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INVESTIGATORY POWER OF AN ADMINISTRATIVE AGENCY

HISTORICAL DEVELOPMENT

The scope of an agency's investigatory power is wholly dependent upon the authority conferred on it by Congress. In several early cases the breadth of the investigatory delegation by Congress was seriously questioned on constitutional grounds,¹ but the Court never struck down these delegations. In these early cases, the Court seemed to feel that unbridled allowance of administrative investigatory power would come dangerously close to violating the fourth amendment's prohibition against unreasonable searches and seizures. For this reason the statutes conferring the power to investigate were narrowly construed.

*Harriman v. ICC*² offers a good example of this judicial attitude. That case dealt with an interpretation of section 12 of the Interstate Commerce Act,³ which conferred general investigatory and subpoena power on the Commission to be used to require testimony of witnesses "for purposes of this Act."⁴ The Court held that the Commission's primary purpose was to enforce the regulations enacted by Congress.⁵ Thus, the Commission could

¹ See, e.g., *Jones v. SEC*, 298 U.S. 1 (1935); *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924); *Smith v. ICC*, 245 U.S. 33 (1917); *Harriman v. ICC*, 211 U.S. 407 (1908); *ICC v. Brimson*, 154 U.S. 447 (1894).

² 211 U.S. 407 (1908). Previously, in *ICC v. Brimson*, 154 U.S. 447 (1908), the Court upheld the statutory procedure requiring the Commission to obtain judicial enforcement of its subpoenas, against a claim that federal courts lacked constitutional power to hear such petitions on the ground that they did not present a "case or controversy" as required by Article III of the United States Constitution. In that case the Court, by way of dictum, also approved of the constitutionality of congressional delegations of investigatory powers to administrative agencies.

In *ICC v. Baird*, 194 U.S. 25 (1904), the constitutional questions were directly placed in issue. The Court held that the investigation there involved did not violate the fourth and fifth amendments, and thereby established the constitutionality of the administrative power of investigation.

³ 24 Stat. 379 (1887). Section 12 was later amended (26 Stat. 743 (1891)). It was in this amended form that it was presented to the Court.

⁴ At this time § 11 read, in pertinent part, as follows:

. . . the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; . . . and for purposes of this act the Commission shall have power to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence may be required from any place in the United States, at any designated place of hearing.

Current statutory provisions relating to the investigatory power of the ICC can be found at 49 U.S.C. §§ 12, 13 & 13a (1964).

⁵ In so holding, the Court specifically rejected the contention that one of the main purposes of the Commission was to use the investigatory power as a means of gathering data pursuant to recommending needed legislation.

only investigate pursuant to the issuance of a complaint. Since the case involved an industry-wide investigation which was not related to any specific breach of the law, the Commission was without power to compel testimony.⁶

However, the holding of the *Harriman* case was not to last long. In *Smith v. ICC*,⁷ the Court rejected appellant's argument that the investigatory power could only be exercised pursuant to an enforcement proceeding, and could not be so exercised in a special investigation authorized by resolution of the Senate.⁸ In so doing the Court apparently envisioned a broad investigatory power for the Commission. Justice McKenna stated:

[T]he investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public . . . and it is not far from true—it may be it is entirely true . . .—that there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.⁹

Whatever liberalization was achieved by the *Smith* case was soon dispelled in *FTC v. American Tobacco Co.*¹⁰ As in *Smith*, this case too involved an industry-wide investigation initiated at the request of the Senate.¹¹ The respondent had refused a Commission order to produce its corporate records for the year 1921, and the District Court had denied the Commission's petition for enforcement. While Justice Holmes did not deny the constitutionality of administrative investigatory power, he did exhibit a strong fear that the exercise of such power could easily result in unreasonable searches and seizures.

Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loathe to believe that Congress intended to authorize one of its subordinate agencies to sweep all traditions into the fire . . . , and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of a crime.¹²

⁶ This decision is somewhat surprising in view of the dictum in *ICC v. Brimson*, 154 U.S. 447 (1894), to wit:

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 . . . otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty . . . of obtaining the required information. . . .

⁷ 245 U.S. 33 (1917).

⁸ The resolution requested that the ICC investigation determine whether appellant's railroad was engaging in any conspiracies that might tend to lessen competition. 50 Cong. Rec. 5864 (1913). The information demanded of appellant in this case related to political contributions made by his railroad. The Court held that this information exceeded that requested by the Senate, and so decided the case on the basis of the Commission's general statutory authority.

⁹ *Smith v. ICC*, 245 U.S. 33, 42-43 (1917).

¹⁰ 264 U.S. 298 (1924).

¹¹ The Senate resolution directed the Commission to investigate "the tobacco situation" with reference to pricing policies. 61 Cong. Rec. 4753 (1921).

