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EXPANSION OF FEDERAL SUPERVISION OF SECURITIES THROUGH THE INQUISITIONAL AND CENSUS POWERS OF CONGRESS—A SUGGESTION

Kenneth Rush*

The Securities Act and the Securities Exchange Act, principally through the means of compulsory disclosure of information, are intended to aid the investing public in evaluating securities and to prevent the undue influencing of their value, market price and sale. These ends are undoubtedly worth seeking in their entirety, but such is the nature of our federal system that the acts, being founded upon the powers of Congress over the facilities of interstate commerce and of the mails, purport to relate only to transactions in securities involving use of those facilities.

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The gaps in federal regulation which by constitutional necessity must result are of more than trivial moment. Thus, the Securities Act, which in the main is concerned with public distribution of securities as distinguished from trading therein, can be avoided by public distribution intrastate and without use of the mails. Practical illustration has shown that the marketing in this manner of an issue as large as $8,000,000 principal amount is feasible.

The Securities Exchange Act also has loopholes of consequence. It is primarily directed toward trading in securities and thus supplements the Securities Act by regulatory provisions relative to securities with trading privileges by listing or otherwise on a stock exchange, to the stock exchanges themselves and to brokers and dealers doing an interstate business in securities including transactions over stock ex-


\[3\text{ Commencing in July, 1934, the issuer and underwriters publicly distributed an issue of$8,000,000 of the Fifteen Year Secured 6% Sinking Fund Bonds due June 1, 1949, of Brooklyn-Manhattan Transit Corporation; without registration thereof under the Securities Act. The contention of the issuer and underwriters was that the issue had been distributed without use of the facilities of interstate commerce or of the mails. C. C. H. Securities Act Service, ¶ 2163.04. Subsequently, however, the Commission indicated some doubt as to the accuracy of this contention and, although the securities had been distributed, registration under the Securities Act both of the $8,000,000 issue and of a subsequent $2,000,000 issue was effected in May, 1935. Release No. 365 of the Securities and Exchange Commission, May 9, 1935.}

changes. Many securities, however, never have trading privileges on an exchange and even though they otherwise be subject to interstate dealing, federal supervision of brokers and dealers doing an interstate business therein is but a slight step toward effective protection of the investor. Furthermore, that certain securities have been registered under the Securities Exchange Act does not compel the registration of other securities of the same issuer which do not fall within the purview of the act.

Not only may the regulatory provision of each act be avoided, but a close tie-up of the acts to insure federal supervision of a security throughout its existence is not readily permitted by their present constitutional bases. Thus, securities through distribution intrastate and without use of the mails may legally avoid registration under the Securities Act, but nevertheless become available for listing and trading on an exchange with resultant qualification under the Securities Exchange Act. The converse situation, that securities registered under the Securities Act be thereafter subject to the disclosure provisions of the Securities Exchange Act has in a measure been attempted,


"Each registration statement hereafter filed pursuant to the Securities Act of 1933, as amended, shall contain an undertaking by the issuer of the issue of securities to which the registration statement relates to file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security listed and registered on a national securities exchange; but such undertaking shall become operative only if the aggregate offering price of such issue of securities, plus the aggregate value of all other securities of such issuer of the same class (as hereinafter defined) outstanding, computed upon the basis of such offering price, amounts to $2,000,000 or more. The issuer shall file such supplementary and periodic information, documents, and reports pursuant to such undertaking, except that the duty to file shall be automatically suspended if and so long as (1) such issue of securities is listed and registered on a national securities exchange, or (2) by reason of the listing and registration of any other security of such issuer on a national securities exchange, such issuer is required to file pursuant to section 13 of this title information, documents, and reports substantially equivalent to such as would be required if such issue of securities were listed and registered on a national securities exchange, or (3) the aggregate value of all outstanding securities of the class to which such issue belongs is reduced to less than $1,000,000, computed upon the basis of the offering price of the last issue of securities of said class offered to the public. For the purposes of this subsection, the term 'class' shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political sub-
the constitutionality of this statutory condition to use of interstate commerce or postal facilities is doubtful.\footnote{See, generally, Hale, "Unconstitutional Conditions and Constitutional Rights," 35 Col. L. Rev. 321 (1935); Merrill, "Unconstitutional Conditions," 77 Univ. Pa. L. Rev. 879 (1929).}

