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SCOPE OF CURRENT QUESTIONNAIRE INVESTIGATIONS BY THE FEDERAL TRADE COMMISSION.

Introduction.

In recent months, corporate officers and counsel in several industries have received registered letters from the Federal Trade Commission, the contents of which have generated a flurry of activity on the part of corporate defenders and government investigators. These letters contain questionnaires concerning corporate activity which are to be filled out and returned to the Commission. This new method of investigation, being implemented under authority of Section 6 (b) of the FTC Act,¹ has allowed the Commission widespread coverage without an increase in FTC personnel. This note will discuss some of the legal issues likely to arise from utilization of the new method.

Until recently, investigations under Section 6 of the Act have been sporadic. Throughout the history of the Act, general economic surveys have been undertaken from time to time;² special reports have also been used in legal investigations³ to gather data in specific antimonopoly cases to either discover violations or to check compliance with outstanding Commission orders.

In 1959, pursuant to a committee recommendation,⁴ the Commission adopted a new policy, that of utilizing the special reports to conduct general legal investigations of antitrust violations throughout entire industries. According to Earl Kintner, former Chairman of the FTC, the new method has permitted "quick, inexpensive and efficient investigation of industry-wide practice."⁵ It has also served to alleviate a problem which has recently plagued members of the antitrust bar, that of dissimilar treatment of competitors which led to inequities in competition.⁶

The industry-wide legal investigations were first used in the grocery and citrus fruit industries.⁷ In the latter case, 118 companies were required to file reports, which resulted in 54 complaints based on Robinson-Patman violations.⁸ The investigative technique has since been used in the department store, food, photographic equipment and drug industries,⁹ and, although exact data is not available,

1 38 Stat. 719, as amended, 15 U.S.C. §§ 41-58. Section 6 of the FTC Act gives the Commission a broad power of investigation through annual and/or special reports which must be filed at the Commission's request.

2 See 1960 FTC ANN. REP. 141, for a summary of all general investigations undertaken by the FTC since 1915.

3 Industry-wide legal investigations are to be distinguished from economic surveys undertaken by the Commission for public information purposes rather than for discovery of antitrust violations. See Kintner, *Developments Under the Antimerger Act and Other Aspects of the Federal Trade Commission's Antitrust Program*, 5 ANTITRUST BULL. 387, 392 (1960).

4 Parrish, *Federal Trade Commission Aids to Antitrust Counseling*, 5 ANTITRUST BULL. 493, 495 (1960).

5 Kintner, *supra* note 3, at 393.

6 See *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1957). The problem referred to arises when the Commission seeks to prevent antitrust violations by one party in a highly competitive market, leaving his competitors free to do as they wish. This results in the party proceeded against being at a distinct economic disadvantage.

7 The grocery investigation began as an economic survey, but the information gained precipitated a general legal investigation throughout the entire industry. Kintner, *supra* note 5, at 392.

8 *Id.* at 392-93.

9 A summary of the questionnaire furnished 37 companies in the drug industry may indicate how broad the investigations are. There are 14 sections containing from one to several specific questions requiring written answers. In addition to asking for basic information concerning company structure, names and addresses of officers and names of subsidiary companies, the questionnaire requests specific information in the marketing and product promotion areas. General categories of information sought include dollar sales of certain drug

it is estimated that approximately 700 such questionnaires have been sent out.¹⁰

One of the reasons for the new type of investigation, as mentioned above, is to insure equal treatment of all business organizations similarly situated in the enforcement of the various statutes (notably Robinson-Patman) which the FTC administers.¹¹ The nature of antitrust law and the rapid pace set by the huge corporate firms that predominate in our present economic society make necessary an extensive backlog of related information to deal with the intricate trade regulation problems and the myriad number of violations as they arise.