¹² *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-306 (1924).

The Court distinguished the *Smith* case on the ground that that case involved a railroad, which, being a public utility, is subject to closer governmental scrutiny.

Justice Holmes then preserved the constitutionality of the statute by reading into it a requirement that the records required must be material. This apparently imposed on administrative investigations the standard of probable cause required by the fourth amendment. He concluded by stating: "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."¹³

The *American Tobacco* case imposed serious restrictions on administrative fact finding powers. The decision undoubtedly reflects a suspicion of the relatively new administrative "branch," and a desire to keep it under close judicial surveillance.

It is interesting to note that in both the *Harriman* and the *American Tobacco* cases, the investigations were on an industry wide basis and were undertaken at the insistence of the Senate. In both of these cases the Court indicated, explicitly in *Harriman*, and implicitly in *American Tobacco*, that the investigatory power could only be constitutionally exercised in connection with a complaint proceeding. This would seem to reflect a general disapproval of legislative-type investigations which dates back to *Kilbourn v. Thompson*.¹⁴ Dicta in that case cast serious doubt on the power of either house of Congress to conduct prelegislative investigations. The *Harriman* and *American Tobacco* cases seem to represent an extension of this doubt to similar type investigations conducted by the administrative creations of Congress.

Indications of a change in judicial attitude toward administrative investigations appeared not too long after the Court unequivocally recognized the investigatory power of Congress in *McGrain v. Daugherty*¹⁵ and *Sinclair v. United States*,¹⁶ and thereby overruled whatever innuendo was created by *Kilbourn v. Thompson*. For example, certiorari was denied in *Bartlett Frazier Co. v. Hyde*,¹⁷ in which the Circuit Court of Appeals had approved an inquiry into the appellant's business records. The court said:

The (Fourth) Amendment . . . cannot be applied to regulations which require reports and disclosures in respect to a business which is *affected with a public interest*, so far as such disclosures may be reasonably necessary for the due protection of the public.¹⁸

¹³ *Id.* at 307.

¹⁴ 103 U.S. 168 (1880). The Court held that a subpoena issued by the House of Representatives pursuant to an investigation into the affairs of Jay Cooke & Co. was invalid as being an exercise of judicial power.

¹⁵ 273 U.S. 135 (1927).

¹⁶ 279 U.S. 263 (1929).

¹⁷ 65 F.2d 350 (7th Cir.); cert. denied 290 U.S. 654 (1933).

¹⁸ *Id.* at 351-352.

Involved in the *Bartlett* case was a disclosure requirement applicable to grain futures brokers. The significance of the case is that it indicated that broader visitation powers would be permitted when dealing with an industry characterized as being "affected with a public interest."

Despite the *Bartlett* case, the Court lapsed back into its former attitude in *Jones v. SEC*,¹⁹ in which it reversed a lower court order enforcing a subpoena issued to the petitioner. In that case, the petitioner had filed a registration statement which the Commission challenged as being incomplete and untrue. He then withdrew his registration statement and refused agency demands to produce certain of his records. Thereupon, the Commission issued its subpoena. The Court rested its decision partially on the ground that further pursuit of information after the registration statement had been withdrawn would constitute the kind of "fishing expedition" decried in *FTC v. American Tobacco Co.* and would contradict the philosophy of the fourth and fifth amendments in a manner reminiscent of the abuses of the Star Chamber. All of this brought forth a strong dissent from Justice Cardozo,²⁰ in which he said:

Appeal is vaguely made to some constitutional immunity, whether express or implied, is not stated with distinctness The argument for immunity lays hold of strange analogies. A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.

The Rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery.²¹

After taking this brief detour, the Court continued in its former direction. It denied certiorari in *Fleming v. Montgomery Ward & Co.*,²² in which the Circuit Court of Appeals held that an agency may inspect books and records, regardless of whether there had been any pre-existing probable cause for believing that there had been a violation of the law.²³ While it was to become clearer later, it was suggested at the time that the *Fleming* case signalled the end to whatever vitality remained in the *American Tobacco Co.* case.²⁴

A very significant step in the development of the administrative in-

¹⁹ See Davis, *The Administrative Power of Investigation*, 56 Yale L.J., 1111, 1113 (1947); Note, Minn. L. Rev. 261, 265 (1944).

²⁰ *Jones v. SEC*, 298 U.S. 1 (1935).

²¹ *Id.* at 32-3.

²² 114 F.2d 384 (7th Cir.); cert. denied 311 U.S. 690 (1940).

²³ *Id.* at 390.

