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## Administrative Investigatory Powers: The National Munitions Control Board

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## ADMINISTRATIVE INVESTIGATORY POWERS: THE NATIONAL MUNITIONS CONTROL BOARD

Probably no industry is as intimately associated with the national diplomacy as the munitions industry.<sup>1</sup> The industry recognizes no national boundaries<sup>2</sup> and seldom hesitates to defy national policy.<sup>3</sup> It will sell to anyone who will buy, whether the purchaser is an ally or a potential enemy of the home government.<sup>4</sup> The result is that the industry may, and sometimes does, embarrass or even frustrate the country's neutrality program.<sup>5</sup> The international traffic in arms is consequently becoming of great political significance.<sup>6</sup> This traffic has been characterized by Major General Fuller of the British Army as "\* \* \* all rather a dirty business and most difficult to get to the bottom of \* \* \*."\*

1. 11 Encyc. Soc. Sci., Munitions Industry (1935). Sen. Rep. No. 944, 74th Cong., 2nd Sess. (1936) part 3, pp. 10-12, and part 4.

2. Ibid. The Senate Hearings revealed the existence of close associations between American, German and British armament firms, the division of profits, the protection of each other's interests, and concerted action to offset outside competition. Hearings before the Special Committee Investigating the Munitions Industry, U. S. Senate, 73rd Cong. (1934) part 1, exhibits 11, 11a, 12, 13, and 804; part 5, exhibits 45, 462, 465, 473, 475, 493, and 512, and part 39. (This series will hereafter be referred to as Hearings). Sen. Rep. No. 944, 74th Cong., 2nd Sess. (1936) part 3, pp. 12-13, and part 5.

3. Some of the munitions companies have circumvented the President's arms embargo applying to Bolivia and Paraguay. Hearings, part 3, exhibit 390, part 4, exhibit 364, part 5, exhibit 477, and part 9, pp. 2344-2355. *United States v. Curtiss-Wright Export Corp.* et al. (1936) 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255; *United State v. Abelow* (D. C. N. Y. 1936) 14 F. Supp. 304. See *United States v. American Armament Corp.* et al. (1935), *United States v. Armatos* (1936) and *United States v. Pierce* (1936) summarized in H. Doc. No. 10, 74th Cong., 1st Sess., First Annual Report of the National Munitions Control Board For the Year Ending Nov. 30, 1936 (1937) 71-2. American firms have armed Germany in violation of our treaties, Hearings, part 5, exhibits 507, 508, 509, and 512, and part 6, exhibits 593, and 595. A bibliography on embargoes may be found in Library of Congress, List of References on Embargoes (compiled under direction of Herman H. B. Meyer, 1917).

4. 11 Encyc. Soc. Sci., Munitions Industry (1935) 132.

5. *Supra*, note 3. See Hearings, part 9 (1935) 2273, 2282, 2295, 2317, 2344, and 2355; and part 38 (1937) 12775, 12781, 12793, 12806, 12827, and 12837. Sen. Rep. No. 944, 74th Cong., 2nd Sess. part 3 (1936).

6. H. R. Rep. No. 1602, 74th Cong., 1st Sess. (1935) 3.

7. Hearings, 12440. See Hearings, part 8, exhibits 782 and 795. A statement of the fifty-three points developed by the Hearings may be found in 74 Cong. Rec. 455-456 (1935). Sen. Rep. No. 944, 74th Cong., 2nd Sess. (1936) parts 2, 3, 5, and 6.

Bibliographies on the industry may be found in 11 Encyc. Soc. Sci., Munitions Industry (1935) 134; Johnsen, *International Traffic in Arms and Munitions* (1934); Perris, *The War Traders* (1914); Newbold, *How Europe Armed for War* (1916); Engelbrecht and Hanighen, *Merchants of Death* (1934).

The National Munitions Control Board<sup>8</sup> was created by the Neutrality Act as a move toward co-ordinated federal supervision of the manufacture and international traffic in arms and munitions<sup>9</sup> and the elimination of the secrecy in which the American munitions industry was shrouded.<sup>10</sup> The Board consists of the Secretary of State, who is the chairman and executive officer of the Board, and the Secretaries of War, Navy, Treasury, and Commerce. To this end<sup>11</sup> every person who engages in the business of manufacturing, exporting, or importing any of the articles declared by the President<sup>12</sup> to be arms, ammunition, or implements of war is required to register<sup>13</sup> with the chairman of

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8. The administration of the Act is vested, for the most part, in the Department of State. H. Doc. No. 10, 75th Cong., 1st Sess. (1937) First Annual Report of the National Munitions Control Board For the Year Ending Nov. 30, 1936.

9. Joint Resolution approved by the President on May 1, 1937, amending the joint resolution of August 31, 1935 (1935) 50 Stat. 126, (1937) 22 U. S. C. A. sec. 245b. This resolution is in essence the same, so far as the Board is concerned, as the neutrality act of August 31, 1935, which expired on May 1, 1937. In the new bill the registration fee was reduced from \$500 to \$100 for persons whose total sales amount to less than \$50,000 a year. For a criticism of the earlier act see Jessup, *Toward Further Neutrality Legislation* (1936) 30 Am. J. Int. Law 262; of the present bill, see Jessup, *Neutrality Legislation—1937* (1937) 31 Am. J. Int. Law 306.

10. H. R. Rep. No. 1602, 74th Cong., 1st Sess. (1935). Hearings Before the Committee on Foreign Affairs on H. R. 8788, House of Representatives, 74th Cong., 1st Sess. (1935) 3.

11. H. R. Repts. No. 1602 and 1883, 74th Cong., 1st Sess. (1935). 74 Cong. Rec. 13797 (1935). 141 Commer. and Fin. Chr. (1935) 2048.

