Michigan Law Review

Volume 49 | Issue 3

1951

ADMINISTRATIVE LAW-FEDERAL TRADE COMMISSION-CONSTITUTIONAL AND STATUTORY AUTHORITY TO ORDER ADDITIONAL COMPLIANCE REPORTS

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RECENT DECISIONS

ADMINISTRATIVE LAW—FEDERAL TRADE COMMISSION—CONSTITUTIONAL AND STATUTORY AUTHORITY TO ORDER ADDITIONAL COMPLIANCE REPORTS—Proceeding under section 5 of its organic act,[1] the Federal Trade Commission issued an order requiring defendants to cease and desist from engaging in certain trade practices. The court of appeals, in its decree affirming the order, directed compliance reports to be filed with the commission within a specified time, reserving jurisdiction to enter further orders.[2] Four years after the compliance reports were filed, the commission, on its own motion, ordered additional reports to show continued compliance. Defendants refused to report, challenging the authority of the commission to issue the order. The district court dismissed suit by the commission for mandatory injunction and penalties,[3] and the court of appeals affirmed.[4] On certiorari to the United States Supreme Court, *held,* reversed. The commission's order was authorized by the Federal Trade Commission Act and did not violate the constitutional prohibition against unreasonable searches and seizures. *United States v. Morton Salt Co.,* 338 U.S. 632, 70 S.Ct. 357 (1950).

Historically, the efforts of Congress to endow administrative agencies with broad powers of investigation have come into collision with (1) the constitutional barrier of the searches and seizures provision of the Fourth Amendment[5] and (2) the reluctance of courts to acknowledge the statutory grant of power.[6] The principal case, in resolving a doubtful question of statutory power[7] in favor of the Federal Trade Commission, exemplifies the tremendous change in recent years away from restrictive interpretation. The case also illustrates the disappearance of many of the earlier constitutional limitations on the power of inquiry. Formerly, it was thought that administrative agencies—like the courts—were restricted in compelling the production of records and reports to instances where there

[1] 38 Stat. L. 717 (1914), as amended 52 Stat. L. 111, 1028 (1938), 15 U.S.C. (1946) §41 et seq.

[2] Salt Producers Assn. v. FTC, (7th Cir. 1943) 134 F. (2d) 354.

[3] United States v. Morton Salt Co., (D.C. Ill. 1948) 80 F. Supp. 419

[4] United States v. Morton Salt Co., (7th Cir. 1949) 174 F. (2d) 703.

[5] The doctrine that the compulsory production of books and records may be an unconstitutional search and seizure has its roots in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886), where the statement was unnecessary to the decision of the case. Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906), gave substance to the Boyd dictum. A recent case, Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946), in stating, at 195, that a subpoena duces tecum presents "no question of actual search and seizure," established a distinct, and relaxed, standard of Fourth Amendment protection for corporate books and records summoned by orderly process.

[6] Harriman v. ICC, 211 U.S. 407, 29 S.Ct. 115 (1908). Cf. Smith v. ICC, 245 U.S. 33, 38 S.Ct. 30 (1917).

[7] Specifically, the statutory question was whether the authorization of the commission to order reports, as granted in §6 (a) and (b), is limited to general economic surveys or extends to reports of continued compliance with orders issued under §5. The problems of interpretation are treated in a note in 17 GEO. WASH. L. REV. 246 (1949).

was probable cause to believe that a specific violation of law had occurred.[8] Recent cases, however, had regarded the agencies to be less like courts and more like grand juries with respect to investigatory powers.[9] This approach was developed in the principal case. Justice Jackson, speaking for the Court, observed that, because federal courts are limited in function to the adjudication of cases and controversies, the judicial subpoena power is exercised only when the evidence sought is relevant to issues in litigation. Administrative agencies in the discharge of accusatory duties are freed from this judicial limitation and may apparently summon evidence on a mere suspicion that the law is being violated. In fact, the emphasis has shifted from the strict requirement of probable cause to believe a violation of law has occurred to the less rigorous standard of overall reasonableness in the disclosure desired by the agency.[10] It is submitted that the decision of the principal case is sound on both the statutory and constitutional issues. To hold otherwise on the statutory question would be to ascribe a contradiction to Congress in charging the commission with the duty of preventing unlawful practices in commerce, while neglecting to provide a suitable method for the agency to determine whether there has been continued compliance with its orders. With respect to the constitutional question, it must be remembered that the really fighting issue—the constitutionality of federal supervision over the defendant's interstate business operations—has already been settled. Implicit in the settlement of that issue was the notion that reasonable means of enforcement would also receive constitutional sanction.[11]

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[8] Harriman v. ICC, supra note 6; FTC v. Baltimore Grain Co., (D.C. Md. 1922) 284 F. 886; FTC v. American Tobacco Co., 264 U.S. 298, 44 S.Ct. 336 (1924); Jones v. SEC, 298 U.S. 1, 56 S.Ct. 654 (1936). Also see Langeluttig, "Constitutional Limitations on Administrative Power of Investigation," 28 ILL. L. REV. 508 (1933).

[9] Woolley v. United States, (9th Cir. 1938) 97 F. (2d) 258 at 262; Consolidated Mines v. SEC, (9th Cir. 1938) 97 F. (2d) 704 at 708; Oklahoma Press Pub. Co. v. Walling, supra note 5 at 208-9. In Blair v. United States, 250 U.S. 273 at 282, 39 S.Ct. 468 (1919), a grand jury is described as "a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation. . . . [T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

[10] Cf. Fleming v. Montgomery Ward & Co., (7th Cir. 1940) 114 F. (2d) 384, cert. den. 311 U.S. 690, 61 S.Ct. 71 (1940), where the administrator of the Wage and Hour Division was permitted to inspect records, which the Fair Labor Standards Act required to be kept, in the absence of a showing of probable cause to suspect a violation of the act.

This transition in constitutional doctrine was facilitated by the Court's recognition that corporations operating in interstate commerce are permitted to do so as a matter of Congressional grace, and, accordingly, are subject to federal supervision for much the same reasons that states may oversee corporations which exist only by virtue of charter grants. Hale v. Henkel, supra note 5 at 74-5; Wilson v. United States, 221 U.S. 361 at 382, 31 S.Ct. 538 (1911).

[11] A recent analysis of the trend toward broader administrative power to gather facts is found in Davis, "The Administrative Power of Investigation," 56 YALE L.J. 1111 (1947). Also see Handler, "The Constitutionality of Investigations by the Federal Trade Commission," 28 COL. L. REV. 708 and 905 (1928).