3], at 19-42 to 19-48.

10. *See Harriman v. ICC*, 211 U.S. 407 (1908); *Boyd v. United States*, 116 U.S. 616 (1886); *FTC v. Baltimore Grain Co.*, 284 F. 886 (D. Md. 1922), *aff'd*, 267 U.S. 586 (1924). *See also* 65 Ky. L.J. 168, 174-75 (1976).

11. 116 U.S. 616 (1886).

12. 19 U.S.C. § 535 (1976). Section 5 of the Act provides in part:

In all suits and proceedings other than criminal arising under any of the revenue-laws of the United States, the attorney representing the Government, whenever, in his belief, any business-book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may

torney, to compel the production of an individual's private books and papers. These materials could then be used as evidence against the demandee in a proceeding to forfeit his property or to establish criminal charges against him.¹³ Although the statute required the government attorney both to specify with particularity the materials sought and to state the nature of the underlying allegation, and although it merely gave a *court* discretionary authority to compel the production, the Court struck down the statute as violative of the fourth amendment.¹⁴ The Court initially stated that compelled production of an individual's private papers is equivalent to an actual search and seizure. Thus, the Court established that compelled production "is within the scope of the Fourth Amendment . . . in all cases in which search and seizure would be. . . ."¹⁵ After reviewing the facts of the case, the Court held that the demand made to the petitioner was unreasonable and therefore violated his fourth amendment rights.¹⁶

Faced with repeated congressional authorization of precomplaint investigative devices,¹⁷ and with the growing influence of large, interrelated, and apparently anticompetitive businesses, the Court decided two cases that are regarded as the ultimate support for the validity of precomplaint administrative investigations. In *Oklahoma Press Publishing Co. v. Walling*¹⁸ the Court upheld the constitutionality of a portion of the Fair Labor Standards Act that permitted the Wage and Hour Administrator to demand certain

make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court . . . and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court.

13. 116 U.S. at 622.

14. *Id.* at 638.

15. *Id.* at 622.

16. The Court stated that:

[it] is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

17. 65 Ky. L.J. 168, 175 (1976).

18. 327 U.S. 186 (1946).

information from businesses by issuance of a subpoena.¹⁹ Upon refusal by the demandee to obey the subpoena, the Administrator could call upon the district courts for enforcement through their contempt powers.²⁰ Petitioners claimed that judicial enforcement of the subpoenas duces tecum issued to them under the Act would violate their fourth amendment rights by permitting the Administrator to conduct a wholesale fishing expedition in hopes of discovering a Fair Labor Standards violation. Contrary to earlier holdings, the Court dismissed petitioners' claim, stating that

[t]he short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside.²¹

The Court emphasized in *Oklahoma Press* that petitioners had misconceived the function of the fourth amendment because they had sought total protection from investigation and not prevention of an unlawful search and seizure.²² The Court blamed this confusion on petitioners' failure to appreciate the distinction between "constructive" and "actual" searches and seizures. Because compulsory production of books and papers is only the *equivalent* of an actual search and seizure, demandees are afforded less protection under the fourth amendment in such circumstances.²³ According to the Court, this distinction is especially true when the

19. Fair Labor Standards Act of 1938, § 11(a); 29 U.S.C. § 211(a) (1976) (the Act). Section 11(a) provides in part:

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of the chapter, or which may aid in the enforcement of the provisions of this chapter.

The subpoena was issued under the authority of § 9 of the Act, which incorporated the enforcement provisions of the Federal Trade Commission Act of 1914, §§ 9-10, 15 U.S.C. §§ 49-50 (1976) (FTC Act). Section 9 of the FTC Act currently provides in part:

For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

20. 327 U.S. at 200.

21. *Id.* at 195.

22. *Id.* at 196-97.

23. *Id.* at 202-04.

demandee is a corporation because corporations are not entitled to full fourth amendment protections.²⁴ Based upon this analysis the Court concluded that in administrative demand cases the requirements of the fourth amendment are met if the following conditions are satisfied: first, that the specified materials are described with particularity; second, that the demanding agency is authorized by law to compel such production; and third, that the materials are relevant.²⁵ The Court emphasized that unlike a warrant an administrative subpoena could be issued without a showing of probable cause and absent a pending charge against the demandee.²⁶ The Court, however, did acknowledge that the fourth amendment would protect demandees from *unreasonable* requests. "Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason."²⁷

Four years later, in *United States v. Morton Salt Co.*,²⁸ the Court cemented its holding in *Oklahoma Press*. In *Morton Salt* respondents sought to overturn a decree of the FTC that had been affirmed with modifications by the Seventh Circuit.²⁹ The decree, pursuant to a cease and desist order regarding certain pricing, producing, and marketing practices, directed respondents to supply the FTC with highly particularized reports showing compliance with the order.³⁰ The FTC subsequently instructed respondents to file reports showing continued compliance. This later directive, however, was neither encompassed within the earlier court decree nor provided for statutorily. Information required by the subsequent reports included "prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists, and price announcements distributed, published or employed in marketing salt from and after January 1, 1944."³¹

After disposing of respondents' objections to the FTC's statutory authority to compel such reports, the Court examined the constitutionality of the administrative demand under the fourth

24. *Id.* at 204.

25. *Id.* at 208.

26. *Id.* at 208-09.

27. *Id.* at 213.

28. 338 U.S. 632 (1950).

29. *Id.* at 635-36.

30. *Id.* at 636.

31. *Id.* at 637 (quoting the text of the FTC order).

amendment. The Court first remarked that the fourth amendment extended to corporations and protected them not only from literal searches and seizures but also from the "orderly taking under compulsion of process."³² Nevertheless, the Court reasoned that businesses did not possess the degree of fourth amendment protection afforded individuals.³³ The Court noted that businesses, endowed with "public attributes," have a great impact upon society in general and derive a subsequent benefit from that impact. Furthermore, it noted that businesses are afforded the privilege of engaging in interstate commerce by the federal government.³⁴ Therefore, the Court asserted that in return for this privilege businesses must expect greater regulation than that imposed upon individuals.³⁵ Applying the three-part test of constitutionality set forth in *Oklahoma Press*, the Court determined that the administrative demand was within the statutory authority of the agency, that the information requested was relevant, and that the documents were described with reasonable particularity.³⁶ Therefore, the Court upheld the constitutionality of the demand. Like its earlier decision in *Oklahoma Press*,³⁷ however, the Court cautioned that the administrative inquisition may result in an abuse of power when it is "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigating power."³⁸

Following the Court's decisions in *Oklahoma Press* and *Morton Salt* the modern law of administrative investigation developed rapidly, and agencies received extensive powers to demand information.³⁹ One of the developments of this modern administrative era is the civil investigative demand. Perhaps the best known piece

32. 338 U.S. at 651-52. For support of this proposition, the Court cited the following cases: *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213-17 (1946); *Hale v. Henkel*, 201 U.S. 43, 70 (1906); *Boyd v. United States*, 116 U.S. 616, 622, 630-33 (1886). See generally *Olmstead v. United States*, 277 U.S. 438, 471, 478 (1928).

33. 338 U.S. at 652. See *United States v. White*, 322 U.S. 694, 704 (1944). But see *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924).

34. 338 U.S. at 652.

35. *Id.* For support of this proposition, the Court cited the following cases: *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 238-40 (1949); *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 199-204, (1944); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944); *Wickard v. Filburn*, 317 U.S. 111, 129-30 (1942).

36. *Id.* at 652-53.

37. *Id.* at 652. See text accompanying note 27 *supra*.

38. *Id.* "Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract." *Id.* at 653.

39. See B. MEZINES, J. STEIN & J. GRUFF, *supra* note 5, § 19.03, at 19-47 to 19-48.

of CID legislation is the Antitrust Civil Process Act,⁴⁰ enacted by Congress in 1962. The Antitrust Division of the Department of Justice initially urged Congress to authorize the use of CIDs to obtain information needed for determining whether to file a civil an-

40. Antitrust Civil Process Act of 1962, 15 U.S.C. §§ 1311-1314 (1976 as amended) (the "ACP Act"). Section 1312 of the ACP Act provides in part:

(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

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(b) Each such demand shall—

(1) state the nature of—

(A) the conduct constituting the alleged antitrust violation, or

(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation, which are under investigation and the provision of law applicable thereto;

(2) if it is a demand for production of documentary material—

(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available; or

(3) if it is a demand for answers to written interrogatories—

(A) propound with definiteness and certainty the written interrogatories to be answered;

(B) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

(C) identify the custodian to whom such answers shall be submitted; or

(4) if it is a demand for the giving of oral testimony—

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify an antitrust investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

Enforcement of the demand is provided for by § 1314, which states in part:

(a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers of attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter.

titrust complaint.⁴¹ Following the ACP Act, an overwhelming majority of the states passed legislation authorizing the issuance of a CID or its functional equivalent by the state attorney general or other official.⁴² A number of these statutes are limited in scope to an inquiry of specified alleged offenses, primarily antitrust or consumer protection violations.⁴³ Other CID statutes, however, have little or no specification as to the type of inquiry or alleged offense that must be involved. Most striking in this category is the Tennessee CID statute recently invalidated in *State ex rel. Shriver v. Leech*.⁴⁴ Challenges to these new statutes resulted in a number of federal and state decisions that upheld their constitutional validity on the basis of *Oklahoma Press and Morton Salt*.⁴⁵

In *Petition of Gold Bond Stamp Co.*⁴⁶ petitioner challenged a demand issued to it pursuant to the ACP Act, claiming, among

41. For a full discussion of the history of the ACP Act, see Perry & Simon, *supra* note 4. See also 37 WASH. L. REV. 278 (1962).