²⁴ See, Davis, *The Administrative Power of Investigation*, 56 Yale L.J., 1111, 1113 (1947); Note, Minn. L. Rev. 261, 265 (1944).

vestigatory power came when the Court announced its decision in *Endicott Johnson Corp. v. Perkins*.²⁵ While that case did not resolve any of the still plaguing constitutional issues, it contributed the important ruling that the agency need not demonstrate that the information demanded tended to prove a violation of the substantive act administered by it. The Court reasoned that the issue of whether a person came within the coverage of the Act was in itself a proper matter for investigation. The Administrator, then, could obtain enforcement of his subpoenas provided they were not "plainly incompetent or irrelevant to any lawful purpose of the Secretary."²⁶

Any constitutional doubts were finally dispelled in *Oklahoma Press Publishing Co. v. Walling*.²⁷ That case involved a subpoena *duces tecum* issued by the Administrator of the Fair Labor Standards Act²⁸ calling for "all of your books, papers, and documents showing the hours worked by, and wages paid to, each of your employees between October 29, 1938 and the date hereof (Nov. 3, 1943). . . ."²⁹ The Court extensively reviewed the argument that administrative investigations involved an unreasonable search and seizure in violation of the fourth amendment, and concluded that such arguments were groundless. It expressly rejected the contention that "the subpoena power is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of power,"³⁰ while approving the language in Justice Cardozo's dissent in *Jones v. SEC* set out above.³¹ The Court concluded by saying that the requirements of the fourth amendment are met, and the dangers inherent in the general warrant or writ of assistance are prevented, if:

the investigation be for a lawfully authorized purpose, within the power of Congress to command. . . . The requirement of "probable cause, supported by oath or affirmation" . . . is satisfied, in . . . an order for production, by the Court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.³²

The holding in *Oklahoma Press* was buttressed by the Court's decision in *United States v. Morton Salt Co.*,³³ involving an order issued by the FTC requiring production of certain records and documents for the purpose of

²⁵ 317 U.S. 501 (1943). The case involved an interpretation of the Walsh-Healey Act, 41 U.S.C. 35-45 (1964), under which the Secretary of Labor is authorized to establish minimum wages for workers in plants having government contracts in excess of \$10,000.

²⁶ *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

²⁷ 327 U.S. 186 (1946).

²⁸ 29 U.S.C. § 209 & 211(a) (1964).

²⁹ *Oklahoma Press Publishing Co. v. Walling*, 147 F.2d 658, 659 (10th Cir. 1945).

³⁰ The quote was taken from Lasson, *History and Development of the Fourth Amendment* 137 (1937).

³¹ The approved language is set out in the text accompanying note 21, *supra*.

³² *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946).

³³ 338 U.S. 632 (1950).

showing compliance with a cease and desist order issued against respondent by the Commission. The respondent raised the fourth amendment issue which the Court easily disposed of by likening the Commission's inquisitorial powers to those of a Grand Jury "which can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."³⁴ The Court then laid down its often quoted test of administrative subpoena validity:

It is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.³⁵

STATE OF THE LAW TODAY

It is common today to find statements suggesting a virtually unchecked administrative power of inquiry.³⁶ Such statements, though generally true, are oversimplifications; it would be error to believe that the permissiveness evidenced in cases like *Morton Salt* and *Oklahoma Press* are equally applicable to investigations by all the administrative agencies. In fact, the Court is primarily interested in balancing the interests of the respective parties and arriving at a solution that appears best in the particular case. Thus, in the most common type of case, where the agency is delving into corporate records, a court must weigh the corporation's interest in privacy against the agency's interest in implementing the public policy of free and open competition as a means of achieving the most efficient use and allocation of resources.³⁷ In such cases, the courts have determined that the public interest weighs more heavily and have generally permitted very penetrating investigations.

This approach is also evident in non-economic areas. Witness, for example, *Frank v. Maryland*,³⁸ in which a Baltimore city ordinance au-

³⁴ *Id.* at 642-43.

³⁵ *Id.* at 652.

³⁶ See, e.g., 1 Davis, *Administrative Law Treatise* 3.06 & 3.14 (1958); Benton, *Administrative Subpoena Enforcement*, 41 *Texas L. Rev.* 874 (1963); Rogge, *Inquisitions by Officials; A Study of Due Process Requirements in Administrative Investigation—I*, 47 *Minn. L. Rev.* 939 (1963).

An illustration of this view can be found in Benton, *supra* at 882:

The cases dealing with legislative use of compulsory processes within the last two decades have dealt mainly with due process rights and privileges of the individuals subpoenaed. The existence of the power itself is taken for granted. The restrictive philosophy of 1881 is gone. . . .

³⁷ Some slight hint of this balancing approach was evident in the *Morton Salt* case. The Court there rested its decision in part on the ground that the Government permitted the corporation the privilege of engaging in interstate commerce, and this privilege carried with it an enhanced measure of regulation. 338 U.S. 632, 652 (1950).

