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ADMINISTRATIVE LAW - COMPULSORY PROCESS TO OBTAIN EVIDENCE - UNREASONABLE SEARCH AND SEIZURE

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COMMENTS

ADMINISTRATIVE LAW — COMPULSORY PROCESS TO OBTAIN EVIDENCE — UNREASONABLE SEARCH AND SEIZURE — That the issuance of a subpoena duces tecum must comply with the provisions of the Fourth Amendment against unreasonable searches and seizures was first established in the case of *Boyd v. United States*.[1] The writ was

[1] 116 U. S. 616, 6 S. Ct. 524 (1886). This holding is attacked by WIGMORE,

there obtained for the purpose of extracting from a person evidence which was to be used against him in a criminal proceeding or forfeiture. This compulsory process which gave the state possession of a man's personal papers to incriminate him was considered a violation of not only the Fifth, but also the Fourth Amendment. The Supreme Court could have reached the same result on the basis of the Fifth Amendment alone and it is difficult to see why it regarded as a "search and seizure" this orderly process issuing out of a court of law and leaving the actual production of the papers with the party served. But this doctrine was reaffirmed in the later case of *Hale v. Henkel*[2] and was applied in aid of a corporation where the issue was not in any way clouded by an application of the Fifth Amendment.[3] The subpoena was there issued on behalf of a grand jury investigating violations of the antitrust laws and demanded production of all books, papers, and correspondence of the corporation since its inception. The Court held this an unreasonable inquiry, too broad and sweeping in its terms and not limited to a request for relevant material suitably described.[4] Just what constituted "reasonable inquiry" was left open for interpretation at a later period.

With the rapid growth of administrative tribunals in the field of governmental regulation of business the problem became particularly acute. As might be expected, the courts adopted different standards of reasonableness depending upon whether the business was one in the nature of a public utility or was just a private enterprise. The railroads certainly came within the category of public utilities and the Court developed a liberal concept of "reasonable inquiry" by the Interstate Commerce Commission, but not without some hesitation. It was early recognized that the commission could force the production of

EVIDENCE, 3d ed., § 2264(2)(b) (1940). See: Fraenkel, "Concerning Searches and Seizures," 34 HARV. L. REV. 361 at 366 ff. (1921); Handler, "The Constitutionality of Investigations by the Federal Trade Commission," 28 COL. L. REV. 905 at 912 (1928); 44 YALE L. J. 819 at 825 ff. (1935).

[2] 201 U. S. 43, 26 S. Ct. 370 (1906). See: Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 YALE L. J. 687 (1932); 2 WHARTON, CRIMINAL PROCEDURE, 10th ed., § 1264 (1918).

[3] A corporation is not protected by the self-incrimination provision of the Fifth Amendment. Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370 (1906); Wilson v. United States, 221 U. S. 361, 31 S. Ct. 538 (1910); Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182 (1920); Essgee Co. of China v. United States, 262 U. S. 151, 43 S. Ct. 514 (1922).

[4] Where the inquiry is reasonable and the material demanded suitably specified and relevant to inquiry, subpoenas quite broad in their requirements have been upheld. In re Bornn Hat Co., (C. C. N. Y. 1911) 184 F. 506, affirmed sub nom. Bornn Hat Co. v. United States, 223 U. S. 713, 32 S. Ct. 521 (1912); Grant v. United States, 227 U. S. 74, 33 S. Ct. 190 (1913); Brown v. United States, 276 U. S. 134, 48 S. Ct. 288 (1928).