42. ALASKA STAT. § 45.50.495 (Supp. 1979); ARIZ. REV. STAT. ANN. § 44-1524 (Supp. 1979); ARK. STAT. ANN. § 70-909 (1979); COL. REV. STAT. § 6-1-107 (Supp. 1978); CONN. GEN. STAT. § 42-110d (1979); DEL. CODE ANN. tit. 6, § 2514 (1974); FLA. STAT. ANN. § 501.206 (West Supp. 1980); GA. CODE ANN. § 106-1213 (Supp. 1980); HAWAII REV. STAT. § 487-9 (1976); IDAHO CODE § 48-611 (1977); ILL. ANN. STAT. ch. 38, § 60-7.2 (Smith-Hurd Supp. 1980); IND. CODE ANN. § 4-6-9-4 (Burns); KAN. STAT. ANN. § 50-631 (1976); KY. REV. STAT. § 367.240 (Supp. 1980); LA. REV. STAT. ANN. § 51-144 (West 1965); ME. REV. STAT. ANN. tit. 5, § 211 (1979); MD. ANN. CODE art. 10, § 26B (1976); MASS. GEN. LAWS ANN. ch. 93A, § 6 (West 1972); MICH. COMP. LAWS § 445.907 (Supp. 1980); MINN. STAT. ANN. § 325.907 (West Supp. 1980); MISS. CODE ANN. § 75-24-17 (Supp. 1979); MO. ANN. STAT. § 407.040 (Vernon 1979); MONT. REV. CODES ANN. § 82-15-204 (1979); NEB. REV. STAT. § 59-1611 (1978); NEV. REV. STAT. § 598A-100 (1979); N.H. REV. STAT. ANN. § 356:10 (Supp. 1979); N.J. STAT. ANN. § 56:8-3 (West Supp. 1980); N.M. STAT. ANN. § 57-1-5 (Supp. 1979); N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1979); N.C. GEN. STAT. § 75-10 (1975); N.D. CENT. CODE § 51-15-04 (1974); OHIO REV. CODE ANN. § 1345.06 (Page 1979); OR. REV. STAT. § 646.618 (1979); 73-74 PA. STAT. ANN. tit. 73, § 201-6 (Purdon 1971) (deleted 1976); R.I. GEN. LAWS § 6-13.1-7 (Supp. 1979); S.D. COMP. LAWS ANN. § 37-24-12 (1972); TENN. CODE ANN. § 8-6-402 (1980); TEX. BUS. & COM. CODE ANN. tit. 2, § 17.61 (Vernon Supp. 1980); UTAH CODE ANN. § 13-11-16 (Supp. 1979); VT. STAT. ANN. tit. 9, § 2460 (Supp. 1980); VA. CODE § 59.1-9.10 (Supp. 1980); WASH. REV. CODE ANN. § 19.86.110 (1978); W. VA. CODE § 46A-7-104 (1976); WIS. STAT. ANN. § 426.106 (West 1974); WYO. STAT. § 40-3-111 (1977).

43. See, e.g., ARK. STAT. ANN. § 70-909 (1979); ILL. ANN. STAT. ch. 38, § 60-7.2 (Smith-Hurd Supp. 1980).

44. TENN. CODE ANN. § 8-6-402 (1980); *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. Mar. 28, 1980). TENN. CODE ANN. § 8-6-401 (1980) provides in part:

The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter.

45. For a discussion of several of these cases dealing with the ACP Act, see Annot., 10 A.L.R. FED. 677, 694-702 (1972). See also 65 Ky. L.J. 168, 178-79 n.56 (1976).

46. 221 F. Supp. 391 (D. Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1964).

other things, that the demand violated its fourth amendment rights. The court initially traced the reasons for the existence of the precomplaint investigatory procedure found in the ACP Act, noting that prior to the passage of the CID statute the Justice Department had four methods of obtaining information upon which to base a complaint. These methods were as follows: first, voluntary compliance by the target of the investigation; second, use of a subpoena duces tecum issued by a grand jury; third, transfer of information obtained by the FTC; and last, utilization of discovery proceedings upon filing of a skeletal complaint.⁴⁷ For a variety of reasons, however, these methods proved undesirable.⁴⁸ In particular, the court noted that the Supreme Court had held that use of a grand jury with no intent to bring a criminal action constituted an abuse of process.⁴⁹ The court concluded its review of these prior methods by declaring that Congress designed the ACP Act to remedy this lack of efficient and satisfactory investigatory technique by providing the Justice Department with independent authority to obtain information.⁵⁰

Turning to petitioner's fourth amendment objections, the court reviewed the reasoning of *Oklahoma Press* and *Morton Salt*. The court recognized that the CID "constitutes an innovation in the civil investigative powers of the Attorney General."⁵¹ Despite the novel nature of the CID, however, the court concluded that the Supreme Court's sanctioning of "sweeping investigative powers" for administrative bodies in *Oklahoma Press* and *Morton Salt* erected "guideposts" for examining the constitutionality of CID statutes.⁵² The court rejected the contention that the demand constituted an impermissible "fishing expedition"; instead, it reasoned that the civil investigative demand process was comparable to a grand jury proceeding because in both situations the *possibility* of a violation has sparked the investigation. Thus, the court concluded that based upon the reasoning of the Supreme Court in the area of administrative demands the provisions of the ACP Act au-

47. *Id.* at 393.

48. *Id.* Not surprisingly, voluntary compliance by the target of the investigation did not arise frequently. Also, attempts to obtain information in the hands of the FTC resulted in an inefficient use of personnel. Similarly, the use of discovery rules proved undesirable "because it was felt that it was unfair to resort to such a practice without any certainty that sufficient evidence existed to warrant a civil suit." *Id.*

49. *Id.* at 393 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958)).

50. 221 F. Supp. at 393.

51. *Id.* at 396.

52. *Id.*

thorizing civil investigative demands were constitutional.⁵³

In addition to the *Gold Bond* court's approval of the Justice Department's investigative powers, several state court decisions have upheld the validity of their respective CID statutes. For example, in *Steele v. Washington*⁵⁴ the Washington attorney general served a CID upon the operators of an employment agency pursuant to his powers granted under the Washington Consumer Protection Act.⁵⁵ Citing *Oklahoma Press* and *Morton Salt*, the court held that businesses are afforded less fourth amendment protection than individuals, and that a CID issued to a corporation would be upheld if it met the three-part test of *Oklahoma Press*.⁵⁶ Finding that the inquiry at issue was within the authority of the attorney general, the demand was not too indefinite, and the information sought was reasonably relevant, the court sustained the issuance of the CID.⁵⁷

Similarly, in *Commonwealth v. Pineur*⁵⁸ a representative of a corporate seller of mobile homes sought protective relief from a CID served upon him by the Kentucky attorney general pursuant to the state's Consumer Protection Act.⁵⁹ The court upheld the CID in question, rejecting the representative's claim that the attorney general should be required to make a showing on the face of the demand that the grounds for issuance were reasonable.⁶⁰ The court relied heavily on the reasoning of *Morton Salt* in concluding that the instant statute met "[t]he constitutional requirements applicable to this kind of an investigatory process"⁶¹

Finally, in *Mobil Oil Corp. v. Killian*⁶² plaintiff sought to quash a subpoena duces tecum served on it under the Connecticut Anti-Trust Act⁶³ during the course of an investigation into alleged

53. *Id.* For other decisions on the ACP Act, see *Amateur Softball Ass'n v. United States*, 467 F.2d 312 (10th Cir. 1972); *Lightning Rod Mfrs. Ass'n v. Staal*, 339 F.2d 346 (7th Cir. 1964); *Hyster Co. v. United States*, 338 F.2d 183 (9th Cir. 1964); *Petition of Columbia Broadcasting Sys. Inc.*, 235 F. Supp. 684 (S.D.N.Y. 1964). See also Annot., 10 A.L.R. 2d 677 (1972).

54. 85 Wash. 2d 585, 537 P.2d 782 (1975).

55. *Id.* at 586, 537 P.2d at 784.

56. *Id.* at 593, 537 P.2d at 787.

57. *Id.* at 595, 537 P.2d at 788.

58. 533 S.W.2d 527 (Ky. 1976).

59. KY. REV. STAT. §§ 367.110-.300 (Supp. 1980).

60. 533 S.W.2d at 530.

61. *Id.* at 528.

62. 30 Conn. Supp. 87, 301 A.2d 562 (1973).

63. CONN. GEN. STAT. §§ 35-24 to -45 (1979).

gasoline price-fixing.⁶⁴ The court refused to grant such relief under the reasoning of *Oklahoma Press* and *Morton Salt*.⁶⁵ Significantly, the court stated that "the Connecticut statute, like the federal act [ACP Act], has virtually eliminated the 'no fishing' signs where civil subpoenas [served] under its aegis are issued."⁶⁶ This view expressed in *Mobil Oil* reflects the current "hands-off" position of many state courts, a view unjustified by even the broad language of *Oklahoma Press*.⁶⁷

B. The Administrative Search Warrant Cases

Beginning in 1967 with *Camara v. Municipal Court*⁶⁸ and *See v. City of Seattle*⁶⁹ the Supreme Court handed down a series of decisions⁷⁰ that collectively stand for the proposition that administrative searches must comply with the warrant requirement of the fourth amendment. It is not the purpose of this Note to provide a detailed analysis of these cases. A wealth of scholarly material is readily available in the area.⁷¹ An overview of these decisions, however, is necessary for a fuller understanding of the fourth amendment's application to the civil investigative demand.

In *Camara* appellant was charged with a criminal violation of the San Francisco Housing Code when he refused to permit a warrantless inspection of his residence.⁷² Appellant claimed that the ordinance, which authorized municipal officials to conduct searches

64. 30 Conn. Supp. at 88-89, 301 A.2d at 563.

65. *Id.* at 95, 301 A.2d at 567.

66. *Id.*

67. See note 14 *supra* and accompanying text.

68. 387 U.S. 523 (1967).

69. 387 U.S. 541 (1967).

70. In addition to *Camara* and *See* the Court decided a number of subsequent cases in an attempt to define the parameters of the fourth amendment in the area of administrative searches. See *Michigan v. Tyler*, 436 U.S. 499 (1978); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

71. These cases resulted in a veritable flood of articles discussing the merits of the respective holdings. An abridged list of the more recent of these articles includes the following: *McManis & McManis, Structuring Administrative Inspections: Is There Any Warrant for a Search Warrant?*, 26 AM. U.L. REV. 942 (1977); Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856 (1979); Note, *Marshall v. Barlow's, Inc.: Are Warrantless Routine OSHA Inspections a Violation of the Fourth Amendment?*, 6 ENV'T'L AFF. 423 (1978); Note, *Searches by Administrative Agencies After Barlow's and Tyler: Fourth Amendment Pitfalls and Short-Cuts*, 14 LAND & WATER L. REV. 207 (1979); 16 HOUS. L. REV. 399 (1979); 57 N.C. L. REV. 320 (1979); 46 TENN. L. REV. 446 (1979); 50 U. COLO. L. REV. 231 (1979); 18 WASHBURN L.J. 325 (1979).