12. Executive proclamation No. 2236, May 1, 1937 lists those articles declared by the President to be arms, ammunition, and implements of war. State Department Publication No. 1023, *International Traffic in Arms* (4th ed. 1937) 4. The present list of items declared by the President to be arms, ammunition, and implements of war includes, with the exceptions of aircraft and aircraft parts, only actual military instruments.

13. H. Doc. No. 10, 74th Cong., 1st Sess., First Annual Report of the National Munitions Control Board For the Year Ending Nov. 30, 1936 (1937) 39-49 lists one hundred and forty-nine persons and companies which have registered with the Board in compliance with the provisions of the Act. 16 Cong. Digest (1937) 105 lists 120 manufacturers which have registered. The latter list does not include export or import firms which have also registered.

The prerequisite of registration is not unusual. See, e. g., Securities Act of 1933 (1933) 48 Stat. 78, (1936) 15 U. S. C. A. sec. 77 f.; Stockyards and Stockyard Dealers Act (1921) 42 Stat. 163, (1927) 7 U. S. C. A. sec. 203; Industrial Alcohol Act (1919) 41 Stat. 319, (1927) 27 U. S. C. A. sec. 72; Air Commerce Act of 1926 (1934) 48 Stat. 1115, (1936) 49 U. S. C. A. sec. 181; Grain Futures Act (1935) 49 Stat. 1495, (1936) 7 U. S. C. A. sec. 6 f.; and (1936) 49 Stat. 1500, (1936) 7 U. S. C. A. sec. 12a; Miscellaneous Taxes (1890) 26 Stat. 618, (1935) 26 U. S. C. A. sec. 771; (1890) 26 Stat. 618, (1935) 26 U. S. C. A. sec. 711; (1890) 26 Stat. 618, (1935) 26 U. S. C. A. sec. 751; (1894) 28 Stat. 560, (1935) 26 U. S. C. A. sec. 931(b)(c); (1912) 37 Stat. 81, (1935) 26 U. S. C. A. sec. 1073(e); (1878) R. S. sec. 3258, (1935) 26 U. S. C. A. sec. 1162; (1926) 44 Stat. 96, (1935) 26 U. S. C. A. sec. 1384; (1878) R. S. sec. 3233, (1935) 26 U. S. C. A. sec. 1401.

the Board his name, or business name, his principal place of business, and places of business in the United States, and a list of the arms, ammunition, and implements of war in which he deals.<sup>14</sup> All persons importing or exporting such articles are required to obtain in advance a license from the Secretary of State covering each individual shipment.<sup>15</sup> Registrants are also required to maintain, subject to the inspection of the duly authorized agents of the Board or of any other enforcement agency of the government of the United States, and distinct from all other records, such special permanent records of manufacture for export, importation, and exportation of the aforementioned articles as the Secretary of State shall prescribe.<sup>16</sup>

It would seem indispensable to a full realization of the purposes of this Act that complete and accurate information as to the arms traffic be available. One would therefore expect that the National Munitions Control Board is possessed of comprehensive fact finding powers. But strangely enough, the Board, unlike so many other administrative boards,<sup>17</sup> has been granted few explicit powers of investigation. It is essential to the efficaciousness of this act that these powers at least permit the Board

14. (1935) 50 Stat. 124, (1937) 22 U. S. C. A. sec. 245b(b). Cf. A Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, art. 4, signed at Geneva, June 17, 1925, 79 Cong. Rec. 8783-8796 (1935).

15. (1935) 50 Stat. 124, (1937) 22 U. S. C. A. sec. 245b(f).

16. (1935) 50 Stat. 124, (1937) 22 U. S. C. A. sec. 245b(e). Among the matters required to be recorded are: the amounts and estimated values of the arms, ammunition, and implements of war manufactured for export, or which are exported or imported; the consignors of articles imported and the port of origin of each shipment; and the consignees and destination of each shipment.

A list of customers is a trade secret, Hopkins, *The Law of Trademarks, Tradenames and Unfair Competition* (4th ed. 1924) sec. 109. But it is extremely doubtful whether the Board could be prevented from publishing this information, even though it might inure to the benefit of the party's competitors, for an order which is justified by a lawful purpose is not rendered illegal by some other motive in the mind of the officer issuing it. *Dakota v. S. D.* (1919) 250 U. S. 190, 39 S. Ct. 507, 63 L. ed. 910, 924, 4 A. L. R. 1623, P. U. R. 1919D, 717; *Phil. v. Stimpson* (1840) 14 Pet. 448, 458, 459, 10 L. ed. 535, 540, 541; *United States v. Chemical Foundation* (1926) 272 U. S. 1, 14, 15, 47 S. Ct. 1, 71 L. ed. 131, 142, 143. Such an exercise of power would seem to be within the police power. But compare *Rush, Expansion of Federal Supervision of Securities Through the Inquisitional and Census Powers of Congress—A Suggestion* (1938) 36 Mich. L. Rev. 426, fn. 59.

17. Compare the Securities and Exchange Commission (1936) 49 Stat. 1379, (1936) 15 U. S. C. A. sec. 78u; the Federal Trade Commission (1914) 38 Stat. 721, (1927) 15 U. S. C. A. sec. 46; the National Labor Relations Board (1935) 49 Stat. 455, (1936) 29 U. S. C. A. sec. 161; and the Interstate Commerce Commission (1922) 42 Stat. 624, (1929) 49 U. S. C. A. sec. 19a.

to verify the truth of all information filed with it, and to obtain all the information necessary to give full publicity to the munitions industry.<sup>18</sup> With this essential in mind this note will examine the sufficiency of the investigatory powers which Congress has deigned to accord the Board.

No cases have, as yet, interpreted any of the provisions of the Act. In order that the courts' treatment of the Act might be prophesied, it is therefore necessary to draw upon the cases interpreting other federal statutes conferring similar powers of investigation upon the administrative bodies and officers.