A second reason, made necessary by the amendment of Section 7 of the Clayton Act, has been advanced.¹² The amended section deals with corporate acquisitions and mergers, proscribing such acquisition of

the whole or any part of the assets . . . of another corporation also engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.¹³

It is self-evident that the Commission must have adequate information to determine what the "relevant market" is, who the producers are and what their respective percentages of the market are in order to determine whether such mergers or acquisitions may substantially lessen competition or tend to create a monopoly.¹⁴

The extended use of the FTC Act's investigatory power, already characterized as the "broadest power available to any agency of the government"¹⁵ has naturally caused some concern among the corporate bar and antitrust defenders. Former Commission Chairman Kintner has promised that, "[T]he Commission has no intention of using this power as a means of harassment or to conduct mere fishing expeditions."¹⁶ Despite this reassurance, it has been stated that the new technique's success will rest upon the manner of its use, not on its effectiveness: "[I]f a short-cut-minded complaint counsel runs wild, it is likely that the ghost of the 1924 *American Tobacco* decision will walk again."¹⁷

It is the purpose of this note to analyze the new investigation method used by the FTC with emphasis on the limitations of such power as past courts have applied them and to examine current complaints about the use of this power.

products, such as narcotics, and detailed information regarding prescription drug packaging and labeling.

A general breakdown of the sales force is requested along with company customers pricing structures, and the details of transactions with customers in five selected trading areas. The following request in regard to product promotion is reprinted from the questionnaire to give some idea of the breadth of the inquiry.

XIII

For the period January 1, 1960 to date, furnish a copy covering each type of advertisement published or disseminated, such as leaflets, brochures, pamphlets, professional journal advertisements, tear sheets, posters, cartoons, articles, drawings, prints of speeches, radio scripts and television scripts (together with a copy of the filmed commercial) used or disseminated in connection with the sale, promotion or introduction of any and all of the prescription drugs and drug products listed in response to V, which mentions or advises of the claimed therapeutic effect, symptomatic relief, or of the side effects, of such prescription drugs and drug products.

Reports to be filed with the Federal Trade Commission by 37 Drug Companies, July 13, 1961.

10 Letter from the Federal Trade Commission to the NOTRE DAME LAWYER, August 17, 1961, on file in Notre Dame Law Library.

11 The FTC administers and draws its powers from 14 statutes listed at 1960 FTC ANN. REP. 99.

12 Letter from the Federal Trade Commission to the NOTRE DAME LAWYER, September 1, 1961, on file in Notre Dame Law Library.

13 64 Stat. 1125, 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914).

14 For an analysis of recent activity pursuant to Section 7, see generally Clark, *Conglomerate Mergers and Section 7 of the Clayton Act*, 36 NOTRE DAME LAWYER 255 (1961).

15 Babcock, *Legal Investigation*, ANTITRUST HANDBOOK, 386 (1958).

16 Kintner, *supra* note 5, at 393.

17 Loughlin, *Developments Under the Robinson-Patman Act*, 5 ANTITRUST BULL. 419, 428-29 (1960).

The Federal Trade Commission Act

In order to consider the FTC Act and Section 6, it is necessary to discuss the Act in the light of its historical perspective.

The huge concentration of power in the hands of a few business magnates during the latter stages of the 19th century became an issue of public concern. Even the extreme *laissez-faire* theorist was ready to concede that the principles of free interplay propounded by Adam Smith had little chance of surviving. Government intervention of some sort was inevitable.

As Van Cise points out, three alternatives presented themselves: first, the course of eliminating private restraints by confiscation of private business interests; second, the alternative of eliminating private restraints by eliminating the freedom of private business through regulation; and third, the course finally adopted by the United States, elimination of private restraints themselves through the antitrust laws.¹⁸

The first attempt by Congress to intervene in business found expression in the Interstate Commerce Act,¹⁹ which set up a commission to administer government control over certain predatory business practices in the transportation industry. As the common progenitor of subsequent administrative agencies, including the FTC, the Interstate Commerce Commission serves as a valuable study of the attitudes, judicial, legislative and popular, that were prevalent at the time.