72. 387 U.S. at 525.

of private dwellings without a search warrant and without probable cause of a housing code violation, violated his fourth amendment right to be free from an unreasonable search and seizure.⁷³ The Court, reversing its earlier position in *Frank v. Maryland*⁷⁴ and *Ohio ex rel. Eaton v. Price*,⁷⁵ held the San Francisco ordinance unconstitutional because it did not require the prior issuance of a search warrant.⁷⁶ In broad language the Court noted that the basic purpose of the fourth amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁷⁷ While acknowledging the difficulty of stating with precision what constituted an unreasonable search and seizure in any given case, the Court nevertheless declared that "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."⁷⁸ The Court rejected the contention that the fourth amendment protected only those individuals suspected of criminal behavior.⁷⁹ Finally, the Court refused to accept appellee's argument that built-in statutory safeguards could substitute for prior individualized judicial review of the administrative search procedure.⁸⁰ The Court closed its discussion of the fourth amendment challenge by restating the necessity of a finding of "probable cause" before a search warrant could issue. Importantly, the Court cited *Oklahoma Press* as authority for the position that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."⁸¹

See, decided the same day as *Camara*, involved the conviction of an individual for violation of the Seattle Fire Code.⁸² The ordinance authorized the fire chief to conduct inspections of all buildings and premises, except the interiors of dwellings, in order to assure compliance with the various fire and safety codes.⁸³ Appellant

73. *Id.* at 527.

74. 359 U.S. 360 (1959).

75. 364 U.S. 263 (1960).

76. 387 U.S. at 528.

77. *Id.*

78. *Id.* at 528-29.

79. *Id.* at 530.

80. *Id.* at 533.

81. *Id.* at 539.

82. *Id.* at 541.

83. *Id.*

had been convicted for refusing the fire inspector access to his commercial warehouse without a warrant, but the Court reversed the conviction on the basis of its holding in *Camara*. The Court initially noted that “[t]he only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences.”⁸⁴ The Court then answered the question in the affirmative, declaring that “[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”⁸⁵ This right, the Court concluded, is jeopardized by warrantless administrative inspections.⁸⁶

The Court in *See* found support in the administrative subpoena cases for its holding that warrants are required for an administrative search.⁸⁷ Initially restating the three-part *Oklahoma Press* standard of limited scope, relevant purpose, and specificity, the Court acknowledged the power of an administrative agency to conduct all document inspections authorized by statute, provided the agency limited the scope of the search by designating the documents needed in a formal subpoena.⁸⁸ In addition to these requirements, the Court stressed that an administrative subpoena must issue from the agency and not the field inspector, and that the subpoenaed party is entitled to judicial review of the reasonableness of the demand prior to imposition of any penalties for noncompliance.⁸⁹ The Court thus reasoned that

[g]iven the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a “constructive” search . . . is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.⁹⁰

84. *Id.* at 542.

85. *Id.* at 543.

86. *Id.* The Court further stated that “we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises.” *Id.*

87. *Id.* at 544. The Court declared:

[W]e have dealt with the Fourth Amendment issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

Id. See notes 18-38 *supra* and accompanying text.

88. 387 U.S. at 544.

89. *Id.* at 544-45.

90. *Id.* at 545.

Based upon this reasoning, the Court concluded that "the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context. . . ." ⁹¹ Thus, the *See* opinion not only clarified the law as to administrative inspections, but also vocalized the unspoken assumption of *Oklahoma Press*—that a demandee is entitled to judicial review *prior to enforcement* of an administrative demand for documents or testimony.

Following *Camara* and *See*, the Court decided a series of cases in an attempt to clarify its holding on administrative searches. In *Colonnade Catering Corp. v. United States*⁹² and *United States v. Biswell*⁹³ the Court retreated from its position in *See* and authorized a warrantless inspection of two commercial premises. In *Colonnade* IRS agents broke the lock to a liquor storeroom and entered without a warrant when refused entrance by the liquor store owner.⁹⁴ In *Biswell* a policeman and an agent of the Treasury Department entered and inspected a pawn shop for unlicensed firearms without a warrant.⁹⁵ In both cases the Court upheld the warrantless searches. The Court stated that because the owners operated businesses "long subject to close supervision and inspection"⁹⁶ they had only a slight expectation of privacy in their premises,⁹⁷ and that, therefore, a warrantless regulatory inspection did not violate their fourth amendment rights.

The Court laid to rest any notion that *Colonnade* and *Biswell* had destroyed the vitality of the warrant requirement in administrative searches in *Marshall v. Barlow's, Inc.*⁹⁸ In *Marshall* agents of the Labor Department conducted a warrantless search of appellee's electrical and plumbing installation business for OSHA violations.⁹⁹ Stating that the nature of the charge—civil or criminal—was irrelevant, the Court held that such a warrantless search violated the standards of the fourth amendment as set forth in *Camara* and *See*.¹⁰⁰ The Secretary of Labor had urged the Court to

91. *Id.* at 546.

92. 397 U.S. 72 (1970).

93. 406 U.S. 311 (1972).

94. 397 U.S. at 72-73.

95. 406 U.S. at 311-13.

96. 397 U.S. at 77.

97. 406 U.S. at 316.

98. 436 U.S. 307 (1978).

99. *Id.* at 309-10.

100. *Id.* at 323-24. The Court concluded that "[t]he general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular

grant OSHA an exception from the warrant requirement similar to the closely regulated business exception of *Colonnade* and *Biswell*.¹⁰¹ The Court acknowledged that exception, but refused to extend it beyond its current reach.¹⁰² The Court, however, did declare that the warrant might issue upon a lesser showing of probable cause, i.e., that reasonable administrative standards for conducting an inspection of a particular business had been met, rather than probable cause to believe that a violation existed at the establishment.¹⁰³

Finally, in *Michigan v. Tyler*¹⁰⁴ the Court announced an additional exception to the warrant requirement. In that case, fire inspectors, without a warrant, had entered a burned building immediately after dousing the fire and several times thereafter to check for arson. The Court declared that no warrant was necessary to inspect in emergency situations and that immediate inspection of a burned building constituted such an emergency.¹⁰⁵ The Court, however, determined that the subsequent inspections had occurred longer than a "reasonable" time after the fire had ended, and that therefore a warrant was required for those inspections.¹⁰⁶

C. Analysis

Based on the preceding review of relevant case law in the area

offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." *Id.* at 311 (footnotes omitted).

101. *Id.* at 313.

102. *Id.*

These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz v. United States*, 389 U.S. 347, 351-52 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

Id.

103. *Id.* at 320. The Court disagreed that such a standard provided only incidental protection, asserting that

[a] warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.

Id. at 323 (footnotes omitted).

104. 436 U.S. 499 (1978).

105. *Id.* at 509.

106. *Id.* at 510-11.

of administrative investigations, two conclusions may be drawn. First, as to administrative inspections, the fourth amendment affords individuals and businesses facing administrative inspections the following protection: a warrant must issue for on-site civil or criminal inspections, absent a showing that the business is closely regulated or that an emergency exists.¹⁰⁷ Second, as to administrative demands for information, the fourth amendment affords individuals, and to a lesser degree businesses, the following protection: a demand for information must comply with statutory requirements, be limited in scope, seek relevant material, describe that material with particularity, and be enforced only after judicial review.¹⁰⁸ Drawing upon the foregoing conclusions and accompanying analysis, this Note will now examine fourth amendment objections to CID statutes from several standpoints.

1. Prior Judicial Review: Timing and Notice

As noted above, judicial review of the reasonableness of a demand is required prior to enforcement for both informational demands and on-site inspections. While many CID statutes,¹⁰⁹ most notably the ACP Act,¹¹⁰ do contain provisions for judicial review prior to enforcement or punishment for noncompliance, the degree to which others afford such an opportunity to the demandee is unclear.¹¹¹ For example, the Tennessee CID statute provides judicial review only in the form of a contempt proceeding initiated by the attorney general. Furthermore, the statute provides that the "chancery court *shall* exercise the authority granted it by law in the treating of contempt . . . all to the end that the witness *shall* be compelled to appear to give testimony at the time and place specified by the chancery court."¹¹² Although adequate judicial re-

107. *Michigan v. Tyler*, 436 U.S. 499 (1978); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Mun. Court*, 387 U.S. 523 (1967). *See generally* *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Watson*, 423 U.S. 411 (1976); *Katz v. United States*, 389 U.S. 347 (1967).

108. *See v. City of Seattle*, 387 U.S. 541 (1967); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). *See also* *General Motors Leasing Corp. v. United States*, 429 U.S. 338 (1977).

109. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 60-7.6 (Smith-Hurd 1977); KY. REV. STAT. §§ 367.260, .290 (Supp. 1978); N.H. REV. STAT. ANN. § 356:10IV (Supp. 1979); N. C. GEN. STAT. § 75-10 (Michie 1975); WASH. REV. CODE ANN. § 19.86.110 (West 1978).

110. 15 U.S.C. § 1314 (1976). *See* note 40 *supra*.

111. *See, e.g.*, LA. REV. STAT. ANN. § 51-150 (West 1965); TENN. CODE ANN. § 8-6-404 (1980).

112. TENN. CODE ANN. § 8-6-404 (1980) (emphasis added).

view may be had by a demandee at an enforcement proceeding,¹¹³ statutes with provisions similar to the Tennessee law by no means assure that the court will allow a demandee to challenge the CID's validity. Thus, under the reasoning of *Oklahoma Press* and *Morton Salt*, such statutes would appear to be unconstitutional to the extent that demandees are denied this right.

This preliminary conclusion, however, is not the only constitutional objection arising from the timing of judicial review. CID statutes that permit an administrative official to obtain documentary material by voluntary compliance prior to judicial review may be subject to another constitutional challenge. As early as *Oklahoma Press*, Justice Murphy, writing in dissent, noted the often involuntary nature of "voluntary" compliance. Many individuals and businesses, faced with an official demand for documentary evidence, comply with the demand ignorant of the right to challenge its reasonableness. Responding to this inequity, Justice Murphy made the following observation:

To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.¹¹⁴

As these observations indicate, it may be a surprise, and certainly small consolation, for the recipient of a CID to learn after a comprehensive and harrassing investigation that the administrative agent acted beyond his constitutional authority. It is particularly irksome to the demandee to discover that, in an attempt to comply with apparent authority, he has waived¹¹⁵ his constitutionally protected right to have the reasonableness of the demand determined by a neutral and detached magistrate. Furthermore, it is unlikely that the right to challenge a CID is as well known among the general lay population as is, for example, the right to refuse consent to an automobile search.¹¹⁶

To meet Justice Murphy's objection, all CIDs should either

113. See B. MEZINES, J. STEIN & J. GRUFF, *supra* note 5, § 21.02, at 21-9.

114. 327 U.S. at 219.

115. *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-46 (1973). In *Schneckloth*, the Court held that consent given to an official search constituted a waiver of fourth amendment protections even though such consent was not "an intentional relinquishment . . . of a known right or privilege." *Id.* at 246. See *Johnson v. Zerbst*, 304 U.S. 458 (1938).