The desirability of these loopholes in federal regulation is questionable. In their nature these gaps are primarily open to securities of relatively small issuers whose activities are little noted in public print or otherwise and as to which, therefore, the disclosure and other provisions of the acts would seem to be especially useful for protection of investors. Effective protection lies in legislative prevention, not in ex post facto judicial remedy. Even if efforts of the various states in this field were adequate, much might be said in favor of integrating supervision of all securities under the single aegis of the Securities and Exchange Commission.\footnote{The Securities and Exchange Commission is hereinafter referred to as "the Commission."} The states, however, handicapped by territorial limitations, have demonstrated their ineptitude in satisfactorily coping with the problem.\footnote{See, in general, Smith, "State 'Blue-Sky' Laws and the Federal Securities Act," 34 Mich. L. Rev. 1135 (1936); Berlack, "Federal Incorporations and Securities Regulation," 49 Harv. L. Rev. 396 at 415-416 (1936).} In many states there are no blue-sky laws at all. Where statutes exist, even the more stringent usually require the filing of information only in connection with the distribution of securities and do not attempt subsequent protection of the investor analogous to that afforded by the Securities Exchange Act. State statutes make no provision for dissemination of filed information among the public, nor could a state agency obtain for securities the widespread publicity and other dispersion of information which the Commission can provide. The effectiveness of such laws, moreover, is largely nullified by broad exemptions, and, as to non-exempt securities, it is not improbable that the advent of federal regulation with the consequent abridgement of state action will tend to even grosser laxity of enforcement of blue-sky laws.

In contrast to state efforts, federal regulation within the jurisdictional limits of the Securities Act and the Securities Exchange Act seems to be accomplishing many of the desired results. While much of the voluminous data required of the informant may actually be read only by administrative subordinates of the Commission, divi-
closures of consequence and of an unexpected or unfavorable nature reach a large part of the investing public through modern-day channels of publicity. Moreover, the very necessity of future divulgence coupled with the overhanging possibility of Commission investigation doubtless conduces to voluntary prevention of many abuses in the sale of securities and in the internal affairs of the informant. The civil or criminal liabilities which misinformation or inadequate disclosure may inflict are too heavy for the risking.

It would seem, then, that the same factors which originally occasioned federal intervention in the securities field would call for extension of the acts without regard to limitations inherent in the interstate commerce and postal powers. In this extension, certain features of the acts would be excepted. Provisions of the Securities Exchange Act directly regulating stock exchanges and the sale of securities over stock exchange floors, for example, are presently as extensive in scope as their nature demands. The features of the acts which should be loosed from interstate commerce or postal restraints are principally those relating to:

A. The requirement that issuers, their officers, directors, and principal stockholders and that dealers and brokers file with the Commission specified information concerning themselves, and that such information be kept reasonably up to date. The acts, in so far as they now apply, achieve this through compulsory registration of securities by their issuers and of brokers and dealers, and through the compulsory periodical filing of certain reports by the officers, directors, and principal stockholders of such issuers. A waiting period for checking as to accuracy and completeness intervenes between the date of filing of the registration statement and the effectiveness thereof. The Securities Exchange Act further requires that information in registration statements filed thereunder, and in some instances, as above stated,
under the Securities Act, be kept reasonably current, and that in specified instances such papers be preserved and further reports filed by informants as the Commission may prescribe.\textsuperscript{14}

B. The dissemination of this information among the investing public. In addition to the usual media of publicity, this is now accomplished under the Securities Act by the stipulation that in the distribution of a security to which the act relates, the security must be accompanied by a prospectus that "meets the requirements of section 10."\textsuperscript{15}

C. Punitive measures to prevent material false statements or omissions and otherwise to coerce compliance with the acts. These measures consist in the imposition of civil liabilities and criminal penalties,\textsuperscript{16} the suspension or withdrawal by the Commission of registrations under the Securities Exchange Act,\textsuperscript{17} and stop-orders of the Commission suspending the effectiveness of registration statements under the Securities Act.\textsuperscript{18}

D. An extensive investigatory power in the Commission that it may better administer the acts and may report to Congress as to specified matters or needed legislation.\textsuperscript{19}

E. Miscellaneous features, such as provisions concerning definition of terms,\textsuperscript{20} judicial review of Commission decisions and jurisdiction of offenses and suits,\textsuperscript{21} the retention of other legal and equitable

\textsuperscript{18}48 Stat. L. 74, § 8 (d) (1933), 15 U. S. C., § 77h (d) (1935).
remedies, prohibition of representations that the Commission has approved securities registered, the invalidity of contracts violative of the Acts, filing and other fees, and the effect of partial invalidity of the statutes. Extension of these provisions gives rise to no constitutional question peculiar to itself and accordingly will not be further considered herein.