The primary source of the Board's investigatory powers lies in the above-mentioned requirement that prescribed permanent records of manufacture for export, importation and exportation be maintained by the armament firms subject to inspection by the Board.<sup>19</sup> Both the state<sup>20</sup> and the federal<sup>21</sup> law are replete

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18. Blaisdell, Jr., *The Federal Trade Commission* (1932) 261.

19. *Supra*, note 16.

20. *Karr v. Baldwin* (D. C. N. D. Tex. 1932) 57 F. (2d) 252 (employment agencies); *State v. Legora* (1931) 162 Tenn. 122, 34 S. W. (2d) 1056 (junk dealers; see also 30 A. L. R. 973 and 88 A. L. R. 973 for annotations on junk dealers); *State v. Knight* (1929) 34 N. M. 217, 279 Pac. 947 (cattle hides to be preserved); *People v. Zimmerman* (1925) 213 App. Div. 414, 210 N. Y. S. 269, *aff'd* (1926) 241 N. Y. 405, 150 N. E. 497 (secret societies of twenty or more persons); *Reaves Warehouse Corp. v. Commonwealth* (1925) 141 Va. 194, 126 S. E. 87 (sales of leaf tobacco); *City of St. Louis v. Baskowitz* (1918) 273 Mo. 543, 201 S. W. 870 (junk dealers); *State v. Sterrin* (1916) 78 N. H. 220, 98 Atl. 482 (motorists causing injuries); *Ex parte Kneedler* (1912) 243 Mo. 632, 147 S. W. 983 (motorists must leave name, residence, and operator's license upon knowingly injuring persons or property); *Hughes v. State* (1912) 67 Tex. Crim. Rep. 333, 149 S. W. 173 (express companies); *St. Louis S. W. Ry. v. Hixon* (Tex. Civ. App. 1910) 126 S. W. 338 (employers required to give employees written statements of the cause of their discharge); *State v. Davis* (1910) 68 W. Va. 142, 69 S. E. 639 (druggists' liquor sales); *Sanning v. City of Cincinnati* (1909) 81 Ohio St. 142, 90 N. E. 125 (salary loan brokers and chattel mortgage brokers); *State v. Pence* (1909) 173 Ind. 99, 89 N. E. 488 (druggists' liquor sales); *Parks v. Laurens Cotton Mills* (1907) 75 S. C. 560, 56 S. E. 234 (cotton buyers); *People v. Schneider* (1905) 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345, 5 Ann. Cas. 790 (automobiles required to possess licenses); *State v. Donovan* (1901) 10 N. D. 203, 86 N. W. 709 (druggists' liquor sales); *Commonwealth v. Intoxicating Liquors* (1899) 172 Mass. 311, 52 N. E. 389 (liquors transported); *City of St. Joseph v. Levin* (1895) 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577 (pawnbrokers); *State v. Davis* (1891) 108 Mo. 666, 18 S. W. 894 (druggists' liquor sales); *Shuman v. City of Ft. Wayne* (1891) 127 Ind. 91, 26 N. E. 560 (pawnbrokers); *Lauder v. City of Chicago* (1884) 111 Ill. 291 (pawnbrokers). Also see *Handler, The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 Col. L. Rev. 906-9.

21. See, e. g., *Instructions of the Comptroller of the Currency Relative to the Organization and Powers of National Banks* (1923) ch. 5, sec. 75; *Fed. Reserve Board Regulation F, Series of 1928, superseding Regulation F of 1924 of the Fed. Reserve Board relating to member banks*, sec. 40; *Grain Futures Act* (1922) 49 Stat. 1497, (1936) 7 U. S. C. A. sec. 7a(3);

with similar requirements, which are almost always declared constitutional<sup>22</sup> on the ground that they are necessary and reasonable police measures.<sup>23</sup> The constitutional protection against self-incrimination does not invalidate such provisions,<sup>24</sup> for an exception is made in the case of information divulged by books required to be kept. This exception is based on the theory that it is a condition precedent to the exercise of a privilege<sup>25</sup> that consent be given to keep records subject to inspection,<sup>26</sup> or on

Warehouses Act (1916) 39 Stat. 490, (1927) 7 U. S. C. A. sec. 264; (1919) 41 Stat. 267, (1927) 7 U. S. C. A. sec. 420; Water Power Act (1921) 41 Stat. 1353, (1927) 16 U. S. C. A. 797; Wire or Radio Communication Act (1936) 49 Stat. 1098, 47 U. S. C. A. sec. 154; Perishable Agricultural Commodities Act (1930) 46 Stat. 535, (1935) 7 U. S. C. A. sec. 4992; Air Mail Act (1935) 49 Stat. 618, (1936) 39 U. S. C. A. sec. 469h; (1913) 38 Stat. 271, (1936) 12 U. S. C. A. sec. 481. The Commissioner of Internal Revenue has extensive powers to require records, e. g. (1912) 37 Stat. 81, (1935) 26 U. S. C. A. sec. 1073(b).

In England accounts are often required in great detail, e. g., Ry. Coms. (Accounts & Returns) Act, 1911, 1 & 2 Geo. V, ch. 34; Assurance Companies Act (1909) 9 Edw. VII, ch. 49; Companies (Consolidation) Act, 1908, 8 Edw. VII, ch. 69; British Sugar (Subsidy) Act, 1925, 15 Geo. V, ch. 12; Companies Act, 1907, 7 Edw. VII, ch. 50; National Health Ins. Act, 1924, 14 & 15 Geo. V, ch. 38; Industrial Assurance Act, 1923, 13 & 14 Geo. V, ch. 8; Companies Act, 1929, 19 & 20 Geo. V, ch. 23.

22. But see *People ex rel. Ferguson v. Reardon* (1910) 197 N. Y. 236, 90 N. E. 829; cf. *City of Clinton v. Phillips* (1871) 58 Ill. 102 where the city did not have the power to create the ordinance in question.

