



## **Recommendation 74-1**

### **Subpena Power in Formal Rulemaking and Formal Adjudication**

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(Adopted May 30-31, 1974)

The present recommendation implements, and somewhat expands, the statement of principle adopted by the Conference in June 1973 with respect to the American Bar Association's Resolution No. 10 concerning proposed amendments to the Administrative Procedure Act. It speaks only to the issue of subpena authority in formal proceedings under the Administrative Procedure Act, and does not reflect any judgment as to the need for general or specific grants of subpena authority in other situations.

#### **Recommendation**

The Administrative Procedure Act should be amended (1) to make agency subpoenas available in all agency proceedings, both rulemaking and adjudication, which are subject to sections 556 and 557 of title 5, United States Code, and (2) to make clear that the power to issue subpoenas in such proceedings shall be delegated to presiding officers.

We propose the following amendments to implement this recommendation:

1. Amend section 555(d) of title 5, United States Code to read as follows:

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpoenas. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

2. Amend section 556 of title 5, United States Code to add the words "subpena authority;" in the heading after the words "powers and duties;" to delete the words "authorized



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by law" in subparagraph (c)(2), to redesignate subsections (d) and (e) as (e) and (f) respectively, and to add the following subsection (d):

(d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpoena any person to appear and testify or to appear and produce books, papers, documents or tangible things, or both, at a hearing or deposition at any designated place. Subpenas shall be issued and enforced in accordance with the procedures set forth in section 555(d) of this title. In case of failure or refusal of any person to obey a subpoena, the agency, through the Attorney General unless otherwise authorized by law, may invoke the aid of the district court of the United States for any district in which such person is found or resides or transacts business in requiring the attendance and testimony of such person and the production by him of books, papers, documents or tangible things. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpoenas and for the judicial enforcement thereof.

### **Citations:**

39 FR 23041 (June 26, 1974)

\_\_\_ FR \_\_\_\_\_ (2012)

3 ACUS 36