116. 412 U.S. at 235-46.

undergo judicial examination prior to issuance or include a notice to the demandee advising him of the right to seek judicial review of the demand prior to its enforcement. Obviously, judicial review prior to issuance provides the greater protection to the demandee. Additionally, the argument that review prior to issuance burdens both the court and the investigating agency and provides little additional protection for the demandee is not valid. Under the constitutional standards of *Oklahoma Press* and *Morton Salt*, an investigative demand must meet certain requirements. Implicit in these requirements is the assumption that the investigating agency will *readily* show a court that those requirements are met. If the agency cannot show that the demand is reasonable, then it is certainly worth judicial time to halt the agency from proceeding with an *unreasonable* demand—especially in light of possible voluntary compliance by the demandee absent this prior review. Consequently, the advantages to the demandee of the inclusion of timing and notice requirements in connection with constitutionally mandated judicial review more than offset the slight inconveniences imposed upon the courts and the investigating agency.

2. The Standard of Review

Although the administrative search cases such as *Camara* and *See* do not apply directly to CIDs,¹¹⁷ the analysis used in those cases does shed light on the relationship between the degree of governmental intrusion and consequential protections provided to the demandee by the fourth amendment. Obviously, an on-site inspection of an individual's home or business premises is more intrusive than a demand for production of his books and papers. The Court recognized this fact in *Oklahoma Press* and *Morton Salt* by terming administrative demands for information "constructive" searches, and by providing the demandee less fourth amendment protection than in the case of an actual search. Similarly, the Court in *Camara* and *See*, while relying upon administrative subpoena cases in determining that a demandee is entitled to judicial review prior to enforcement, clearly went beyond the protections afforded in subpoena cases by requiring that an administrative demand to inspect be enforceable only with a warrant issued by a judge on a showing of probable cause. This higher threshold—probable cause—clearly reflects the Court's response to a greater governmental intrusion on the reasonable expectation of

117. See notes 68-91 *supra* and accompanying text.

privacy of an individual or a business.

The use of CIDs has greatly increased in the last twenty years.¹¹⁸ While many CID statutes¹¹⁹ provide limitations as to the subject matter and scope of inquiries and require the investigator to notify the demandee of the nature of the investigation, others do not.¹²⁰ Again, the Tennessee statute provides a good example. It authorizes the state's attorney general, upon reasonable belief that the state will be a party litigant, "to require any person to testify under oath as to *any matter* which is a *proper subject of inquiry*."¹²¹ No additional provision is made to define the nature or scope of an inquiry, and no provision is made to notify the demandee of the subject under investigation. Clearly, the degree of governmental intrusion inherent in this type of CID statute is greater than the intrusion seen in either *Morton Salt* or *Oklahoma Press*. In fact, investigation without any limitation as to its nature or scope approaches the degree of intrusion in *Camara* and *See* and argues for the imposition of their consequential requirement of probable cause. While probable cause of some type currently must precede the issuance of a CID under several state statutes,¹²² courts should fashion a probable cause standard as a *fourth amendment requirement* for the enforcement of all CIDs.

An extension of the probable cause standard to CIDs, however, should not eliminate the Court's distinction either between business and individual demandees or between closely regulated and relatively unregulated businesses. The Court in *Morton Salt* made a valid point in stating that businesses should not be able to claim equality with individuals in the enjoyment of a right to privacy.¹²³ Businesses are artificial, profit-based entities that intimately affect the daily life of society. Deriving benefits from society in general and government in particular, these artificial entities should expect an enhanced degree of regulation.¹²⁴ In addition, those individuals who voluntarily have chosen to conduct a business in an area traditionally permeated by government regulation ought to be subject to greater regulation and investigation for the

118. See note 42 *supra* and accompanying text.

119. *E.g.*, 15 U.S.C. § 1311 (1976); Ky. Rev. Stat. §§ 367.110-.300 (Supp. 1976).

120. *E.g.*, MASS. ANN. LAWS ch. 93A, § 6 (Michie/Law. Co-op 1975); MICH. COMP. LAWS § 445.907 (Supp. 1980).

121. TENN. CODE ANN. § 8-6-402 (1980) (emphasis added).

122. *E.g.*, MONT. REV. CODES ANN. § 82-15-204 (1979); N.J. STAT. ANN. § 56:8-3 (West 1964); TENN. CODE ANN. § 8-6-401 (1980).

123. 338 U.S. at 652.

124. *Id.*

protection of the public as a whole.¹²⁵

Thus, the standard of probable cause must vary with the category into which the demandee falls. For this reason, similar to *Colonnade* and *Biswell*, the requirement of probable cause need not be extended to a CID issued to a closely regulated business. A demand issued to an individual who is the target of an investigation, however, should be enforced only upon a showing of probable cause that a violation has been or is about to be committed. A demand issued to a non-closely regulated business that is the target of an investigation should issue only when there is probable cause to believe that reasonable administrative standards for conducting an investigation have been met. This dual standard reflects the differing expectations of privacy between businesses and individuals.¹²⁶ Finally, a demand issued to an individual who is not the target of an investigation¹²⁷ should be enforced only if there is probable cause that the demandee is in possession, custody, or control of documents pertinent to the investigation.

This three-level CID standard is not a new creation. It borrows heavily from current fourth amendment requirements concerning on-site administrative inspections and applies them to administrative subpoenas for documentary material or oral testimony. Its only true addition is its limitation on civil investigative demands issued to individuals not targeted by the investigation. It is submitted that this three-level standard, which strictly observes the fourth amendment protections afforded the individual while allowing for necessary business regulation, will most effectively and appropriately apply the fourth amendment's search and seizure provisions to CID.

4. State Constitutional Protections

Following a series of cases handed down by the Burger court enunciating a more restrictive view of fourth amendment protections in general,¹²⁸ several state courts accepted search and seizure challenges based upon comparable state constitutional provi-

125. See *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

126. See *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

127. *E.g.*, 15 U.S.C. § 1312(a) (1976); KY. REV. STAT. § 367.240 (Supp. 1980); N.H. REV. STAT. ANN. § 356:10 (Supp. 1979); N.C. GEN. STAT. § 75-10 (1975); TENN. CODE ANN. § 8-6-401 (1980); WASH. REV. CODE ANN. § 19.86.110 (1978).

128. *E.g.*, *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Miller*, 425 U.S. 435 (1976); *United States v. Watson*, 423 U.S. 411 (1976).

sions.¹²⁹ While the importance of these parallel state challenges should not be exaggerated, neither should they be overlooked. State courts that may be reluctant to expand federal constitutional law, regardless of how appropriate such an expansion might be, may well accept search and seizure objections based upon the provisions of state constitutions.

In *In re Investigation No. 2*¹³⁰ the New Mexico Supreme Court upheld the validity of an administrative subpoena issued pursuant to the state's Organized Crime Act.¹³¹ Although the majority did not reach the merits of petitioner's fourth amendment claim, it did cite *Oklahoma Press* and *Morton Salt* for the proposition that the subpoena must be sufficiently limited in scope and relevant in purpose.¹³² While agreeing with the majority's disposition of the fourth amendment issue, Chief Justice McManus in a separate opinion stated that he would afford New Mexico citizens greater protection of privacy under the provisions of the state constitution.¹³³ The Chief Justice noted that, as ultimate arbiter of New Mexico law, the state's supreme court was free to read provisions of the state constitution more expansively than the corresponding federal language. The Chief Justice went on to declare that

[a]lthough administrative subpoenas are not equivalent to the search and seizure provisions associated with a warrant, a subpoena in aid of an investigation is clearly a search of citizen's papers and effects. This type of a subpoena which calls for the production of private records functions in the same manner as a warrant insofar as it violates one's constitutional right to be secure in their papers and effects . . . [therefore] I would adopt a different approach from the federal due process standard and grant the citizens of this state greater protection "in their persons, papers, homes and effects". . . .¹³⁴

129. See *People v. Brisendine*, 13 Cal. 3d 528, 550-51, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975); *People v. Clyne*, 189 Colo. 412, 541 P.2d 71 (1975); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975); *Commonwealth v. Harris*, 429 Pa. 215, 239 A.2d 290 (1968); *State v. Lakin*, 588 S.W.2d 544 (Tenn. 1979); *State v. Hehman*, 14 Wash. App. 770, 544 P.2d 1257 (1976).

130. 91 N.M. 516, 577 P.2d 414 (1978).

131. N.M. STAT. ANN. § 29-9-1 to -17 (1978).

132. 91 N.M. at 517-18, 577 P.2d at 415-16.

133. *Id.* See *State v. Hodges*, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976). Section 10, Article II of the New Mexico Constitution provides:

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

134. 91 N.M. at 519-20, 577 P.2d at 417-18.

State court judges, who may be hesitant to alter federal constitutional law, indeed may become more receptive to such state law challenges. Certainly counsel for the demandee should be aware of and explore this avenue of relief for his client.

5. Alternative Methods and Standards

The primary alternative methods used to gather information sought by a CID have been the grand jury investigation and the use of discovery proceedings following the filing of a skeletal complaint.¹³⁵ As indicated above, the Supreme Court's decision in *United States v. Procter & Gamble Co.*¹³⁶ has been interpreted as holding that use of the grand jury with no intent to bring a criminal action constitutes an abuse of process.¹³⁷ Nevertheless, this Note contends that at least where the demandee is also an individual who is the target of an investigation, a CID should issue only upon a showing of probable cause that a violation has been or is about to be committed.¹³⁸ Therefore, with respect to such an individual, the use of a grand jury as a means of obtaining information should not constitute an abuse of process. In fact, use of the grand jury subpoena instead of a CID would increase the privacy protection of the demandee by allowing a group of his peers to operate as a buffer between the demandee and the investigating agency. Considering the Supreme Court's pronouncement in the area of grand jury investigations, however, a CID is still the more appropriate technique when the demandee either is not the target of the investigation or is a targeted business.

Obtaining information by use of liberal discovery rules subsequent to the filing of a skeletal complaint has been disfavored supposedly because it was considered unfair for the state to file suit solely to obtain information.¹³⁹ Nevertheless, this view must be weighed against the advantages associated with the use of discovery proceedings instead of CIDs. First, no production of any document or other material could be compelled without prior judicial approval.¹⁴⁰ Second, the inquiry target could obtain a judicial protective order covering certain of the requested material.¹⁴¹ Last,

135. See generally notes 47-50 *supra* and accompanying text.

136. 356 U.S. 677 (1958).