The marked characteristic of the supervision to be extended, then, is the procurement and dissemination of information. Of course, concepts of federal power other than the interstate commerce and postal powers must be found to warrant such expansion. Two recognized prerogatives of Congress which it is believed might be helpful in effectuating this purpose are those usually invoked by Congress in the procurement and dissemination of information, namely, the census power and the inquisitorial power in aid of the administrative and legislative functions. To forecast how courts will act is, of course, hazardous, but if their past trend of decision at all portends their future opinions, we may safely assume that the powers of Congress will be more liberally rather than more narrowly construed. And, in any event, attempts to prophesy future judicial action must be largely grounded on a consideration of prior relevant decisions. Therefore, this article is primarily concerned with the extent to which the features of the Securities Act and the Securities Exchange Act above listed may, under past and existing judicial construction and judicially unchallenged legislative interpretation of the census and inquisitorial powers, probably be extended to intrastate, non-postal transactions in or relative to securities.

For convenience of categorization, legislative and judicial interpretations of the census and the inquisitorial powers, respectively, will be separately considered. But in essence the two powers are directed toward the same purpose, the procurement and dissemination of information, and many of the generalizations as to one are equally applicable to the other.

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The Census Power

Of the two prerogatives, the usableness of the census authority is more nebulous. The Constitution provides for an enumeration of persons "within three years after the first meeting of the Congress of the United States and within every subsequent term of ten years in such manner as they shall by law direct." This clause, not unlike its constitutional contemporaries, has received a freer legislative construction than its language readily connotes. Thus, in long practice, judicially supported in so far as the courts have had occasion so to do, Congress has restricted the census neither to natural persons nor to requiring information only once in each ten-year period. The existent statute, for example, authorizes the Director of the Census to collect and publish, for every second year after 1927, statistics of manufacturing industries. Data concerning their internal organization and activities which as a result are requested of corporations and other persons approach in detail and presumably could be identical in every way with that asked for under the Securities Act and the Securities Exchange Act. Fine or imprisonment is the penalty for false or inadequate disclosure.

Despite its being in full operation throughout our constitutional history, this census clause has received no definitive interpretation by the Supreme Court, and but little by other courts. In a passing comment, the Supreme Court once negatived restriction of the clause to its original purpose. A lower federal court decision in United States v. Moriarity was more directly concerned with its scope and, although the climate of opinion of the day was not favorable to Congressional investigations, construed it quite broadly. The question before the court was the sufficiency of an indictment charging a special census agent with making a fictitious return in the compilation of manufacturing statistics under a statute closely similar to the present one. To the defense that the clause is limited to a census of the population and that the statute was accordingly unconstitutional, the court in upholding the indictment replied:

"For the national government to know something, if not everything, beyond the fact that the population of each state reaches

27 U. S. Constitution, art. 1, § 2.
30 Legal Tender Cases, 12 Wall. (79 U. S.) 456 at 556, 20 L. Ed. 287 (1871).
31 (C. C. N. Y. 1901) 106 F. 886.
a certain limit, is apparent, when it is considered what is the dependence of this population upon the intelligent action of the general government. Sanitation, immigration, naturalization, the opening and development of the public domain; the laying of taxes, duties, imposts, and excises, involving the adjustment of duties for the purposes of revenue to the domestic products of every kind, and the taxation of industries, as illustrated in the laws for collecting an internal revenue, and in what is known as the ‘War Revenue Tax Law’; the fostering of exports; the immense appropriation annually for the development and improvement of waterways for the purposes of commercial interchange between the states and the states and foreign nations; the establishment of post offices and post roads; the chartering of corporations for the convenient reception and distribution of money to meet the convenience and exigencies of trade; the institution of a just system of bankruptcy; the promotion of highways of travel by railway and otherwise; vigilant protection and helpful interest in suggested facilities of transportation in other countries; a judicious consideration of giving or witholding aid to our merchant marine; the necessity of providing a suitable volume of money for the purpose of facilitating the exchange of commodities; the making of commercial treaties with foreign countries and establishing reciprocal trade relations with the same; the building of ships, forts, and public buildings; the equipment and maintenance of armies,—for these and similar purposes the government needs each item of information demanded by the census act, and such information, when obtained, requires the most careful study, to the end that the fulfillment of the governmental function may be wise and useful. If one shall select any of the powers reposed in the federal government as above indicated, and the enumeration is not complete, and consider thoughtfully the direct essential aid that the information, in whole or in part, sought by the act, must give, he will not hesitate to ascribe plenary ability to congress to obtain such information. A government whose successful maintenance depends upon the education of its citizens may not blindly legislate, but may exercise the right to proclaim its commands, after careful and full knowledge of the business life of its inhabitants, in all its intracacies and activities.” 32