evidence when investigating violations of the act.[5] The Interstate Commerce Act gave the commission power to compel the production of evidence for purposes of the act;[6] authorized it to inquire into the management and conduct of carriers;[7] and ordered it to report information of value to Congress.[8] But in *Harriman v. Interstate Commerce Commission*[9] the Court evinced great displeasure with the contention that Congress intended this power to be used for purposes of general investigation. Indeed, it excluded the possibility by referring to another section of the act dealing with investigation of complaints[10] and declared that Congress must have intended to restrict the use of compulsory process to complaint cases. When the section was later broadened by amendment,[11] the Court in *Smith v. Interstate Commerce Commission*[12] was forced to acknowledge the legislative intent that general investigations were properly implemented by power to force the production of evidence by subpoena. It was further conceded that the commission in so acting was not conducting an unreasonable inquiry in violation of the Fourth Amendment. Thus the Court recognized the need for complete information in regulating an industry so basic to the public needs as that of transportation of persons and property for hire. This decision established the right of a federal administrative agency to force a public utility to produce evidence for the purposes of (1) inquiry into violations of the statute; (2) general fact finding investigations as a basis for reports to Congress.[13]

[5] Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125 (1894); Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 S. Ct. 563 (1904). See Lilienthal, "The Power of Governmental Agencies to Compel Testimony," 39 HARV. L. REV. 694 at 713 (1926).

[6] 24 Stat. L. 383, § 12 (1887), 49 U. S. C. (1935), § 12.

[7] Id.

[8] 24 Stat. L. 387, § 21 (1887), 49 U. S. C. (1935), § 21.

[9] 211 U. S. 407, 29 S. Ct. 115 (1908).

[10] 24 Stat. L. 384, § 13 (1887): "Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

[11] 36 Stat. L. 551, § 13 (1910), 49 U. S. C. (1935), § 13: "and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act."

[12] 245 U. S. 33, 38 S. Ct. 30 (1917).

[13] If a state commission is investigating, there is a plenary power of visitation over corporations created by the state, or permitted by it to do business within its boundaries. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 S. Ct. 178 (1908); Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370 (1909); State ex

In *Federal Trade Commission v. American Tobacco Co.*[14] the Supreme Court denied the commission the power to compel a private industry to produce its records and papers for a general fact finding investigation. Justice Holmes denounced such "fishing expeditions" and declared that "the mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be."[15] The Court clearly felt that the government's need for information upon which to base regulations did not justify "The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause." Under the Federal Trade Commission Act, the commission was authorized to gather information concerning the management and practices of corporations engaged in commerce,[16] and to use compulsory process for the obtaining of evidence where corporations were being investigated or proceeded against.[17] In denying the commission the right to obtain evidence for purposes of general investigation, the Court declared that the statute did not authorize such compulsion where no violation of the act was involved.[18] It further stated that in absence of explicit language in the affirmative, it would not infer that Congress intended to grant such a power. Thus, by a somewhat imagi-

rel. Public Utilities Commission v. Atchison, T. & S. F. Ry., 115 Kan. 3, 221 P. 359 (1923); State ex rel. Railroad & Warehouse Commission v. United States Express Co., 81 Minn. 87, 83 N. W. 465 (1900).

[14] 264 U. S. 298, 44 S. Ct. 336 (1924). See: Mechem, "Fishing Expeditions by Commissions," 22 MICH. L. REV. 765 (1924); 35 MICH. L. REV. 510 (1937); Watkins, "An Appraisal of the Work of the Federal Trade Commission," 32 COL. L. REV. 272 at 280 (1932).

[15] 264 U. S. 298 at 305, 306, 44 S. Ct. 336 (1924).

[16] 38 Stat. L. 721, § 6 (1914), 15 U. S. C. (1935), § 46: "That the commission shall also have power—(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships."

[17] 38 Stat. L. 722, § 9 (1914), 15 U. S. C. (1935), § 49: "That for the purposes of this Act 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 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."