137. See text accompanying note 49 *supra*.

138. See text accompanying note 123 *supra*.

139. See note 48 *supra*.

140. See, e.g., FED. R. CIV. P. 34(b), 37.

141. See, e.g., FED. R. CIV. P. 26(c).

the opportunity for reciprocal discovery would provide the inquiry target with additional information concerning the nature of the investigation.¹⁴² In effect, these advantages may provide safeguards to the demandee beyond the safeguards that this Note suggests for CIDs.

III. FIFTH AMENDMENT SELF-INCRIMINATION

As recently as *Maness v. Meyers*¹⁴³ the Supreme Court reaffirmed its earlier holdings¹⁴⁴ that the fifth amendment privilege against self-incrimination applies to any civil, criminal, administrative, or judicial proceeding. The fifth amendment privilege applies to the states through the due process clause of the fourteenth amendment.¹⁴⁵ Once this foundation has been laid, however, problems arise in the practical application of the privilege to CID statutes. Does the protection afforded by the privilege vary according to the particular demandee? Against whom may information obtained be used in subsequent proceedings? How does the offer of immunity alter the scope of the privilege? What type of immunity need be offered? This Note briefly outlines the current status of the law on these issues and then offers suggestions on improvements that should, and in some instances must, be made to remedy constitutional infirmities.

A. Nature of the Demandee

1. Business Versus Nonbusiness

In *Oklahoma Press* the Court held that the fifth amendment privilege against self-incrimination does not extend to corporations or their officers who must produce corporate records pursuant to a lawful judicial order.¹⁴⁶ Furthermore, corporate officers cannot claim the privilege when information is obtained from the corporation.¹⁴⁷ There is authority, however, for the proposition that the fifth amendment may limit the indefiniteness or the breadth of the

142. See, e.g., FED. R. CIV. P. 26.

143. 419 U.S. 449 (1975).

144. *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (White, J., concurring); *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

145. *Andresen v. Maryland*, 427 U.S. 463, 470 (1976); *Malloy v. Hogan*, 378 U.S. 1 (1964).

146. 327 U.S. 186, 196 (1946); see *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

147. 327 U.S. at 205.

inquiry.¹⁴⁸ Concurring in *Fisher v. United States*,¹⁴⁹ Justice Brennan, citing *Wilson v. United States*,¹⁵⁰ stated that, although the fifth amendment did extend to the compelled production of personal records, generally business entities were not "persons" within the meaning of the amendment and hence could not assert the privilege. Nevertheless, he noted that the Court had extended the privilege to a sole proprietor or practitioner on the theory that the operator and the business were not distinct entities.¹⁵¹

The distinction between corporate officers and sole proprietors ignores the common perception of fifth amendment protections. While a business or a corporation obviously does not fall within the scope of the fifth amendment, a corporate officer or business partner should be afforded protection during investigations concerning his participation in the enterprise. It is incongruous that a corporate official could be compelled to incriminate himself, while the owner of a sole proprietorship can refuse to cooperate. Evidence offered by such a corporate officer, like all compelled self-incriminating testimony, is of questionable veracity. It is precisely this situation in which the corporate or business official is faced with "the cruel trilemma of self-accusation, perjury, or contempt."¹⁵² Therefore, it is suggested that the fifth amendment privilege against self-incrimination should be extended to corporate or business officials who receive an investigative demand concerning their business. This extension would not protect the demandee from the production of the evidence through other sources or demandees. It would, however, protect the CID recipient from compelled self-incrimination.

2. Third Party Demandees

As noted above, a party is privileged from producing self-incriminating evidence, but not from its production by another source.¹⁵³ This general proposition, however, is not without limitation. In *Fisher v. United States*¹⁵⁴ individual defendants, under in-

148. *Ajello v. Hartford Fed. Sav. & Loan Ass'n*, 32 Conn. Supp. 198, 347 A.2d 113 (1975).

149. 425 U.S. 391 (1976).

150. 221 U.S. 361 (1911).

151. 425 U.S. at 426-27 (Brennan, J., concurring); see *Bellis v. United States*, 417 U.S. 85, 87-88 (1974).

152. *Andresen v. Maryland*, 427 U.S. 463, 476 (1976); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

153. 427 U.S. at 473; *Johnson v. United States*, 228 U.S. 457, 458 (1913).

154. 425 U.S. 391 (1976).

vestigation for civil and criminal tax liability, had their accountants prepare certain documents which defendants subsequently transferred to their attorneys.¹⁵⁵ IRS agents served summonses on the attorneys to require production of the documents, and when the attorneys refused to comply the IRS brought suit to compel production.¹⁵⁶ The Supreme Court upheld the IRS' position, stating that the fifth amendment privilege was a personal right of the demandee¹⁵⁷ and that defendants, therefore, had no standing to raise the issue of compelled self-incrimination. The Court acknowledged that defendants could not be forced to give incriminating testimony or to produce private papers in their possession.¹⁵⁸ Furthermore, the Court stated that defendants' attorneys could not be compelled to produce material within the scope of the attorney-client privilege.¹⁵⁹ The Court, however, refused to extend the scope of the fifth amendment privilege beyond compelled self-incrimination *by the demandee*. The Court dismissed defendants' contention that the production of papers by one's attorneys testifies to their existence and possession, declaring that such an admission fell outside the protection of the fifth amendment.¹⁶⁰

Although the Court subsequently held in *Andresen v. Maryland*¹⁶¹ that the mere production of material itself—with the consequent admission of its existence and possession—could constitute prohibited compelled self-incrimination, the *Fisher* holding remains essentially unchanged: absent a privileged relationship between the accused and the demandee, and a legitimate justification for possession by the demandee of the accused's private papers, the true target of the inquiry may not assert the fifth amendment privilege on behalf of the third party demandee. Despite this rather restrictive reading of the privilege, such a position is consistent with the purpose of the amendment.¹⁶² Unlike the corporate or business officer, the third party demandee has no overriding incentive to be untruthful in his testimony or production. The third party demandee does not face the same "cruel trilemma" as the

155. *Id.* at 393-94.

156. *Id.* at 395.

157. *Id.* at 397-98.

158. *Id.* at 398.

159. *Id.* at 403.

160. *Id.* at 410-11.

161. 427 U.S. 463, 473-74 (1976).

162. Historically, the purpose of the fifth amendment's prohibition against compelled self-incrimination has been to assure or promote truthful testimony. *See generally* Y. KAMISAR, W. LAFAYE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 510-12 (4th ed. 1974).

corporate or business demandee. The third party demandee, however, may assert the fifth amendment privilege on his own behalf should he be called upon to incriminate himself. Therefore, concerning the furnishing of information by third party demandees, CID practice is in accord with appropriate fifth amendment doctrine and needs no modification or revision.

B. Grant of Immunity

In *Hale v. Henkel*¹⁶³ the Court declared that "[t]he interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply."¹⁶⁴ *Henkel* demonstrates that if the state confers immunity from prosecution on a witness then that witness can be compelled to give self-incriminating testimony. Although *Henkel* was initially interpreted as requiring transactional immunity¹⁶⁵ in return for the compelled testimony, the Supreme Court in *Kastigar v. United States*¹⁶⁶ held that use and derivative use immunity is coextensive with the scope of the fifth amendment privilege.¹⁶⁷ The Court rightly recognized that the purpose of the fifth amendment is to protect an individual against compelled self-incriminating testimony. The privilege does not mean that one who invokes it cannot be prosecuted subsequently for a crime related to his testimony.¹⁶⁸ Most CID statutes do not explicitly provide for use and derivative use immunity, and this omission does not render such statutes constitutionally infirm.¹⁶⁹ Nevertheless, it is suggested that specific inclusion of immunity provisions would be beneficial. Apart from the tempering effect its inclusion might have on enthusiastic investigating officials, explicit mention of such immunity in the statute

163. 201 U.S. 43 (1906).

164. *Id.* at 67.

165. "Transactional immunity" extends not only to "prosecutions resulting from the use of evidence given under oath or subpoena, and to evidence derived from such testimony, but also to evidence uncovered from testimony given under oath which was substantially connected with the transaction covered by the indictment." *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 340, 291 N.E.2d 648, 653 (1972).

166. 406 U.S. 441 (1972).

167. "Use and derivative use immunity" protects a witness from prosecution resulting "from the use of compelled testimony and evidence derived therefrom. . . ." *Id.* at 452-53.

168. *Id.* at 453.

169. See generally Memorandum of the Chancellor, State *ex rel.* Shriver v. Leech, No. 79-761-II, slip op. at 9 (Tenn. Ct. App. June 21, 1979).

might very well prohibit unknowing or unintentional waiver of the privilege. It is unlikely that compelled oral testimony under a CID constitutes custodial interrogation¹⁷⁰ of a degree necessary to mandate *Miranda* warnings prior to questioning.¹⁷¹ A plain statement in the CID statute of the required grant of immunity, however, would help eliminate involuntary waivers of the privilege by demandees and assure investigating officials that the CID examination is not subject to the *Miranda* standards.¹⁷²

IV. NONRECIPROCAL DISCOVERY

In *Wardius v. Oregon*¹⁷³ the Supreme Court examined an Oregon "notice of alibi" statute¹⁷⁴ challenged by petitioner who had been convicted for the unlawful sale of narcotics.¹⁷⁵ Unlike a similar Florida statute earlier upheld by the Court,¹⁷⁶ the Oregon alibi statute did not provide the defendant with a corresponding opportunity to discover the evidence possessed by the state.¹⁷⁷ In a brief opinion the Court declared that, although the due process clause of the fourteenth amendment did not require Oregon to afford its criminal defendants access to the rules of discovery,¹⁷⁸ due process did prohibit Oregon from granting discovery to the government while denying it to the defendant.¹⁷⁹ The Court stated that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."¹⁸⁰ The Court labelled the Oregon unilateral rules of criminal discovery "fundamentally unfair."¹⁸¹

170. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

171. *Id.* See *United States v. Globe Chem. Co.*, 311 F. Supp. 535 (S.D. Ohio 1969).

172. 384 U.S. at 467-73.

173. 412 U.S. 470 (1973).

174. OR. REV. STAT. § 135.455 (1979) (previously codified at OR. REV. STAT. § 135.875).

Generally, a notice of alibi statute requires that a defendant in a criminal trial provide the prosecution with a list of the names and addresses of witnesses that he intends to call to verify his alibi defense. The defendant must also reveal the nature of his alibi. Failure to provide such information within a specified pre-trial period results in the inability to introduce evidence of the alibi defense.

175. 412 U.S. at 472.

176. See *Williams v. Florida*, 399 U.S. 78 (1970).

177. 412 U.S. at 475.

178. *Id.*

179. *Id.*

180. *Id.* (footnote omitted).