In another case the penal provisions of the statute were applied to the refusal of an individual to furnish requested particulars con-

32 106 F. 886 at 891-892.
cerning a farm belonging to his wife.\textsuperscript{33} And recently a high federal court, in recognizing the full authority of Congress over the census and the validity of delegation of administrative power to the Director of the Census, refused by mandamus to interfere with the Director’s discretion in determining the manner of publication of census information.\textsuperscript{34} 

While these decisions are not particularly helpful, they at least do not seriously restrict exercise of the census power. Therefore, no overruling or tortuous distinguishing of prior decisions would be necessary to permit of judicial acceptance of the long prevailing legislative construction and use of the clause, which in turn would make it available, to some extent, in effecting federal supervision of securities without regard to interstate commerce or postal limitations.

**The Inquisitional Power**

Closely allied to the census authority is the now well established inquisitorial power of Congress. No original purpose doctrines rise to plague its existence, for it is an implied prerogative whose scope is not encompassed within language of the founding fathers. But that Congress should be possessed of the fullest possible means of obtaining knowledge to determine what action by it is necessary and what the nature of such action should be can hardly be gainsaid. And in the administration of statutory enactments, full knowledge of all relevant facts is equally essential that the administrative agency may efficiently carry out its duties and that Congress may properly judge as to the sufficiency of the statutory means and the excellence of their administration. A further highly valuable service rendered by the Federal Government is acquainting the public with data relative to specialized or general fields. Business men in studying or forecasting economic conditions rely heavily upon bulletins of the Commerce and Treasury Departments, and of other branches of the Government. The farmer is similarly benefited by information emanating from the Department of Agriculture. And so on into many phases of our economic and social life.\textsuperscript{35}


\textsuperscript{34} United States ex rel. City of Atlanta v. Stuart, (App. D. C. 1931) 47 F. (2d) 979, noted in 40 Yale L. J. 476 (1931).

Unless these purposes of gathering information are in many cases to be largely defeated, the permissible range of governmental inquiry must extend to any data which would be of benefit in the proper exercise of the legislative function or in the administration of legislative enactments. This has been recognized and the inquisitorial power so construed by the Supreme Court. The scope of federal activities and, thus, the scope of inquiry extends, of course, far beyond interstate commerce and postal affairs. For example, relative to the suggested federal supervision of intrastate, non-postal transactions in securities, in carrying out many legislative functions and in the administration of numerous statutes, Congress or administrative agencies need information of the nature now required under the securities acts but which could not be coerced under the interstate commerce or postal powers. In the drafting or amending of tax statutes, in the collection of taxes levied, and in the expenditure of public funds to provide for the general welfare, it is difficult to imagine any informational detail relative to the activities of issuers, their officers, directors and principal stockholders and to brokers and dealers which would not be helpful. Similar information is of value with regard to such matters as determining the need for or initiating constitutional amendments; the making of treaties, particularly those relating to trade; the regulation of business by virtue of powers other than those over interstate commerce and the mails; the laying of tariffs; control of the currency and fiscal affairs; bankruptcy and corporate reorganization; the national defense. The list is far from complete but illustrates that hardly any fact now requested under the securities acts, if extended to intrastate, non-postal transactions, could be safely labeled as of no benefit to the Federal Government in the performance of legislative or administrative functions. Moreover, it is worthy of note that many administrative features of the securities acts, such as the compulsory filing of data by informants in response to specific inquiries of the Commission, the subject matter of information requested, the classification of persons of whom information is required, the publicizing of data obtained, and the imposition of civil liabilities and criminal penalties for failure properly

to divulge requested data, are adapted in large measure from methods employed by Congress and its administrative agencies in obtaining information under the inquisitorial power. The suggested use of the inquisitorial power would, however, involve the procurement of specific information for somewhat more general legislative and administrative purposes than has heretofore been attempted.