23. *State v. Legora* (1931) 162 Tenn. 122, 34 S. W. (2d) 1056; *United States v. Clyde Steamship Co.* (C. C. A. 2, 1929) 36 F. (2d) 691, cert. denied (1930) 281 U. S. 744; *People v. Harley* (1925) 230 Mich. 676, 203 N. W. 531; *People v. Zimmerman* (1925) 213 App. Div. 414, 210 N. Y. S. 269, aff'd (1926) 241 N. Y. 405, 150 N. E. 497; *Reaves Warehouse Corp. v. Commonwealth* (1925) 141 Va. 194, 126 S. E. 87; *Ex parte Kneidler* (1922) 243 Mo. 632, 147 S. W. 983; *City of St. Louis v. Baskowitz* (1918) 273 Mo. 543, 201 S. W. 870; *I. C. C. v. Goodrich Transit Co.* (1912) 224 U. S. 194, 32 S. Ct. 436, 56 L. ed. 729, rev. (Com. Ct. 1911) 190 Fed. 943; *Hughes v. State* (1912) 67 Tex. Crim. Rep. 333, 149 S. W. 173; *St. Louis S. W. Ry. v. Hixon* (Tex. Civ. App. 1910) 126 S. W. 338; *State v. Pence* (1909) 173 Ind. 99, 89 N. W. 488; *Sanning v. Cincinnati* (1909) 81 Ohio St. 142, 90 N. E. 125; *People v. Schneider* (1905) 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345, 5 Ann. Cas. 790; *Commonwealth v. Intoxicating Liquors* (1899) 172 Mass. 311, 52 N. E. 389; *City of St. Joseph v. Levin* (1895) 128 Mo. 588, 31 S. W. 101; *Shuman v. City of Fort Wayne* (1891) 127 Ind. 91, 26 N. E. 560; *Lauder v. City of Chicago* (1884) 111 Ill. 291.

24. Ordinarily the Fourth Amendment applies to administrative officers, viz. *Int. Rev. Agent v. Sullivan* (1923) 287 Fed. 138; *I. C. C. v. Brimson* (1894) 154 U. S. 447, 14 S. Ct. 1125, 38 L. ed. 1047.

25. It is not necessary that a business be charged with a public interest in order that it may be required to keep records subject to inspection by an administrative body or its agents, as witness the taxing power where such requirements are frequent. *Supra*, note 21. *Bartlett Frazier Co. v. Hyde* (C. C. A. 7, 1933) 65 F. (2d) 350, 352.

26. *Mansbach Scrap Iron Co. v. Ashland* (1930) 235 Ky. 265, 30 S. W. (2d) 968; *State v. W. O. Bennett* (1926) 315 Mo. 1267, 288 S. W. 50; *United States v. Mulligan* (D. C. N. D. N. Y. 1920) 268 Fed. 893; *State v. Sterrin* (1916) 78 N. H. 220, 98 Atl. 482; *Shuman v. City of Fort Wayne*

the theory that the books are quasi-public records.<sup>27</sup> Another rationale is that the government announced its requirement that the books be kept before any crime existed<sup>28</sup> and, as a consequence, the duty to produce books "existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it."<sup>29</sup>

In like manner the constitutional protection against unreasonable searches and seizures has been held not to forbid requirements that books be kept subject to inspection.<sup>30</sup> The courts have held that the acceptance of a license to engage in a business regulated by law is a necessary acceptance of the statutory conditions and to that extent an implied waiver of the constitutional immunity.<sup>31</sup> A party who keeps records in accordance with the

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(1891) 127 Ind. 91, 26 N. E. 560 which also emphasized fact that this was a reasonable police regulation; *State v. Davis* (1891) 108 Mo. 666, 18 S. W. 894. See *Karr v. Baldwin* (D. C. N. D. Tex. 1932) 57 F. (2d) 252, where such a regulation was upheld because such businesses have long been subject to just that sort of scrutiny.

27. *State v. Knight* (1929) 34 N. M. 217, 279 Pac. 947; *Marron et al. v. United States* (C. C. A. 9, 1925) 8 F. (2d) 251; *United States v. Mulligan* (D. C. N. D. N. Y. 1920) 268 Fed. 893; *Paladini v. Superior Court* (1918) 178 Cal. 369, 173 Pac. 588; *State v. Donovan* (1909) 10 N. D. 203, 86 N. W. 709; *State v. Davis* (1891) 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640; *United States v. Distillery at Petersburg* (C. C., E. D. Va. 1876) 1 Hughes 533, 25 Fed. Cas. No. 14,961.

28. *N. Y. v. Rosenheimer* (1913) 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161. See *Parks v. Laurens Cotton Mills* (1907) 75 S. C. 560, 56 S. E. 234, where the court said that as the proceeding was not of a criminal nature, nor an action to declare a forfeiture the statute did not come within the protection against self-incrimination.

29. 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2259c; *Sullivan v. United States* (1927) 274 U. S. 259, 47 S. Ct. 607, 71 L. ed. 1037; *State v. Donovan* (1901) 10 N. D. 203, 86 N. W. 709; *People v. Henwood* (1900) 123 Mich. 317, 82 N. W. 70; *St. Joseph v. Levin* (1894) 128 Mo. 588, 31 S. W. 101; *State v. Smith* (1888) 74 Iowa 580, 584, 38 N. W. 492; contra *People ex rel. v. Reardon* (1910) 197 N. Y. 236, 90 N. E. 829; cf. *State v. Pence* (1909) 173 Ind. 99, 89 N. E. 488.