Section 20 of the Act²⁰ empowered the ICC to require annual reports from carriers. From the beginning the Commission found that these reports were not adequate to permit effective performance of its duties, and the annual reports filed with Congress are replete with requests for extended investigative powers.²¹ In 1906, Congress responded to these pleas by an amendment which authorized the Commission "to require such carriers to file monthly reports of earnings and expenses or special reports within a specified period."²²

The amendment of 1906 was assailed on many sides for a variety of reasons. The courts, especially, were unable to accept such a powerful grant of authority in a form not known to the common law. One authority has explained the judicial attitude as follows,

Courts are not unconscious of the fact that, due to their own inadequacies, areas of government formerly within their control have been handed over to administrative agencies for supervision. . . . Thus, under the guise of constitutional and statutory interpretation, efforts to thwart the effects of those legislative judgments are not uncommon.²³

Another factor that probably weighed heavily in the controversy was that Justice Holmes, who once characterized antitrust law as "humbug based on economic ignorance and incompetence,"²⁴ was on the Supreme Court at that time. From

18 Van Cise, *The Problems and Procedures of Counsel in Advising On Compliance with the Antitrust Laws*, 5 ANTITRUST BULL. 221, 222 (1960).

19 24 Stat. 379 (1887).

20 24 Stat. 386 (1887).

21 See, e.g., 1890 ICC ANN. REP. 69; 1898 ICC ANN. REP. 79.

22 34 Stat. 593 (1908).

23 LANDIS, *THE ADMINISTRATIVE PROCESS*, 122 (1938). The striking dichotomy in judicial attitudes between the early Sherman Act era and the present time may be observed in the following two quotations.

The judicial administrators of the competitive principles of our antitrust laws, however, included in the days of our fathers many ardent converts to a great and abiding faith, namely faith in business. An initial two decades of trial and error in construing these laws had persuaded influential judicial spokesmen that he governs best who governs industry least. VAN CISE, *Understanding the Antitrust Laws* 45 (1958).

Although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States v. Morgan*, 313 U.S. 409, 422 (1940).

24 Letter from Oliver W. Holmes to Baron Pollock, 1 POLLOCK-HOLMES LETTERS 163 (1942).

this, it is clear that the radically new methods of regulation were bound to get more than superficial scrutiny by the judiciary. As the antitrust laws generally and the administrative power of investigation in particular are dependent on the courts for enforcement, a favorable judicial attitude is the most important single element in determining their effectiveness. As will become apparent after an analysis of relevant case law, "[T]he swing of the judicial pendulum . . . has carried our anti-trust laws first to a business right and then to a government left."²⁵

The validity of the amendment to Section 20 of the Interstate Commerce Act was tested in *Harriman v. ICC*,²⁶ a case in which the Commission had subpoenaed a corporate officer to testify and produce documentary evidence on which the Commission hoped to recommend legislation. Justice Holmes, writing for the majority, said,

[T]he power to require testimony is limited, as it usually is in English speaking countries, at least, to only the cases where the sacrifice of privacy is necessary, — those where the investigations concern a specific breach of the law.²⁷

Continuing, Justice Holmes stated that only "explicit and unmistakable"²⁸ words by Congress will create such a power.

Aided by this indication that the Supreme Court would tolerate only the most precise language in such a powerful grant of authority, Congress in 1910 articulated such a grant.²⁹ Under authority of the 1910 amendment, the ICC, pursuant to a Senate resolution, undertook an investigation of political contributions by members of the railroad industry. In *Smith v. ICC*,³⁰ the investigation was challenged on the basis of *Harriman*. The Court said, "Appellant presses that case beyond its principle. And we may observe that § 13 has been amended and broadened since the decision in that case."³¹ Thus armed with an idea of the success of the Interstate Commerce Act amendment, and a need for increasing coverage of the anti-trust laws, Congress put broad investigatory power in the hands of the new Federal Trade Commission.

The FTC Act³² was the first general antitrust statute which created an organic Commission of qualified personnel to deal with the diverse number of possible trade irregularities as defined by Section 5 of the Act. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."³³ The generality of this statement is indicative of the broad area of inquiry that Congress wished to delegate to the FTC. "The substantive content of the phrase 'unfair methods of competition' was deliberately left undefined by Congress, in order to leave wide latitude for checking new and varied forms of monopolistic practices."³⁴

Section 6 of the Act confers the general investigatory power. Subsection (a) provides that "the Commission shall have power to gather and compile information . . . and to investigate . . . the organization, business, conduct . . . of any corporation engaged in commerce."³⁵ The following subsection, 6(b), provides that business associations shall:

file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special reports or answers in writing to specific questions.³⁶

25 VAN CISE, *Understanding the Antitrust Laws* 62 (1958).

26 211 U.S. 407 (1908).