Strangely, the Supreme Court recognized that Congress could invest in administrative agencies the power, with judicial aid, to coerce disclosure of information long before like recognition was definitely given to investigations directly by Congress itself with coercion of testimony by its own process. Almost since its creation, however, each House of Congress has in practice frequently employed committees of its members to conduct investigations and has used its own process to compel the giving of testimony and the production of papers.\(^\text{36}\) Judicial opinion as to the propriety of this legislative conduct has widely varied. In 1821 the Supreme Court recognized that the House of Representatives might summarily punish a person for contempt, the offense involved being an attempt to bribe a member rather than a refusal to testify.\(^\text{37}\) Both the inquisitorial power and the correlative power to punish for contempt were seriously jeopardized sixty years later by the opinion in *Kilbourn v. Thompson*,\(^\text{38}\) but the Court by its decision in *In re Chapman*\(^\text{39}\) strongly veered toward leniency in permitting Congress to exercise its investigatory function. Later it paused in *Marshall v. Gordon*\(^\text{40}\) to hold that a House of Congress could summarily punish for contempt only for the purpose of removing an obstruction to the legislative process. Finally in *McGrain v. Daugherty*,\(^\text{41}\) and subsequent decisions,\(^\text{42}\) the Court plumped for broad authority in Congress to conduct investigations and summarily to


\(^{38}\) 103 U. S. 168, 26 L. Ed. 377 (1881).

\(^{39}\) 166 U. S. 661, 17 S. Ct. 677 (1897).

\(^{40}\) 243 U. S. 521, 37 S. Ct. 448 (1917).

\(^{41}\) 273 U. S. 135, 47 S. Ct. 319 (1927).


*McGrain v. Daugherty* involved an attempt by the Senate to compel Mal S. Daugherty to appear before one of its committees and personally to testify concerning the committee’s investigation of the Department of Justice and of Harry M. Daugherty, then Attorney General. Mal S. Daugherty had refused to obey a committee subpoena and upon being taken into custody pursuant to a resolution of the Senate sought and was granted a writ of habeas corpus. The Supreme Court in reversing this order of the District Court, reviewed its prior decisions on the question and stated:

"While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with ‘general’ power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. . . .

"We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . .

". . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this
attribute to the end that the function may be effectively exercised. . . .

"The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable." 48

*McGrain v. Daugherty* has been strengthened by subsequent decisions. In *Sinclair v. United States* 44 the conviction of Sinclair under a criminal statute for failure to testify before a Senate committee concerning a contract between one of Sinclair's corporations and other private persons was upheld. This case involved a continuation of the "Teapot Dome" inquiry and the contract in question allegedly related to a release by private persons to Sinclair's corporation of rights in government lands. The Supreme Court in its opinion seemingly places on the witness the duty of establishing that the inquiry is not in aid of the legislative function, a difficult task in view of the vast extent of Congressional powers and of the judicial presumption that, even though the authorizing resolution does not so state, the investigation is for a proper legislative purpose unless the subject matter negatives such assumption. The Court further held that "the committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function." 45

In a recent pronouncement on the subject the Supreme Court upheld the power of a Senate committee pursuant to an authorizing resolution to coerce the production of papers, as well as oral testimony, and to punish for contempt after the obstruction to the legislative process has been removed. 46 Thereby, *Marshall v. Gordon* was departed from in fact, but in language was distinguished as an instance wherein the acts complained of were not of a character to obstruct the legislative function.

The House of Congress authorizing an investigation may, and almost invariably does, delegate conduct thereof to a committee of its members. 47 This committee in turn must rely upon its agents to per-

44 279 U. S. 263, 49 S. Ct. 268 (1929).
45 279 U. S. 263 at 297, 49 S. Ct. 268 (1929).
47 See articles cited supra, note 35.
form such tasks as examining papers, compiling data, and determining what witnesses should be called and the manner of their examination. Delegation to the Commission, by virtue of the inquisitorial power and within proper standards set by Congress, of the actual procuring of information from issuers and their directors, officers and principal stockholders and from brokers and dealers would be but a slight additional step. And, in fact, long before its decision in *McGrain v. Daugherty*, the Supreme Court had approved the endowment of administrative agencies with broad inquisitorial powers for administrative purposes or to compile information for Congress relative to specified subjects, and Congress has by statute or by resolution increasingly resorted to such delegation. Thus in early upholding the conferring of extensive inquisitorial powers upon the Interstate Commerce Commission, the Court stated:

"An adjudication that congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty, not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