30. *Hodges et al. v. United States* (C. C. A. 10, 1929) 35 F. (2d) 593, 596; *Schutte v. United States* (C. C. A. 6, 1927) 21 F. (2d) 830; *Gatterdam et al. v. United States*, *Gatterdam v. Same* (C. C. A. 6, 1925) 5 F. (2d) 673; see *Kovach v. United States* (C. C. A. 6, 1931) 53 F. (2d) 639.

In *United States Distillery at Petersburg* (C. C., E. D. Va. 1876) 1 Hughes 533, 25 Fed. Cas. No. 14961 and in *State ex rel. City of Minn. v. Minn. St. Ry. Co. et al.* (1923) 154 Minn. 401, 191 N. W. 1004, 1008 the courts said that the books required to be kept were quasi-public records and were intended for use as much by the government as the party keeping them and therefore the constitutional protection against unreasonable searches and seizures was not applicable.

31. *United States v. Vlahos* (D. C. D. Ore. 1937) 19 F. Supp. 166; *Marron v. United States* (C. C. A. 9, 1925) 8 F. (2d) 251; *Wibmer v. State* (1923) 182 Wis. 303, 195 N. W. 936.

provisions of the Neutrality Act cannot, therefore, complain that the Board has inspected the required records without recourse to a search warrant<sup>32</sup> or to hearings upon complaints of violations of the statute.<sup>33</sup> But this right to inspect the books does not, of itself, give the right to make a forcible entry to make such inspection.<sup>34</sup> In those instances in which a party becomes contumacious<sup>35</sup> and refuses to admit the agents of the Board in order that they might inspect the required permanent records, the agents must resort to the aid of a search warrant<sup>36</sup> and are not able to break into the premises, because the implied consent does not include the privilege to force oneself into the premises or to destroy property upon them.<sup>37</sup> On like principles, the right to inspect the books would not include the right to seize them.<sup>38</sup>

Although the constitutionality of the provision that books be maintained subject to inspection by the Board is clear, real problems in regard to these prescribed records would arise should an attempt be made to verify statements in them or to determine whether material matter was omitted. The act obviously seeks correct statements by registrants.<sup>39</sup> It would, accordingly, be a violation of the Act to give the Board untrue or incomplete statements.<sup>40</sup> But it should be remembered that the records are

32. *Marron v. United States* (C. C. A. 9, 1925) 8 F. (2d) 251.

33. *Isbrandtsen-Moller Co. v. United States* (N. Y. 1937) 14 F. Supp. 407, aff'd (1936) 300 U. S. 139, 57 S. Ct. 407, 81 L. ed. 562. A distinction must be drawn between the situations where prescribed books may be required and where the administrative body may only search through records not required to be kept. Thus the Federal Trade Commission and the National Labor Relations Board, both of which are of the latter type, may only make such searches upon complaints. Note (1936) 22 WASHINGTON UNIVERSITY LAW QUARTERLY 81, 93, fn. 50a.

34. *United States v. Kraus* (D. C. S. D. N. Y. 1921) 270 Fed. 578.

35. The extent to which companies may be contumacious in regard to submitting their books is shown in *In re Financial Transactions of the N. Y., N. Haven & Hartford R. Co.* (1914) 31 I. C. C. 32. The great majority of business men, however, are not contumacious. Thomas C. Blaisdell, Jr., *The Federal Trade Commission* (1932) 262.

36. Books required to be kept are "property used as means to commit a felony," (1917) 40 Stat. 228, (1927) 18 U. S. C. A. sec. 612. They are therefore subject to search warrant under the statute. *In re Rosenwasser Bros.* (D. C. N. Y. 1918) 254 Fed. 171; *United States v. Kirschenblatt* (C. C. A. N. Y. 1926) 16 F. (2d) 202.

37. *United States v. Kraus* (D. C., S. D. N. Y. 1921) 270 Fed. 578.

38. *Ibid.*

39. Cf. Note (1935) 44 Yale L. J. 822.

40. (1937) 50 Stat. 123, 22 U. S. C. A. sec. 245g provides penal sanctions. Penal actions are often included in statutes conferring administrative powers, e. g. I. C. C. (1893) 27 Stat. 443, (1934) 49 U. S. C. A. sec. 46; F. T. C. (1914) 38 Stat. 723, (1934) 15 U. S. C. A. sec. 50; S. E. C. (1934) 48 Stat. 900, 15 U. S. C. A. sec. 78u(c); F. C. C. (1934) 48 Stat. 1097, 47 U. S. C. A. sec. 409(j); Federal Power Commission (1935) 49 Stat. 857, (1936) 16 U. S. C. A. sec. 825f; National Labor Relation Board (1935)



self-serving accounts, and the penalties for perjury<sup>41</sup> can hardly be viewed as an adequate deterrent to a group of men who intend to evade the Neutrality Act.<sup>42</sup> The perjury, furthermore, must be discovered before it can be punished. But in this instance discovery is the very power sought.

The dearth of powers granted the Board would seem to necessitate the Board's resort to criminal proceedings in order to verify records.<sup>43</sup> Where there is "probable cause" to believe that the records contained false statements a search warrant could be issued for those documents or articles which are used to avoid keeping accurate records, which is the crime itself.<sup>44</sup> But in most instances the Board would not be able to establish the necessary prerequisite to obtaining a search warrant, namely, "probable cause;"<sup>45</sup> for a survey of the records would usually not reveal sufficient information to give the Board good reason to suspect that some of the information rendered was false. As most big armament-producing companies are not exclusively arms firms,<sup>46</sup> it would not be too difficult to cover up discrepancies that might appear in the records by charging them off to the remainder of

49 Stat. 455, (1936) 29 U. S. C. A. sec. 161; The Tariff Act of 1930 (1930) 46 Stat. 707, (1937) 19 U. S. C. A. sec. 1341(b). Board of Trade v. Olsen (1923) 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839 held the penal provision in the Grain Futures Act (1922) 42 Stat. 998, 1003, (1934) 7 U. S. C. A. secs. 6, 13, which required that persons keep written records of certain prescribed contracts to be constitutional. In regard to this problem see Note (1937) 51 Harv. L. Rev. 312, 316.