However, this characterization of interstate commerce as being a privilege begs the essential question of whether it is a privilege or a right. This privilege-right dichotomy is well-known in administrative law in such areas as right to hearing and judicial review, and is now well recognized as being more of a conclusion than a substantive test. In back of this conclusion is a judicial balancing of the relative interests of the parties.

³⁸ 359 U.S. 360 (1959). [Editor's Note—Subsequent to this issue going to press, *Frank v. Maryland*, *supra* note 38 has been overruled by *Camara v. Municipal Court of City & Co. of San Francisco*, — U.S. —, 82 Sup. Ct. 1727 (1967)].

thorized health examiners to enter the home of any person to investigate health violations where there is cause for suspicion of the existence of a nuisance. The ordinance also provided for a fine to be imposed against any person who refused to admit a health officer into his home. In this case the Court was faced with the problem of having to balance the interests of the individual in his privacy, against the community health interest. Noting that the ordinance provided protection against the use of the power by requiring the existence of cause for suspicion of the existence of the nuisance and by limiting the conduct of the investigations to daylight hours, the Court upheld the ordinance against claims of violation of the fourth and fourteenth amendments. Thus, the limitations placed on the use of the power combined with a high public interest in community health counterweigh the usually preferred right of individual privacy.

There does reach a point, however, when individual rights will so strongly outweigh the public interest as to result in serious restrictions being placed on the investigatory power. A good example can be found in *United States v. Minker*.³⁹ That case involved the interpretation of a provision of the Immigration and Naturalization Act⁴⁰ which conferred upon immigration officers the power to require, by subpoena, the "attendance and testimony of witnesses. . ."⁴¹ The respondent in that case was a naturalized U.S. citizen who had been served a subpoena in an effort by the agency to determine whether good cause existed to institute denaturalization proceedings against him. No constitutional issues were raised in the case, the sole issue being whether a putative defendant in a denaturalization proceeding could properly be considered a witness within the meaning of the statute. If he could properly be considered a witness, then the issuance of the subpoena was within the agency's investigatory power. Justice Frankfurter recognized a "patent ambiguity" that existed in the statutory language which made it possible to interpret the statute as applying to the respondent. Yet, the Court refused to interpret "witnesses" as including prospective defendants, stating:

In such a situation where there is doubt it must be resolved in the citizen's favor. Especially must we be sensitive to the citizen's rights where the proceeding is nonjudicial because of "(T)he difference in security of judicial over administrative action. . . ." *Ng Fung Ho v. White* (295 U.S. 276) at page 285. . . .

(C)ompulsory ex parte administrative examinations, untrammelled by the safeguards of a public adversary judicial proceeding, afford too ready opportunities for unhappy consequences to prospective defendants in denaturalization suits.⁴²

³⁹ 350 U.S. 179 (1956).

⁴⁰ 8 U.S.C. § 1101 *et seq.* (1964).

⁴¹ 8 U.S.C. § 1225(a) (1964). (Emphasis added.)

⁴² *United States v. Minker*, 350 U.S. 179, 188 (1956).

The *Minker* case is significant as pointing out the fallacy in concluding that the administrative investigatory power is boundless. The power has its limits, but these limits are not frequently reached in the ordinary course of administrative investigation. Most of the investigations are conducted by the so-called regulatory agencies which have been established to oversee particular types of economic activity or particular segments of the economy. As to those agencies, it may well be true that the investigatory power is virtually unchecked. But it should not be concluded, by an examination of cases involving those agencies, that the principles announced therein will be equally applicable to the investigatory power of all agencies. This is not to suggest that investigations conducted by some agencies are constitutional, while those conducted by other agencies are not. It is only to suggest that where the individual interest is high enough to outweigh the public interest, the courts will be far less permissive, and will subject the investigations to greater judicial scrutiny.⁴³

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⁴³ Another example of judicial reluctance to enforce administrative subpoenas when stronger competing interests exist can be found in *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962). In that case the FTC had requested leave of court to inspect and copy certain documents submitted to a grand jury impanelled in the Eastern District of Pennsylvania. That jury had previously returned twenty indictments alleging violations of the Sherman Antitrust Act. The court recognized the broad investigatory power of the Commission, but chose to adhere to the policy of preserving the secrecy of grand jury proceedings as provided for by Rule 6(e) of the Federal Rules of Criminal Procedure, 28 U.S.C. (1964). The court strictly construed Rule 6(e) even though, by its terms, access to grand jury records was allowed "to the attorneys for the government for use in the performance of their duties" and disclosure could be ordered by a court "preliminarily to or in connection with a judicial proceeding." Thus, even though ambiguous statutory language could have been construed to permit access by the FTC, the court apparently considered the need for grand jury secrecy paramount to the needs of the Commission.