In *Interstate Commerce Commission v. Goodrich Transit Company* the Court further expressed its opinion as to delegation of inquisitorial powers to the Interstate Commerce Commission as follows:

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by Congress." 49

And recently the Court said that:

"Authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts, but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy; that is, as Chief Justice Marshall expressed it 'to fill up the details' under the general provisions made by the legislature." 50

In determining of what persons information may be coerced, seemingly the only restriction as to classification is that there be established to the Court's satisfaction some acceptable reason therefor. Of course, wide powers of inquiry are especially requisite that governmental agencies invested with regulatory functions may properly carry out their duties, and the statutes and judicial decisions reflect this need. But the Supreme Court has expressly negatived any idea that the requiring of information is regulation 51 and has sustained the validity of investigations by administrative bodies of persons not public utilities and not otherwise declared to be "affected with a public interest." Thus, the Treasury Department, in advising Congress as to or in en-

49 224 U. S. 194 at 214, 32 S. Ct. 436 (1912).


forcing federal tax statutes, may and does extensively examine the present or prospective taxpayer.\textsuperscript{52} Similarly with regard to the anti-trust laws, the investigatory function is a vital attribute of the Federal Trade Commission's activities.\textsuperscript{53} Or, classifying in another manner, the designation of corporations as the only persons to be examined\textsuperscript{54} and, in fact, the requiring of information of only one of various corporations similarly circumstanced\textsuperscript{55} is unobjectionable. Therefore, there would appear to be no constitutional question that, under the inquisitorial power, issuers, their officers, directors and principal stockholders, and dealers and brokers could be set apart as the only persons of whom the Commission would coerce disclosures.

Relative to the subject matter of information that may be coerced under the inquisitorial power, the Court has been reluctant to impose restraints upon the legislative will. For example, persons engaged in interstate commerce and thereby subject to federal supervision, have been forced to give information as to their intrastate activities also.\textsuperscript{56} Information relating to the internal organization, management, financial condition, methods of account and bookkeeping, and in fact, virtually all facts of which the securities acts require disclosure have with judicial approval been coerced of such persons.\textsuperscript{57} It should be noted, 


\textsuperscript{54} Consolidated Rendering Company v. Vermont, 207 U. S. 541, 28 S. Ct. 178 (1907).

\textsuperscript{55} Isbrandtsen-Moller Co., Inc. v. United States, 300 U. S. 139, 57 S. Ct. 407 (1937).


\textsuperscript{57} Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125
however, that the Securities Exchange Act and, less adequately, the Securities Act, now quite properly protect the informant against disclosure of trade secrets and of other information which should not be made public.\(^{58}\) Probably the same protection could be claimed under the due process of law clause of the Fifth Amendment and the unreasonable searches and seizures clause of the Fourth Amendment.\(^{59}\)

**Privilege Against Self-Incrimination and Unreasonable Searches and Seizures**

Although fully as applicable to existent supervision under the acts as to the proposed extension thereof, the privilege against self-incrimination contained in the Fifth Amendment and against unreasonable searches and seizures contained in the Fourth also merit some attention in connection with the proposed extension of federal supervision.

The privilege against self-incrimination offers little difficulty to the suggested use of the inquisitorial and census powers. Most issuers are corporations, and the Supreme Court, unwilling needlessly to fetter judicial or other governmental procurement of information, has committed itself to the interpretation that the guarantee applies only to natural persons, not to corporations.\(^{60}\) Moreover, a natural person (1894); Isbrandtsen-Moller Co., Inc. v. United States, 300 U. S. 139, 57 S. Ct. 407 (1937); cases cited supra, note 56.


cannot object because the production of corporate books and records, even though prepared by him, may incriminate him,\(^{61}\) or because he or anyone else is required pursuant to statute to keep, prepare and file with a governmental body reports of corporate activities which may incriminate him.\(^{62}\) One under examination in a federal proceeding cannot refuse to answer because of possible self-incrimination under state law.\(^{63}\) Where applicable, the privilege, unless duly exerted, is deemed to be waived\(^{64}\) and may be entirely taken away by a proper statutory immunity.\(^{65}\) This clause is not, then, a serious deterrent to effective supervision of the nature attempted under the securities acts.

Unlike the privilege against self-incrimination, the protection against unreasonable searches and seizures afforded by the Fourth Amendment is granted also to corporations.\(^{66}\) For present purposes the extent of this constitutional restraint may be better understood by categorizing divulgence of information into (1) oral testimony of witnesses, (2) preparation and filing by informants of specified reports in response to inquiries propounded pursuant to statute, and (3) production or inspection of the informants’ books and records.