[18] The federal courts have not interfered with investigations of unfair methods of competition in violation of the act. Federal Trade Commission v. Nulomoline Co., (C. C. A. 2d, 1918) 254 F. 988; T. C. Hurst & Son v. Federal Trade Commission, (D. C. Va. 1920) 268 F. 874; Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8th, 1922) 280 F. 45.

native interpretation of the statute,[19] the Court avoided expressing itself on the constitutional issue, but decisions in the lower federal courts have indicated that Congress could not constitutionally grant such broad powers of discovery.[20] Under the Securities Act the Securities and Exchange Commission has very specifically been given the power to compel the production of evidence in making general fact-finding investigations.[21] Since Congress has explicitly shown its intention in this act, the power of the commission will have to be determined upon a constitutional basis. A lower court has already upheld the provisions for obtaining evidence where the commission is inquiring into violations of the act,[22] but in regard to general investigations the question is still unanswered.[23]

The circuit court of appeals case of *Bartlett Frazier Co. v. Hyde*[24] recognized one other type of business besides the public utility whose documents are subject to compulsory production in aid of general investigations. Under the Grain Futures Act,[25] grain dealers on the Chicago Board of Trade were forced to produce their books and papers for inspection by agents of the Department of Agriculture when there was no charge or suspicion of conduct contrary to law. The court classified this business as one "affected with a public interest" and therefore subject to visitation and disclosure in the interests of government regulation for the benefit of the public. These broad powers of inspection were held necessary in order to enable federal officers to detect the unlawful speculations in grain against which the act was aimed. In view of the public need for such action by the government, the claim of accompanying disturbance and expense to the dealers was dismissed as unworthy of serious consideration.[26]

[19] Handler, "The Constitutionality of Investigations by the Federal Trade Commission," 28 COL. L. REV. 708 at 720 ff., 733 (1928).

[20] United States v. Basic Products., (D. C. Pa. 1919) 260 F. 472 at 482; Federal Trade Commission v. Baltimore Grain Co., (D. C. Md. 1922) 284 F. 886 at 890; Federal Trade Commission v. Millers' Nat. Federation, (App. D. C. 1927) 23 F. (2d) 968, rehearing denied (App. D. C. 1928), unpublished opinion by Smith, J.

[21] 48 Stat. L. 85, § 19(b) (1934), 15 U. S. C. (1935), § 77s(b).

[22] McMann v. Engel, (D. C. N. Y. 1936) 16 F. Supp. 446.

[23] But see Jones v. Securities and Exchange Commission, 298 U. S. 1, 56 S. Ct. 654 (1936), where the Court speaks with distaste of "fishing expeditions" previously condemned by Justice Holmes.

[24] Bartlett Frazier Co. v. Hyde, (C. C. A. 7th, 1933) 65 F. (2d) 350, cert. den. sub nom. Bartlett Frazier Co. v. Wallace, 290 U. S. 654, 54 S. Ct. 70 (1933).

[25] 42 Stat. L. 998 (1922), 7 U. S. C. (1935), c. 1, amended by the Commodity Exchange Act, 49 Stat. L. 1491 (1936), 7 U. S. C. (Supp. 1939), c. 1.

[26] But see Cudahy Packing Co. v. United States, (C. C. A. 7th, 1926) 15 F. (2d) 133. Under Packers and Stockyards Act, 42 Stat. L. 159 (1921), 7 U. S. C. (1935), c. 9, the Secretary of Agriculture was given the same powers of inspection as

The court's use of the phrase "affected with a public interest" in the *Hyde* case injected into the picture a definition of variable pitch and the recent decision of *Fleming v. Montgomery Ward & Co.*,[27] under the Fair Labor Standards Act has served to amplify its importance. The Supreme Court in declaring this act constitutional also indicated that the provisions for the keeping and producing of wage-hour records could be justified upon the basic principle that they were necessary to the proper enforcement of a valid law.[28] Congress has clearly demonstrated an intention to give the administrator of the Fair Labor Standards Act such powers of investigation "as he may deem necessary or appropriate" for discovering violations of the act.[29] It was objected in the *Montgomery Ward* case that the administrator could not inspect the documents[30] of a private business when he lacked reasonable grounds for believing that there was a violation of the act. In upholding the order of the lower court issuing a subpoena duces tecum[31] for the production of wage and hour records the Court declared that a showing of probable cause was dispensed with in the case of a business "affected with a public interest." According to the Supreme Court this term meant no more than "that an industry, for adequate reason, is subject to control for the public good."[32] Since the protection of interstate commerce constituted an adequate reason for control by the Fair Labor Standards Act, all industries regulated by it

the Federal Trade Commission. The court held he had no right to copy books of account and records of packers in advance of any complaint or charge of impropriety even though the business was impressed with a public interest.