41. Ibid. See Edwin W. Patterson, *The Insurance Commissioner in the United States* (1927) 333 in which the author discusses the report to the insurance commissioner as self-serving.

42. The extent to which a corporation will go to falsify records and accounts may be seen in *St. Paul & Puget Sound Accounts* (1914) 29 I. C. C. 508.

The extent to which the English munitions license provisions have been circumvented is shown in Hearings, part 3, exhibit 260.

43. The Neutrality Act provides for a penalty of imprisonment exceeding one year and consequently the offense of violating the Act is deemed a felony (1909) 35 Stat. 1152, (1927) 18 U. S. C. A. sec. 541. Where a statute provides punishment which amounts to a felony, it need not expressly provide that it is a felony for the Code of Criminal Procedure supplies the omission (1909) 35 Stat. 1152, (1927) 18 U. S. C. A. sec. 541. *Tyomies Pub. Co. et al. v. United States* (C. C. A. 6, 1914) 211 Fed. 385, 23 C. C. A. 47; cf. *United States v. Chapman* (D. C., S. D. Ala., S. D. 1931) 3 F. Supp. 900.

44. *United States v. Kraus* (D. C. S. D. N. Y. 1921) 270 Fed. 578.

45. Cornelius, *The Law of Search and Seizure* (1926) sec. 82.

46. One of the most important features of munitions firms is their composite character. They produce goods used primarily in peace, as well as arms. The industry is intimately bound up with the general manufacturing industry. Ralph H. Stimson, *The Private Manufacture of Arms* (Ja. 1935) 16 Acad. Pol. Sci. Proc. 1; I. C. I. Before the Arms Commission (Feb. 8, 1936) 34 Chemical Age 113-114; 11 Encyc. Soc. Sci., *Munitions Industry* (1935) 128-130.

the company's business, thereby preventing the records from speaking for themselves in regard to the existence of any "probable cause." If "probable cause" could be established, it would still be necessary to describe the property sought by the warrant with particularity,<sup>47</sup> because fishing expeditions for evidence are forbidden by the Fourth Amendment.<sup>48</sup> Thus the Board might often be in the predicament of not knowing just what articles would establish the violation of the Act, and consequently would be unable to verify the statements made in the records.

Where, on the other hand, the records did not contain full information, the problem for the Board would be even more difficult than where the records were incorrect. Many of the arms works are merely small departments of giant steel and chemical companies.<sup>49</sup> If arms were being manufactured in one of many plants, or were being shipped in secret from one of them, it would be virtually impossible to discover the crime, as the records might not reveal these secret actions. Because of the Gargantuan size of such companies it would be relatively simple to conceal guilty operations. As the Board is not allowed to rove at will through a firm's properties or otherwise fish for evidence of infringements of the Act,<sup>50</sup> the Board is virtually helpless to prevent violations.

Still another power which, upon analysis, is found to be inadequate to close the aforementioned loop-holes in the Act is the authority of the Secretary of State to promulgate such rules and regulations with regard to its enforcement as he may deem necessary to carry out its provisions.<sup>51</sup> In order to determine the accuracy and completeness of the records it is probable that the Board would require, at the very least, the power to subpoena witnesses; to compel the production of books, papers, correspondence, memoranda, and other records relevant to the inquiry; and to inspect the properties of the registrant"<sup>52</sup> \* \* \* in order

47. Cornelius, *op. cit.*, sec. 122.

48. *F. T. C. v. P. Lorillard Co.* (D. C. N. Y. 1922) 283 Fed. 999, *aff'd* in *F. T. C. v. American Tobacco Co.* (1924) 264 U. S. 298, 44 S. Ct. 336, 68 L. ed. 696, 32 A. L. R. 786.

49. *Supra*, note 46.

50. *United States v. Kraus* (D. C., S. D. N. Y. 1921) 270 Fed. 578. *Supra*, note 48.

51. (1935) 50 Stat. 124, (1937) 22 U. S. C. A. sec. 245b.

52. Under the N. I. R. A. the inspection of properties was not expressly authorized. The Petroleum Code nevertheless authorized the inspection of properties, tanks, and pipe lines. *Amazon Pet. Corp. v. R. R. Com.* (D. C., E. D. Tex. 1934) 5 F. Supp. 639 refused to permit such power to be exercised in the absence of express powers. It was overruled by *Ryan et al. v. Amazon Petroleum Corp.* (C. C. A. 5, 1934) 74 F. (2d) 1, 8 in which the decision was seemingly based on the fact that the Fourth Amendment to

to subject one to inquisitions, visitations, and interrogations by extrajudicial bodies for the purpose of obtaining information against them, statutory authority for such claim of right must

the Constitution did not apply because the properties were open to free entry. The court cited *Hester v. United States* (1924) 265 U. S. 57, 44 S. Ct. 445, 68 L. ed. 898, which holds that the Fourth Amendment does not apply to open fields, and *United States v. Western & Atl. R.* (D. C. N. D. Ga. 1924) in which it was held that the Fourth Amendment does not apply to inspection of railroad cars as the Amendment only applies to houses, papers and effects. Cars on an open track were held not to be private in that sense.