The giving of oral testimony in its nature is protected by the privilege against self-incrimination, not that against unreasonable searches and seizures. The second category, the procuring of specified information through the preparation and filing by informants of reports in response to inquiries propounded pursuant to statute, and (3) production or inspection of the informants’ books and records.


the form of reports, such as of a registration statement, is prescribed by the Commission. Consonant with its decisions under the self-incrimination clause, the Supreme Court has thus far refused to permit a refusal fully to prepare and file such reports to be grounded on the privilege against unreasonable searches and seizures.

This attitude of the Court is well exemplified in a decision recently handed down. In question was the validity of an order of the Secretary of Commerce requiring a shipping company to file a copy or summary of its books and records for the period from September 1 to November 12, 1935, which should show certain items of information. The order recited that full information was necessary for proper administration of the Shipping Act. To the defense that the Secretary had rejected the company's offer to file records on condition that they would not be revealed to its competitors and that the Secretary had stated his purpose was to turn the records over to the public, which allegedly would result in fostering unfair competition and would ruin the company's business, the Court replied that the order, being justified by a lawful purpose, was not rendered illegal by any other motive. Since the order demanded only the filing of data and "determined no rights and prescribed no duties" of the company as an ocean carrier, objections to the propriety of the mode of its issuance were deemed to be inconsequential. The Court, in upholding the validity of the order in its entirety, stated, "The argument that the order amounts to an unreasonable search and seizure, forbidden by the Fourth Amendment, is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers." 67

Restraints against unreasonable searches and seizures, although doubtless in flagrant instances potentially applicable to the second category, have thus far been confined to the third category; that is, to the examination by the government agency of the informant's books and records as distinguished from oral testimony or the compulsory filing of reports pursuant to statute. As regards such examination, wide discretion, of course, rests in the Court to determine what search or seizure is "unreasonable." If with "reasonable particularity the subjects to which the documents called for relate" 68 are specified in the subpoena, access to the informant's books has been permitted. The Court, on the other hand, has frowned upon

so-called "fishing expeditions," or a "general" inspection of corporate books without specification of a "proper purpose" of examination, although in such cases, the decisions restraining administrative investigations have usually been based not upon the constitutional inhibition against unreasonable searches and seizures, but upon interpretation of the statutory power bestowed upon the government instrumentality. However, so far as concerns the suggested use of the inquisitorial and census powers to compel the filing of data relative to intrastate, non-postal transactions in securities, similar in nature to that now filed under the securities acts, the specification of information required and of persons who must make disclosure appears to be sufficiently limited and definite to avoid condemnation as a "fishing expedition" or a "general" inquiry; and, as has been discussed, the information seems sufficiently to relate to the legislative and administrative functions to furnish a "proper purpose" of inquiry. On the other hand, the restraint against unreasonable searches and seizures would be particularly applicable, as it now is under the securities acts, to independent investigations by the Commission. Thus far, however, the Commission has usually so conducted such independent investigations as to avoid judicial displeasure. 60

Modes of Coercing Information

In coercing disclosures directly, Congress, as has been noted, may employ its own process and power to punish for contempt or may resort to the courts. Where the investigations are delegated to admin-


Administrative agencies, the Supreme Court has approved at least three methods of legal compulsion: (1) making a refusal to disclose a criminal offence punishable by fine or imprisonment or both; (2) authorizing the agency to bring the issues between it and the witness before a court for determination; (3) authorizing a proceeding by information against the informant to recover any penalty imposed by statute. The recovery of such penalty may, of course, be statutorily bestowed upon any one who wishes to sue or may be restricted to specified individuals. Civil liabilities, even penal in nature, may also be imposed upon the violator of a statute; as, for example, those provided for as follows in the Clayton Act: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." This statute, based on the interstate commerce power, has been upheld under the rationale that where Congress has power to make acts illegal it may authorize a recovery for damages caused by those acts even though the damages are suffered wholly within the boundaries of one state. In general, the civil liabilities and criminal penalties of the securities acts follow these theories, which, of course, are in no sense limited to statutes based upon the interstate commerce and postal powers, but could with equal hope of constitutionality be similarly invoked under the inquisitorial and census powers.