[27] (C. C. A. 7th, 1940) 114 F. (2d) 384, cert. den. sub nom. Montgomery Ward & Co. v. Fleming, 311 U. S. 690, 61 S. Ct. 71 (1940).

[28] United States v. Darby, 312 U. S. 100 at 125, 61 S. Ct. 451 (1941): "These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it."

[29] 52 Stat. L. 1066, § 11(a) (1938), 29 U. S. C. (Supp. 1939), § 211(a): "The Administrator . . . may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records . . 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 this Act. . . ."

[30] 52 Stat. L. 1066, § 11(c) (1938), 29 U. S. C. (Supp. 1939), § 211(c): "Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him . . . and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order. . . ."

[31] Subpoenas also issued in: Fleming v. G. & C. Novelty Shoppe, (D. C. Ill. 1940) 35 F. Supp. 829; Fleming v. Lowell Sun Co., (D. C. Mass. 1940) 36 F. Supp. 320.

[32] Nebbia v. New York, 291 U. S. 502 at 536, 54 S. Ct. 505 (1934).

were affected with a public interest and for enforcement purposes subject to routine inspections. Admittedly the legalistic syllogism is complete, but what are the implications of this decision? It obliterates the veiled proscriptions of the *American Tobacco* case against searches conducted in the hope that some evidence of misconduct will be uncovered. Furthermore, the language of this Court does not indicate that it would find any serious constitutional objection to those provisions of statutes which authorize the various commissions to make general investigations of private business for the purpose of purveying information to Congress.[33] If the commissions are henceforth to exercise such broad powers as this decision would seem to sanction, they will be obliged to use discretion. For without it, the resulting disturbance and expense to business of prolonged and extensive investigations and the revelation of valuable trade secrets would be too high a price to pay for the information obtained.[34]

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[33] This power of investigation may well be restricted to matters upon which Congress can legislate, but this is not a stringent limitation. Kilbourn v. Thompson, 103 U. S. 168 (1880); In re Chapman, 166 U. S. 661, 17 S. Ct. 677 (1897); McGrain v. Daugherty, 273 U. S. 135, 47 S. Ct. 319 (1927); Sinclair v. United States, 279 U. S. 263, 49 S. Ct. 368 (1939); Jurney v. MacCracken, 294 U. S. 125, 55 S. Ct. 375 (1934). See: Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 (1926); Herwitz and Mulligan, "The Legislative Investigating Committee," 33 COL. L. REV. 4 (1933).

[34] For discussions concerning the advantages and disadvantages of such general investigations at the expense of private rights and for opinions as to the constitutionality of such investigations, see: Jouett, "The Inquisitorial Feature of the Federal Trade Commission Act Violates the Federal Constitution," 2 VA. L. REV. 584 (1915); Randolph, "The Inquisitorial Power Conferred by the Trade Commission Bill," 23 YALE L. J. 672 (1914); Needham, "The Federal Trade Commission," 16 COL. L. REV. 175 (1916); Stradley, "Constitutionality of the Compulsory Statistical Reports of the Federal Trade Commission," 76 UNIV. PA. L. REV. 19 (1927); Hankin, "Validity and Constitutionality of the Federal Trade Commission Act," 19 ILL. L. REV. 17 (1924), believes them constitutional; see also 1 BILL OF RIGHTS REV. 137 (1941).