Almost all codes under the N. I. R. A. provided for the requiring of reports and statistics by the members of the code, Prentice Hall, 4 Fed. Trade & Industry Service, par. 4861, and Lewis Mayers, *A Handbook of NRA* (2nd ed. 1934) 35. The N. I. R. A. did not expressly authorize the inspection of books and papers to determine the accuracy of the reports, yet a large number of the codes provided for verification of these reports if doubt as to their accuracy was entertained: Alcoholic Beverage Wholesale Code, Art. X, sec. 2; Asphalt Shingle & Roofing Code, Art. VI, sec. 2(d); Anti-Hog Cholera Serum Code, Art. V, sec. 2; Asbestos Code, Art. VI, sec. 2(c); Asphalt and Mastic Tile Code, Art. VI, sec. 2(c); Automotive Parts & Equipment Code, Art. VI-A(3); Brewing Code, Art. VII, sec. 2; Amend. no. 2 (approved Sept. 21, 1934, effective Oct. 1, 1934) to Business Furniture, Storage Equipment & Filing Supply Industry Code; Cast Iron Pressure Pipe Code, Art. VI, sec. 6(b); Coat & Suit Code, Art. VI, sec. 2D; Copper Code, Art. VI, sec. 5(i); Distilled Spirits Code, Art. IX, sec. 2; Distilled Spirits Rectifying Code, Art. X, sec. 2; Fabricated Metal Code, Art. IV, sec. 6; Fibre Can & Tube Code, Art. VII, sec. 7; Fire Extinguishing Appliance Code, Art. VI, sec. 2(g); Fishery Code, Art. VII, sec. 2; Imported Date Packing Code, Art. VI-B, sec. 1(d); Investment Bankers Code, Art. X, sec. 7; Iron & Steel Code, Art. IX, sec. 2; Malleable Iron Code, Art. VII, sec. 2; Mayonnaise Code, Art. VI, sec. 1(e); Men's Clothing Code, Art. XIII; Metal Etching Code, Art. V, sec. 9; Motion Picture Laboratory Code, Art. III, sec. 5; Motor Fire Apparatus Code, Art. VI, sec. 2; Motor Vehicle Storage & Parking Code, Art. V, Div. B, sec. 3; Petroleum Code in Puerto Rico, Art. III, rule 23; Raw Peanut Milling Code, Art. VII, sec. 2; Rayon & Silk Dyeing Code, Art. IX; Reinforcing Materials Code, Art. IX, sec. 2; Rubber Mfg. Code, Art. II-A, sec. 4(e); Rubber Tire Code, Art. II-A, sec. 4(d); Set Up Paper Box Code, Art. VII, sec. 1; Southern Rice Milling Code, Art. VII, sec. 2; Steel Casting Code, Art. V, sec. 5; Trucking Code, Art. X, sec. 3; Underwear Code, "Reports to Industry Ctte." sec. 5; Watch Case Mfg. Code, Art. VI, sec. 3; Waxed Paper Code, Art. VII, sec. 1; Wholesale Automotive Code, Art. VIII-D; Wholesale Confectioners' Industry Code, Art. VI, sec. 14(c); and Wine Code, Art. VIII, sec. 2. The code for the Live Poultry Industry of the Metropolitan Area in and about the City of New York (approved Apr. 13, 1934, effective April 23, 1934, with amendments approved and effective Sept. 25, 1934) Prentice-Hall, 2 Federal Trade & Industry Service, par. 11,297, provided for the giving of reports, but not for their verification. The Schechter case, which dealt with that code, consequently did not have to take up the issue as to the authority for such provisions for verification of the reports. That issue was, therefore, never decided by the courts.

It is interesting to note that the Small Arms & Ammunitions Mfg. Industry Code of Fair Competition, Art. VII, sec. 1, Art. IX, sec. 1, provided for verification of the reports.

These codes can be found in National Recovery Administration, *Codes of Fair Competition* (1933-1935).

be shown to plainly and definitely confer upon such bodies such authority."<sup>53</sup> If the Secretary of State undertook, by virtue of this power, to supply omissions in the law he would, accordingly, be violating the principle of separation of powers and hence would be acting illegally.<sup>54</sup> The maximum power the courts seem to have permitted administrative agencies under similar broad powers to make necessary rules and regulations is the authority to make minor and routine regulations and to define the terminology used in the statute under which the agency was created.<sup>55</sup>

Although the Board is incapable, as a practical matter, of discovering false statements or omissions in the required records by resorting to its own powers, it would seem that cooperation with the Board by other bodies of the national government might give the Board some of the information which it desired. Such cooperation is not unknown in the national government for the Army and Navy have long cooperated on varied matters. It is possible, for example, that the Commissioner of Internal Revenue who has broad and extensive investigatory powers<sup>56</sup> might obtain information of value to the Board—information which the Board would be unable to obtain for itself. There is no express provision in this Act providing for such cooperation,<sup>57</sup> but no

53. *Amazon Pet. Corp. v. R. R. Com.* (C. C., E. D. Tex. 1934) 5 F. Supp. 639, reversed by *Ryan et al. v. Amazon Pet. Corp.* (C. C. A. 5, 1934) 71 F. (2d) 1. *Accord, Harriman v. I. C. C.* (1908) 311 U. S. 408, 29 S. Ct. 115, 53 L. ed. 253; and *Overton Refining Co. v. Terrell et al.* (1933) 4 F. Supp. 443.

54. *Ardley Club v. Durey* (D. C. N. Y. 1930) 40 F. (2d) 293. Regulations have no binding effect if they alter, amend, or extend the statute, *Greenport Basin & Construction Co. v. United States, Young v. United States* (D. C. E. D. N. Y. 1920) 269 Fed. 58, aff'd (1923) 260 U. S. 512, 43 S. Ct. 183, 67 L. ed. 370; 6 B. T. A. 265; and 9 B. T. A. 246. A regulation made under a statute must have a definite relation to the statute's purpose, *United States v. Bohl* (D. C. Conn. 1903) 125 Fed. 625.