181. *Id.* at 476.

Plaintiffs raised the application of this "reciprocity" standard to the Tennessee CID statute¹⁸² in *State ex rel. Shriver*.¹⁸³ Noting that the Tennessee CID statute failed to afford the demandee any opportunity to discover details concerning the nature of the inquiry, plaintiffs stressed the Supreme Court's requirement that discovery be a "two-way street."¹⁸⁴ The State, however, argued that *Wardius* dealt solely with a pretrial criminal proceeding and should not be extended to precomplaint investigations.¹⁸⁵ Furthermore, the State asserted that the demandee *would* be afforded discovery subsequent to the filing of a complaint if the investigation were to proceed to that point.¹⁸⁶ The chancellor found *Wardius* distinguishable from an investigative demand,¹⁸⁷ but limited the use of evidence acquired to impeachment only.¹⁸⁸ On appeal Judge Todd reversed the ruling of the chancellor, stating simply that "[d]ue process requires reciprocal discovery."¹⁸⁹ Judge Todd asserted that nonreciprocal discovery could only be justified by a strong showing of a special public interest, such as an activity affecting the public health, safety, or morals.¹⁹⁰ "Special" public interest could not mean *any* aspect of private life, and since the Tennessee CID statute authorized investigation by the state of any matter, the court held the statute to be unconstitutional.¹⁹¹

It is clear that the "reciprocity" requirement of *Wardius* has not been extended beyond the immediate pretrial stage, much less to a precomplaint investigation. Moreover, both *Wardius* and its predecessor, *Williams v. Florida*,¹⁹² dealt exclusively with felony prosecutions. The Court in these cases recognized the particular

182. TENN. CODE ANN. §§ 8-6-401 to -407 (1980).

183. *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. March 28, 1980); TENN. CODE ANN. § 8-6-402 (1980).

184. Plaintiffs' Brief at 23, *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. March 28, 1980). See also *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977); *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976); *United States ex rel. Hairston v. Warden*, 407 F. Supp. 524 (N.D. Ill. 1976).

185. Memorandum in Support of Motion to Reconsider at 2, *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. March 28, 1980).

186. *Id.*

187. Memorandum of the Chancellor, *State ex rel. Shriver v. Leech*, No. 79-761-II, slip op. at 10 (Tenn. Ct. App. June 21, 1979).

188. *Id.* at 11; Supplemental Memorandum of the Chancellor at 4, July 12, 1979, *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. March 28, 1980).

189. *State ex rel. Shriver v. Leech*, No. 79-761, slip op. at 8 (Tenn. Ct. App. March 28, 1980).

190. *Id.*

191. *Id.* at 8-9.

192. 399 U.S. 78 (1970).

importance of guaranteeing equal access to information when the defendant faced serious criminal penalties. Therefore, reciprocal discovery is not constitutionally required. Despite the lack of constitutional objections, however, the demandee does have an important interest in some type of discovery prior to the filing of a formal complaint. If the suit is preceded by a lengthy investigation, evidence discoverable by the demandee may become stale. Some witnesses may have become unavailable, and the memory of available witnesses may have dimmed. In addition, immediate discovery would apprise the demandee of the exact nature of the inquiry and perhaps eliminate the production of irrelevant documentary material. Finally, immediate discovery would reveal the purpose of the inquiry and prevent investigations designed to harass the demandee. Thus, CID statutes should afford some form of precomplaint discovery. This discovery may be limited to an explanation of the nature of the investigation, a listing of witnesses interviewed by the government, and the testimony and/or documentary material obtained. It is suggested that this form of discovery will protect the demandee from groundless inquiry and promote a more efficient civil investigation.¹⁹³

V. PROCEDURAL DUE PROCESS

In *Fuentes v. Shevin*¹⁹⁴ Justice Stewart described the century-old notion of procedural due process: " 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' . . . It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' "¹⁹⁵ This due process concept provides the basis for a procedural due process challenge to many state CID statutes. Although the government is not required to provide a hearing for every impairment of a private interest,¹⁹⁶ the greater the private interest involved, and the less compelling the state interest in the impair-

193. See Proposed Model Statute in Part VIII *infra*. Disclosure of other information obtained by the investigative agency would be subject to the confidentiality requirements set forth in Part VI *infra*.

194. 407 U.S. 67 (1972).

195. *Id.* at 80 (citations omitted). See *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Granis v. Ordean*, 234 U.S. 385 (1914); *Hovey v. Elliott*, 167 U.S. 409 (1897); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1863).

196. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Lewandowski v. Danforth*, 547 S.W.2d 470 (Mo.), *cert. denied*, 434 U.S. 832 (1977).

ment, the more extensive the procedures authorizing such impairment must be.¹⁹⁷ Procedural due process objections to a CID statute may involve either a claim that the CID did not adequately notify the demandee of the nature of the investigation or of the particular materials requested, or that the state did not afford the demandee an opportunity to be heard prior to enforcement of the demand.

In *Lewandowski v. Danforth*¹⁹⁸ the Missouri Supreme Court addressed these two issues in the context of the Missouri CID statute. Appellants, the principals of Pen Pals International (PPI), instituted a proceeding to set aside the CID issued by the attorney general calling for the production of a number of documents.¹⁹⁹ The court reiterated Justice Stewart's statement in *Fuentes*,²⁰⁰ but found that the Missouri statute satisfied the requirements of procedural due process.²⁰¹ The court asserted that the statute,²⁰² which required the attorney general to state the nature of the investigation and to specify the documents sought by the CID, provided the demandee with adequate notice of the scope of the inquiry.²⁰³ The statute also granted the demandee an opportunity to

197. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

198. 547 S.W.2d 470 (Mo.), cert. denied, 434 U.S. 832 (1977).

199. *Id.* at 471. The CID requested the following information:

1. the actual number of solicitations mailed by PPI to Missourians since January 1, 1975;
2. the number of State residents who enrolled with PPI under the "half price discount offer";
3. the names of members across the nation who are known by PPI to have formed "strong and romantic attachments" and "marriages" that resulted from associations formed through PPI;
4. a gross income and cost statement, including the salaries, wages and profits of all employees and owners;
5. a list of names, addresses and phone numbers of all Missourians who have joined PPI since January 1, 1975;
6. a list of the names and addresses of all employees, past or present, of PPI since January 1, 1975.

Id.

200. *Id.* at 472; see text accompanying note 195 *supra*.

201. 547 S.W.2d at 472-73.

202. MO. ANN. STAT. § 407.040.2 (Vernon 1979) provides in part:

2. Each civil investigative demand shall:
 - (1) State the statute and section thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;
 - (2) Describe the class or classes of information, documentary material, or physical evidence to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded. . . .

203. 547 S.W.2d at 473.

petition the court to modify or set aside the demand prior to its enforcement.²⁰⁴ Therefore, the court also determined that it afforded the demandee an adequate opportunity to be heard.

Although the court in *Lewandowski* upheld the Missouri CID statute in question, the implication of the decision is that a statute that did not provide similar constitutional safeguards would not afford the demandee adequate procedural due process. Many state CID statutes,²⁰⁵ and the federal Antitrust Civil Process Act,²⁰⁶ explicitly require the CID to state the nature of the inquiry and to describe the material requested with particularity, while also allowing the demandee to petition the appropriate court for judicial review of the demand prior to its enforcement. Other state CID statutes, however, lack such procedures and requirements,²⁰⁷ and thus should be held constitutionally infirm. Absent a statutory provision affording the demandee reciprocal discovery of the nature of the inquiry,²⁰⁸ procedural due process mandates that all CID statutes require the following: first, that the administrative official inform the demandee of the particulars of the investigation; second, that the demand state with specificity the documentary materials sought; and third, that the demandee have access to a

204. *Id.* Mo. ANN. STAT. § 407.070 (Vernon 1979) provides:

At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the circuit court of the county where the parties reside or in the circuit court of Cole county.

205. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 60-7.2 (Smith-Hurd Supp. 1980-1981); N.H. REV. STAT. ANN. § 356:10 (Supp. 1979).

206. 15 U.S.C. § 1312 (1976) provides in part:

(b) Contents

Each such demand shall—

(1) state the nature of—

(A) the conduct constituting the alleged antitrust violation, or

(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation,

which are under investigation and the provision of law applicable thereto;

(2) if it is a demand for the production of documentary material—

(A) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified. . . .

In addition to the above notice, the Act also provides the demandee an opportunity to modify or set aside the demand similar to the Missouri statute upheld in *Lewandowski*. 15 U.S.C. §§ 1312(b), 1314(b).

207. *See, e.g.*, N.C. GEN. STAT. § 75-9 (1975); TENN. CODE ANN. §§ 8-6-401 to -407 (1980).

208. *See* Part IV *supra*.

judicial forum in order to object to the scope of the demand prior to its enforcement.²⁰⁹

VI. SUBSTANTIVE DUE PROCESS

The fifth amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."²¹⁰ A CID that requires the demandee to produce documentary material or to make such material available for inspection could be subject to a substantive due process challenge on two separate grounds. First, depriving the owner of possession of the material may constitute a "taking" within the meaning of the fifth and fourteenth amendments. Second, an administrative agency's disclosure of trade secrets obtained from the demandee may amount to a deprivation of property without due process of law. The first objection may be satisfied by requiring only that the demandee make such documents available for inspection and by placing the cost of duplicating the material upon the investigating agency. Resolution of the problem of the disclosure of trade secrets, however, is more troublesome.

Although the court in *State ex rel. Shriver*²¹¹ did not explicitly rule on any substantive due process challenge to the Tennessee CID statute, plaintiffs raised this argument by alleging that they had substantial property rights in their trade secrets and other confidential documents that should be protected from disclosure under the investigative demand.²¹² Plaintiffs noted that the Anti-trust Civil Process Act prohibits the compelled production of any material that would be privileged under the standards applicable to a judicial subpoena duces tecum or under the Federal Rules of Civil Procedure.²¹³ Similarly, several state CID statutes specifically

209. This constitutional argument based upon prior opportunity to be heard is distinct from the prior judicial review discussed in Part II *supra* concerning fourth amendment safeguards. Regardless of the applicability of the fourth amendment to CID statutes, procedural due process should require that the demandee be afforded an opportunity to challenge the demand prior to the compelled production of private papers.

210. U.S. CONST. amend. V. The fourteenth amendment also provides that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

211. No. 79-761 (Tenn. Ct. App. March 28, 1980).

212. Plaintiffs' Brief in Opposition to Amended Motion to Dismiss at 26, *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. March 28, 1980).