Conclusions

In any such extension of federal supervision of securities to intrastate, non-postal transactions by virtue of the inquisitorial and census powers, the Commission would become to that extent not a regulatory body but an investigatory agency and a repository of information for the use of Congress and its administrative agencies. But as regards such transactions this would accomplish in large measure the purposes of the acts. More specifically, fitting the features of the acts as heretofore categorized into the inquisitorial and census powers as discussed herein, the following conclusions with regard to intrastate, non-postal transactions in or relative to securities seem supportable:

73 Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 S. Ct. 65 (1906).
A. The requirement that issuers, their directors, officers and principal stockholders, and that dealers and brokers file with the Commission information as specified in the acts, concerning themselves, and that such information be kept reasonably up to date, would be constitutionally justified under the inquisitorial and census powers. Information of comparable nature has been requested in legislative and administrative investigations, is periodically demanded under the Census Act, and would be of use to Congress in carrying on its functions. The classification of issuers, their directors, officers and principal stockholders, and of brokers and dealers, as the persons of whom the information should be required and the delegation to the Commission of the administrative task of collecting such information within statutory standards as set by the present acts would be constitutionally unobjectionable.

As to securities already distributed, no occasion for a waiting period similar to that in registrations under the Securities Exchange Act would arise, for no registrations would be made. As to public distribution of an issue, a waiting period between the date of filing information with the Commission and the public offering of the securities similar to that under the Securities Act should intervene to permit checking by the Commission as to accuracy. It would seem that a statutory designation of the time of filing information in order to effectuate this purpose would give rise to no constitutional issues.

B. In the dissemination of this information, the Director of the Census, Congressional committees, the Commission and various other government agencies now use—and under the census and inquisitorial powers the Commission could continue to use—the usual media of publicity or the distribution of data to individuals at government expense or at the expense of the person seeking the information. The information once filed belongs to the Government and, except in the case of trade secrets and other information the disclosure of which the court deems to be unduly harmful, the person from whom it came has no constitutional right to prevent its being made public or its being otherwise employed as Congress sees fit.74

More difficulty arises in extending under the inquisitorial and cen-
sus powers the prospectus requirements of the Securities Act. Congress
could probably specify when information should be revealed and
thereby could forbid use of a prospectus unless copies thereof were
previously filed with the Commission. The filing of a list of all sub-
scribers to the issue could also be required. The Commission with full
data in hand would thereupon be able to notify each subscriber or
otherwise publicize the fact that a prospectus contained material mis-
statements or omissions, and the investor could then resort to his
common-law remedies. Thus a major deterrent to such resort in the
past, ignorance of any specific wrongdoing, would be overcome.

Whether Congress could compel a copy of the prospectus to be sent
to each offeree of the securities is an element of the larger question as
to how far Congress may go in making an informant or others convey
to private individuals the information divulged. A distant analogy is
that the Supreme Court has recently upheld the constitutionality of
the imposition by state statute of the expense of regulation upon the
utility being regulated. And in another recent decision, a state statute
requiring that, before sale, a written analysis of constituents in products
be attached at the manufacturer’s expense to particular units of the
completed product was upheld by the Supreme Court. Imposition
upon the informant or other vendors of the cost of sending a pros-
pectus to offerees of securities in the distribution thereof is but little
more onerous and of greater social benefit.

C. As has been discussed, a carry-over under the inquisitorial and
census powers of the civil and criminal provisions of the Securities Act
and the Securities Exchange Act would doubtless be permissible. Stop
orders or the suspension or withdrawal of registrations would be in-
applicable, for no registrations would be made.

D. The Commission under the census and inquisitorial powers
could be given adequate investigatory authority to ascertain the ac-
curacy and completeness of information filed and otherwise to perform
its tasks. Comparable authority is given to the Director of the Census
and to numerous other administrative agencies and, from time to time,

Constitutionality of Investigations by the Federal Trade Commission," 28 Col. L.
Rev. 708, 905 at 909 (1928).

75 Great Northern Railroad Company v. Washington, 300 U. S. 154, 57 S. Ct.
397 (1937).

76 National Fertilizer Association v. Bradley, 301 U. S. 178, 57 S. Ct. 748
(1937).
to Congressional committees. As discussed heretofore, the privilege against self-incrimination and against unreasonable searches and seizures would operate as a limited safeguard against abuse of this investigatory authority.

But optimism as to the constitutionality of untried uses of Congressional powers is dangerous. Doubtless, there are many objections not envisioned herein to the proposed employment of the inquisitorial and census powers. However, the lack of proper supervision of public distribution of and trading in securities intrastate and without use of the mails presents a problem worthy of fuller exploration.