55. *Hurwitz v. United States* (C. C. A. 8, 1922) 280 Fed. 109; *Tucker v. Williamson* (D. C. S. D. Ohio, E. D. 1915) 229 Fed. 201; *Coopersmiller v. Lemon* (C. C. A. 6, 1908) 163 Fed. 145, 89 C. C. A. 595; *Avery v. Comsr.* (1934) 292 U. S. 210, 54 S. Ct. 674, 78 L. ed. 1216; *Magnano Co. v. Hamilton* (1934) 292 U. S. 40, 46, 54 S. Ct. 599, 602, 78 L. ed. 1109; *Old Colony R. Co. v. Comsr.* (1932) 284 U. S. 552, 560, 52 S. Ct. 211, 213, 76 L. ed. 484; *Intercoast Trading Co. v. McLaughlin* (D. C. N. D. Calif., S. D. 1936) 18 F. Supp. 149. *Comer, Legislative Functions of National Administrative Authorities* (1927) 138. Presumably the power to control their internal operation and to furnish a procedure for third parties to deal with them would be accorded these bodies if such powers were contested as it would seem that these powers were those primarily intended to be embraced by this type of statute.

56. *United States v. Vlahos* (D. C. C. Ore. 1937) 19 F. Supp. 166.

57. The Foreign Trade Zone Board (1934) 48 Stat. 1001, (1937) 19 U. S. C. A. sec. 81j, the Federal Power Commission (1921) 41 Stat. 1353, (1927) 16 U. S. C. A. sec. 797(b), and the Federal Trade Commission (1914) 38 Stat. 722, (1927) 15 U. S. C. A. sec. 48, are to receive the cooperation of

private individual could prevent the President from ordering such cooperation or prevent voluntary cooperation by any administrative body in the national government. Cooperation between the Board and other government agencies, for the enforcement of the Board's duties, seems highly probable in view of the fact that the Board is composed of five important cabinet officers, including the Secretary of the Treasury under whom the Commissioner of Internal Revenue serves.

Inasmuch as there is no adequate way in which to determine the accuracy and completeness of the information which the munitions firms have given, except insofar as other governmental bodies consent to cooperate with the Board, the Board is reduced to the necessity of relying, in a large measure, upon the courtesy and the candor of the registrants. Under that situation it is absurd to look for a satisfactory illumination of "this most dangerous of the socially dangerous trades."

The inquisitorial powers conceded to the Board seem to be wholly inadequate. The Board lacks such elementary means of investigation as the powers to get a mandamus to force a party to keep the required books,<sup>58</sup> administer oaths and affirmations, take depositions, take evidence material to the inquiry, require reports, and subpoena witnesses. Unlike many other administrative agencies, the Board is entirely dependent upon the Attorney General's office for the enforcement of those powers which it does possess.<sup>59</sup> No provision in the Act permits the Board to apply directly to the federal courts to secure compliance with its orders. Nor has the Board adequate powers to discover, of its own initiative, whether any person is violating or is about to violate the Act. The Board, furthermore, has no power to make investigations to accumulate information upon the basis of which

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the executive departments and other agencies of the national government in regard to information which may be requested by the respective commissions. The Foreign Trade Zone Board (1934) 48 Stat. 1001, (1937) 19 U. S. C. A. sec. 81i, is directed to cooperate with other state and national agencies.

58. *Supra*, note 17. Also compare the Tariff Commission, John Larkin Day, *The President's Control of the Tariff* (1936) 16. No federal court may deal with any controversy over which it has not been given authority by some constitutional or statutory grant, *Mansfield v. Swan* (1884) 111 U. S. 379, 382, 28 L. ed. 462, 4 S. Ct. 510; *Hanford v. Davies* (1896) 163 U. S. 273, 279, 16 S. Ct. 1051, 41 L. ed. 157; *Barnette v. Wells Fargo* (1925) 270 U. S. 438, 46 S. Ct. 326, 329, 70 L. ed. 781; *Gainsville v. Brown-Crummer* (1928) 277 U. S. 54, 48 S. Ct. 454, 72 L. ed. 781. The jurisdiction of federal courts to entertain original actions for mandamus, consequently, may be conferred only by statute, *Cudahy Packing Co. v. United States* (C. C. A. 7, 1926) 15 F. (2d) 133.

59. *Supra*, note 17.

administrative rules might be promulgated or further Congressional legislation enacted. The Board's inability to subpoena the books and records of third persons who are not required to be registered under the Act will be another hindrance to enforcement.<sup>59a</sup> The meagerness of the investigatory powers conceded to the Board forms a striking contrast to the broad powers afforded to other administrative officers such as the Commissioner of Internal Revenue.<sup>60</sup>

Although it would seem essential to adequate control of the arms industry that Congress know the identity of the persons chiefly interested in the various munitions firms, the Neutrality Act makes no provision for such information. To be effective in that respect the Act should at least require that all shares in corporations devoted to any considerable degree to the manufacture of munitions be registered and that the registration books of such corporations be open to inspection by the Board.<sup>61</sup>

In view of the aforementioned deficiencies it seems that those powers which the Board has are innocuous and, therefore, not to be taken too seriously for it takes more than a wish, a hope, and a commission to insure the publicity for which the Act purports to provide.

WILLARD B. MYERS.

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59a. *Ibid.*

60. Compare the power of the Commissioner of Internal Revenue (1919) 45 Stat. 1142, (1935) 26 U. S. C. A. sec. 1514. *Brownson v. United States* (C. C. A. Mo. 1929) 32 F. (2d) 844; *Miles v. United Founders* (D. C. N. J. 1933) 5 F. Supp. 413; *United States v. Mobile First Nat. Bk.* (D. C. Ala. 1924) 295 Fed. 142, *aff'd* 267 U. S. 576, 45 S. Ct. 231, 69 L. ed. 796; *Cooley v. Bergin* (D. C. Mass. 1928) 27 F. (2d) 930.

61. The 1921 Report of the Temporary Mixed Commission of the League of Nations found in *Stimson, The Private Manufacture of Arms* (1935) 16 Acad. Pol. Sci. Proc. 34 adopted this recommendation.