213. 15 U.S.C. § 1312 (1976). Section 1312(c) provides:

No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testi-

exempt trade secrets from the scope of a CID.²¹⁴ Plaintiffs charged that the Tennessee CID statute, which prohibits disclosure of evidence obtained except by the attorney general "in the discharge of the duties of the office or in legal proceedings in which the state is a party,"²¹⁵ provided little or no protection for plaintiffs' confidential information.²¹⁶

The North Carolina Court of Appeals, in *In re Southern Bell Telephone and Telegraph Co.*,²¹⁷ affirmed a lower court's issuance of a protective order covering certain documentary material subpoenaed from petitioner by the state attorney general.²¹⁸ Implying judicial authority to issue such an order, the court declared that "the potential for harm and embarrassment . . . is highest at those early stages of investigation, when the evidence may be insubstantial and incompetent, yet very damaging and when disclosure is not subject to the safeguards imposed in judicial proceedings."²¹⁹ A federal district court similarly implied judicial authority to issue a protective order covering a CID in *Aluminum Co. of America v. United States Department of Justice*.²²⁰ The court held that despite Antitrust Civil Process Act amendments that expanded the

mony, if such material, answers, or testimony would be protected from disclosure under—

- (1) the standards applicable to subpoenas [sic] or subpoenas [sic] duces tecum issued by a court of the United States in aid of a grand jury investigation, or
- (2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any demand is appropriate and consistent with the provisions and purpose of this chapter.

The ACP Act was amended in 1976 to allow obtained material to be used by any authorized official of the Justice Department "in connection with the taking of oral testimony. . . ." 15 U.S.C. § 1313(c)(2) (1976). In *Aluminum Co. of America v. United States Dept. of Justice*, 444 F. Supp. 1342, 1345 (D.D.C. 1978), the district court stated that this expanded use of documentary material was offset by the imposition of the stricter standards applicable to the Federal Rules of Civil Procedure.

214. For example, the Massachusetts CID statute provides in part:

- (5) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court or the commonwealth; or require the disclosure of any documentary material which would be privileged, or which contains trade secret information, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

MASS. ANN. LAWS ch. 93A, § 6(5) (Michie/Law. Co-op 1975). See also WASH. REV. CODE ANN. § 19.86.110(6) (1978).

215. TENN. CODE ANN. § 8-6-407 (1980).

216. Plaintiffs' Brief at 27, *State ex rel. Shriver v. Leech*, No. 79-761 (Tenn. Ct. App. March 28, 1980).

217. 30 N.C. App. 585, 227 S.E.2d 645 (1976).

218. *Id.* at 589, 227 S.E.2d at 648.

219. *Id.* at 588, 227 S.E.2d at 647.

220. 444 F. Supp. 1342 (D.D.C. 1978).

use of information obtained under a CID,²²¹ a demandee was still entitled to protection against "unwarranted and unreasonable government intrusion."²²² The court ordered the government to inform the petitioner of its proposed disclosure of information to certain persons at least twenty-five days prior to such disclosure, and further declared that the petitioner could contest the disclosure in a judicial proceeding.²²³

It is well established that fifth and fourteenth amendment protections extend to corporations and businesses as well as to individuals.²²⁴ Although a corporation does not possess all the rights of an individual,²²⁵ the state may not take the property of a corporation without compensation, nor may it proceed against a corporation without due process of law.²²⁶ Therefore, it is submitted that civil investigative demand statutes authorizing the compelled production of documentary material and/or oral testimony from either business or nonbusiness demandees, without providing for judicial protection of confidential information and trade secrets, unconstitutionally deprive the CID recipient of property without due process of law.

VII. SEPARATION OF POWERS

Several CID recipients have claimed that an administrative officer's power to subpoena witnesses and compel the production of documents constitutes an unlawful delegation of legislative or judicial investigative authority. Although case law in this area is sparse, it is clear that challenges to the CID based upon this argument have been singularly unsuccessful.²²⁷

In *People v. Crawford Distributing Co.*²²⁸ the Supreme Court of Illinois addressed the appellee's contention that delegation of the subpoena power violated the separation of powers doctrine.

221. See note 213 *supra*.

222. 444 F. Supp. at 1346 (quoting H.R. REP. NO. 94-1343, 94th Cong., 2d Sess. 8 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2596, 2602).

223. *Id.* at 1347-48.

224. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Hale v. Hinkel*, 201 U.S. 43, 76 (1906); *Blawis v. Bolin*, 358 F. Supp. 349, 354 (D. Ariz. 1973).

225. See 358 F. Supp. at 354.

226. 201 U.S. at 76.

227. See *Mobil Oil Corp. v. Killian*, 30 Conn. Supp. 87, 301 A.2d 562 (Super. Ct. 1973); *In re McGowen*, 303 A.2d 645 (Del. 1973) (subpoena nevertheless quashed because too open-ended and issued pursuant to a police rather than a grand jury investigation); *In re Blue Hen Country Network, Inc.*, 314 A.2d 197 (Del. Super. Ct. 1973); *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 291 N.E.2d 648 (1973).

228. 53 Ill. 2d 332, 291 N.E.2d 648 (1973).

The court examined the state constitutional provision outlining the authority of the attorney general and stated:

Although the subpoena power is not vested in the Attorney General under the constitution of 1970, we hold that the constitutional provision that "[t]he Attorney General . . . shall have the duties and powers . . . prescribed by law," is sufficiently broad to warrant such a legislative grant. Also, this court has held that the powers and duties of the Attorney General include not only those powers conferred upon him by statute, but also those powers and duties inherent in the office as it existed at common law.²²⁹

Under the court's reasoning in *Crawford*, CID recipients in those states without broad constitutional or common-law grants of authority to the attorney general²³⁰ may have a strong argument that delegation of the subpoena power constitutes a violation of the separation of powers doctrine.

Two Delaware court decisions have also upheld the authority of the attorney general to issue CIDs in the face of separation of powers objections. In *In re McGowen*²³¹ the Delaware Supreme Court stated that the purpose of the statutory grant was to confer upon the attorney general authority similar to the grand jury investigative power, presumably to fill the long time gap between sessions of the grand jury.²³² In *In re Blue Hen Country Network, Inc.*,²³³ decided the same year, the Delaware Superior Court granted a CID enforcement petition of the attorney general, rejecting a demandee's claim that the investigative authority vested in the administrative official was overly broad.²³⁴ Following *McGowen*, the superior court likened the power of the attorney general to that of the grand jury, which had traditionally been afforded wide investigative authority.²³⁵ These Delaware decisions, however, fail to recognize that an administrative inquiry, unlike a grand jury investigation, does not provide the at least theoretically neutral buffer of private citizens between the demandee and the law enforcement authority.²³⁶ Despite this shortcoming, the holdings in *McGowen* and *Blue Hen* are representative of the views taken by most, if not all, state courts in reported decisions, when faced with a CID separation of powers challenge. It appears, there-

229. *Id.* at 345-46, 291 N.E.2d at 656 (citing *People ex rel. Elliott v. Covelli*, 415 Ill. 79, 112 N.E.2d 156 (1953)).

230. *See Smith v. Superior Court*, 101 Ariz. 559, 422 P.2d 123 (1967).

231. 303 A.2d 645 (Del. 1973).

232. *Id.* at 647 (quoting *In re Hawkins*, 123 A.2d 113, 115 (Del. 1956)).

233. 314 A.2d 197 (Del. Super. Ct. 1973).

234. *Id.* at 200.

235. *Id.* at 199-200.

236. *See text accompanying note 138 supra.*

fore, that an objection based upon a delegation of powers argument may prove successful only in those states that provide a narrow constitutional grant of powers to the attorney general or its equivalent, and in which additional common-law authority for the power is weak.

VIII. PROPOSED MODEL CIVIL INVESTIGATIVE DEMAND STATUTE

The primary focus of this Note has been the examination of the bases for a constitutional challenge to the civil investigative demand. The fact that the CID is the subject of such objections, however, does not diminish its utility as an investigative device if the relevant CID statute meets these objections. State attorneys general require the CID as a necessary tool for carrying out their investigative functions, and Congress and the several state legislatures have recognized this need by enacting statutes providing for the demand. This Note will therefore propose a model CID statute that meets the demandee's constitutional objections while retaining the positive qualities of the demand. The proposal is partially a consolidation of some of the most appropriate provisions of existing CID statutes, and partially an incorporation of novel demand requirements. Although in many instances the proposed statute mirrors language widely accepted by legislatures and courts, other sections of the statute modify existing statutory law so as to bring it into compliance with present minimum constitutional requirements. Finally, some provisions in the proposed statute set standards beyond those minimally required by the United States Constitution, either because several states now mandate such standards through state constitutional law,²³⁷ or because equitable considerations demand that such increased protections be afforded to the CID recipient.

Proposed Model Civil Investigative Demand Statute

§ 1. Definitions

a. "Civil investigative demand" or "demand" as used herein means a precomplaint [request for, or judicial order compelling²³⁸] one or more of the

237. See text accompanying notes 129-34 *supra*.

238. The proposed statute will offer two alternative CID procedures, each of which will satisfy current constitutional requirements. Because most state CIDs now authorize the attorney general or his equivalent to issue a demand prior to obtaining judicial review of its scope and contents, the proposed statute will offer a modified version of this procedure in addition to the alternative statute which mandates initial judicial examination prior to issuance of the demand. This modified version will facilitate quicker reform of many existing CID statutes, both by reducing the number of statutory changes that must be made, and by presenting a statute with which most legislatures will already be partially familiar. The ver-

following: the production of documentary material for inspection and copying or reproduction; the completion in writing of written interrogatories; or the giving of oral testimony by the demand recipient.

b. "Business" as used herein means any commercial entity, including, but not limited to, a sole proprietorship, partnership, corporation, or association.

c. "Closely regulated": whether an entity is to be deemed a "closely regulated" entity shall be determined with reference to the following considerations:

- (1) the nature of the goods or services sold, leased, or rented by the entity;
- (2) the history of prior state governmental regulation of the entity;
- (3) the extent of present state governmental regulation of the entity; and
- (4) the nature and character of state governmental regulation of the entity.²³⁹

d. "Closely regulated business" as used herein means any commercial entity (including, but not limited to, a sole proprietorship, partnership, corporation, or association), including the owners, officers, or agents of such entity, determined to be "closely regulated" as defined in § 1.b. of this Act.

e. "Documentary materials" as used herein includes, but is not limited to, the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, notation, log, or other document.

f. "Natural person" as used herein shall mean only an individual, not a sole proprietor.

g. "Person" as used herein means any natural person, sole proprietorship, partnership, corporation, association, or any other legal entity, except as otherwise indicated.

h. "Probable cause" as used herein means:

(1) if the demand recipient is any person, other than a closely regulated business, who is not under investigation for a possible violation of section [. . .], probable cause to believe that the demand recipient is in possession, custody, or control of any information or documentary material that is sought by the demand and which is reasonably relevant to an investigation of another person, other than a closely regulated business;

(2) if the demand recipient is a natural person who is the target of an investigation by the attorney general, probable cause to believe that the demand recipient has engaged in, is engaging in, or is about to engage in activity prohibited by sections [. . .], of the statutes of this state²⁴⁰ and that the demand recipient is in possession, custody, or con-

sion requiring initial judicial review, however, is the preferred alternative. See notes 114-16 *supra* and accompanying text.

239. Rather than listing particular entities as "closely regulated," the Proposed Model Statute offers several criteria for each state to apply to determine whether an entity is "closely regulated." The particular entities that will be included in this provision will vary from state to state, and will probably be expanded by future judicial rulings.

240. Each state should here designate the *specific* statutory provisions the violation of which may be the subject of an investigation by the attorney general, and hence, may involve the use of a civil investigative demand. No further citations for these blank statutory

trol of any information or documentary material sought by the demand;

(3) if the demand recipient is a nonclosely regulated business that is the target of an investigation by the attorney general, probable cause to believe that reasonable administrative standards for conducting an investigation have been met.

§ 2. Authorization of Investigation

The attorney general [or his duly authorized agent, or other official designated by statute]²⁴¹ is hereby empowered and it shall be his duty, to conduct, or cause to be conducted, an investigation into any act, method or practice which is or may be a violation of sections [. . .] of the statutes of this state.²⁴²

§ 3. Civil Investigative Demands

a. If the attorney general has probable cause to believe

(1) that any person has engaged, is engaging, or is about to engage in any activity prohibited by sections [. . .] of the statutes of this state, or

(2) that any person possesses information concerning such prohibited activity, he may apply to the [circuit or chancery]²⁴³ court in the county where the person resides, is domiciled, is incorporated, or conducts business, for an order issuing a civil investigative demand to such person.

b. The court shall issue the demand to any such person other than a closely regulated business only upon a showing of probable cause by the attorney general.

[a.a.][alternative] If the attorney general has reason to believe that any person has engaged, is engaging, or is about to engage in any activity prohibited by sections [. . .] of the statutes of this state, or possesses information concerning such prohibited activity, he may issue to such person a civil investigative demand.

[b.b.][alternative] The attorney general shall have the demand served upon any such person other than a closely regulated business only if he reasonably believes that probable cause for the issuance of the demand exists.

c. Every demand served upon any person shall:

(1) state the nature of the alleged conduct under investigation;

(2) state the statute and section number thereof, the past or prospective violation of which is under investigation;

(3) list the documentary material sought to be produced, describing the same with reasonable definiteness and certainty;

(4) state with reasonable definiteness and certainty the written interrogatories sought to be answered;

(5) describe with reasonable certainty any person from whom oral testimony is sought who cannot otherwise be positively identified;

sections will be provided.

241. Each state should here designate the official to whom the investigatory power is delegated. For the sake of brevity, this official shall hereinafter be referred to simply as the attorney general.

242. This grant of power will be necessary in those states in which the constitutional delineation of authority is vague or ambiguous. *See* Part VII *supra*.

243. The particular state legislature should here insert the appropriate judicial designation for the court that initially will deal with the demand.

(6) prescribe dates, times, and places at which the documentary material may be inspected and copied or reproduced, the answers to written interrogatories are to be submitted, and/or the oral testimony of the person is to be taken; provided, that no date earlier than [thirty (30)]²⁴⁴ days following the service of the demand shall be specified;

(7) identify the official to whom such documentary material or answers to written interrogatories are to be submitted, or by whom such oral testimony is to be taken.

§ 4. Receipt of Information by Demand Recipient

At any time subsequent to the service of the demand, the demand recipient may, subject to § 8, serve upon the attorney general a request for additional information. The request may ask for further details concerning the nature of the investigation, the names and addresses of other demand recipients connected with the conduct under investigation, and an opportunity to inspect and copy documentary material and answers to written interrogatories obtained from other such demand recipients.²⁴⁵

§ 5. Review and Enforcement

a. At any time prior to the earliest date specified in the demand, the demand recipient may petition the [circuit or chancery]²⁴⁶ court in the county where he resides, is domiciled, is incorporated, or conducts business, for a hearing to review the basis for the issuance of the demand, or for an order modifying or setting aside the demand, or both. A hearing shall be granted if requested by the demand recipient, absent good cause shown by the attorney general why the petition for a hearing should be denied. The time allowed for compliance with the demand shall not run during the pendency of the petition or the subsequent hearing except that the demand recipient shall comply with any portion of the demand not sought to be modified or set aside in the subsequent hearing.

b. Subsequent to the disposition of all such petitions filed by the demand recipient, the court shall issue a final order stating the portion or portions of the demand as originally issued, or as modified by the court, with which the demand recipient must comply. If no timely petition for a hearing, or for an order modifying or setting aside the demand, is filed, the original demand shall constitute a final order of compliance.

[b.b.][alternative]²⁴⁷ If a person fails to comply with an original or modified demand, the attorney general may petition the [circuit or chancery]²⁴⁸ court in the county where the person resides, is domiciled, is incorporated, or conducts business, for an order compelling compliance with such demand. Upon a showing of probable cause, the court shall then issue a final order stating the portion or portions of the demand as originally issued, or as modified by the court, with which the demand recipient must comply.

c. Any person who fails to comply with a final order of the court requiring compliance with an original or modified demand, including any person who appears but refuses to testify at the taking of oral testimony, shall be guilty of a civil contempt, and shall be punished in accordance with the relevant provisions of the laws of this state.

244. Each state may here insert its own respective time period.

245. See Part IV *supra*.

246. See note 243 *supra*.

247. See note 238 *supra*.

248. See note 243 *supra*.

d. Any person who commits any of the following acts shall be [guilty of a misdemeanor, or assessed a civil penalty of not more than [. . .], or both]:²⁴⁹

(1) intentionally avoids, evades, or impedes any investigation under this Act, including the removal, concealment, alteration, or destruction of documentary material included in a demand pursuant to the investigation;

(2) intentionally conceals relevant information;

(3) . . .;²⁵⁰

e. At any time subsequent to the issuance of a request for additional information and prior to a final order of compliance with the demand, the demand recipient may petition the court for an order compelling compliance with the request. The court shall then issue an order compelling compliance with the request for additional information unless it finds that the disclosure of certain information would be prohibited by § 8 of this Act, in which case the court shall issue a final order stating which portions, if any, of the request must be complied with. The time allowed for compliance with the demand shall not run during the period beginning with the issuance of the request, and ending with compliance with the request or a denial by the court of the petition to compel compliance with the request, whichever period is shorter. If the attorney general fails to comply with any final order issued by the court hereunder, the court shall order that the demand served upon the person requesting additional information be set aside.²⁵¹

§ 6. Immunity of Demand Recipients

No oral testimony, written information, or documentary material obtained from a person under a civil investigative demand, or any evidence derived therefrom, shall be used subsequently against such person as substantive evidence in any prosecution, unless such person has voluntarily waived his privilege against self-incrimination.²⁵² For purposes of this section, "person" shall mean all natural persons, including owners, officers, and agents of any business.

§ 7. Trade Secrets and Privileged Material

No demand shall require the production of any documentary material, the submission of answers to written interrogatories, or the giving of any oral testimony if such documentary material, answers, and/or oral testimony constitutes a trade secret or other privileged information, or would be protected from disclosure under the rules of civil procedure of this state. If a claim of privileged information is raised, the court shall order an *in camera* inspection

249. Each state should here insert the desired criminal and/or civil penalty, and the amount thereof.

250. Additional grounds for assessment of a penalty may be set forth by the individual state.

251. It is the position of this Note that failure to afford limited reciprocal discovery to the demand recipient should entirely preclude use of the demand itself.

252. See Part III *supra*. "Waiver" in the context of the fifth amendment means "an intentional relinquishment . . . of a known right or privilege." See *Schneckloth v. Bustamonte*, 412 U.S. 218, 236-38 (1973) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). For application of the waiver standard to compelled self-incrimination before an administrative agency, see *Smith v. United States*, 337 U.S. 137 (1949). Of course, the states are free to offer the demand recipient increased protection by affording transactional immunity under state law. See Part III *supra*.

of the information to determine the genuineness of the claim.²⁵³

§ 8. Confidentiality of Information Obtained Under a Demand

a. No documentary material, answers to written interrogatories, transcripts of oral testimony, or any other information obtained under a demand or a request for additional information may be disclosed to anyone other than a duly authorized agent of the attorney general or the demand recipient, respectively, without the consent of the person who produced such information.

b. Notwithstanding paragraph a. of this section, the appropriate court may order the disclosure of any information obtained under a demand or request for good cause shown. The court may also place such limitations and restrictions on such disclosure as it deems necessary.²⁵⁴

c. Any person who discloses any information obtained under a demand or a request for additional information other than by court order, or with the consent of the person who produced such information, shall be [guilty of a misdemeanor, or assessed a civil penalty of not more than [. . .], or both].²⁵⁵ The person who disclosed the information shall also be liable to the injured party for civil damages.

§ 9. Appearance of Counsel

Any person compelled to appear under a demand for oral testimony may be accompanied, represented, and advised by counsel throughout the taking of the testimony.²⁵⁶

§ 10. Time Periods

The time period for the performance of any act set forth in this Act may be increased or decreased by the appropriate court for good cause shown.

§ 11. Fees and Mileage

Any person served with a demand compelling the giving of oral testimony shall be paid fees and mileage on the same basis as is authorized to be paid to witnesses in the courts of this state.²⁵⁷

§ 12. Service

a. Any demand authorized by this Act may be served upon any person in the manner provided for by the rules of civil procedure for the courts of this state.

b. Any request for additional information authorized by this Act may be served upon the attorney general or his duly authorized agent in the following manner:

(1) by delivering a duly executed copy thereof to such person to be served; or

(2) by depositing such copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person to be served.

253. See Part VI *supra*.

254. See Part VI *supra*.

255. Each state should here insert the appropriate criminal and/or civil penalty, and the amount thereof.

256. See 15 U.S.C. § 1312(i)(7)(A) (1976).

257. See TENN. CODE ANN. § 8-6-406. See generally Part VI *supra*.

§ 13. Appeal of Final Orders

All final orders entered with regard to any demand or request for additional information may be appealed immediately as provided by the laws of this state.

ANTHONY J. MCFARLAND