27 *Id.* at 419.

28 *Id.* at 421.

29 36 Stat. 551 (1910).

30 245 U.S. 33 (1917).

31 *Id.* at 44.

32 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58.

33 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45.

34 Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161, 163 (1960).

35 38 Stat. 721 (1914), 15 U.S.C. § 46(a).

36 38 Stat. 721 (1914), 15 U.S.C. § 46(b).

Section 9 of the Act provides, among other things, that, (1) the Commission have "at all reasonable times" access to and the right to copy any documentary evidence of a corporation being investigated, and (2) the FTC shall have the subpoena power to compel testimony of witnesses and the production of relevant records. The Commission may not enforce its own subpoenas but must go to the appropriate district court.³⁷

Section 10 of the Act contains a provision dealing with penalties for failure to comply with legitimate FTC requests.³⁸ The penalties are significant and have ranged as high as \$80,000.³⁹

Pursuant to the Administrative Procedure Act,⁴⁰ the FTC has promulgated certain rules of practice⁴¹ concerning all phases of the Commission's activities. The rules were revised in 1960, and provide a great deal of information to those subject to the FTC's jurisdiction relating to practical steps to be taken in dealing with the Commission.

Subpart D of the rules begins with a statement of investigation policy, urging cooperation but warning "of the compulsory processes authorized by law."⁴²

Section 1.33 provides that "[A]ny party under investigation compelled to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation."⁴³

Other parts of Subpart D deal with specific procedures and policies relating to investigatory proceedings, articulating the FTC Act as it has been interpreted and applied by the courts and the Commission.⁴⁴

The Federal Reports Act of 1942⁴⁵ also affects Section 6(b) and the questionnaire method of investigation. Section 139(c) requires that whenever a federal agency submits more than ten questionnaires in identical form to business organizations, the forms must first be cleared through the Bureau of the Budget. This Act was passed to avoid harassment of business and duplicity of effort on the part of government agencies.⁴⁶ The position of the Commission in regard to the Federal Reports Act and the current questionnaire investigation is likely to be the object of some controversy. The FTC readily admits that the Act applies to general economic surveys which seek statistical information, but takes the position that the current investigations are analogous to field investigations and that approval from the Bureau of the Budget is unnecessary. It is argued that the Budget Bureau usually consults with industry representatives in evaluating the form and content of the questionnaires and that this would put the Commission in the anomalous position of having to solicit the approval of the people investigated.⁴⁷ While this argument has merit, the fact remains that this position collides with the policy of the Federal Reports Act. Congress intended to alleviate the burden on private industry which is entailed in compilation of large amounts of data. The fact that the questionnaires are being used for a different purpose does not make this burden any less apparent. For this reason, it is possible that a challenge on these grounds may be sustained. This difficulty might be surmounted, however, by a change in the policy of the Bureau of the Budget in regard to the new questionnaire method. Specifically, the Bureau could take the position, as urged

37 38 Stat. 722 (1914), 15 U.S.C. § 49(b).

38 62 Stat. 909 (1948), 15 U.S.C. § 50.

39 Hoffman, *Meeting Antitrust Investigations*, 3 ANTITRUST BULL. 293, 303-04 (1958).

40 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11.

41 16 C.F.R. Chap. 1 (1960).

42 *Id.* at 1.31.

43 *Id.* at 1.33.

44 *Id.* at §§ 1.31-1.42.

45 56 Stat. 1079 (1942), 5 U.S.C. § 139(c).

46 *Id.* at § 139.

47 Letter from the Federal Trade Commission to the NOTRE DAME LAWYER, November 29, 1961, on file in the Notre Dame Law Library.

by the FTC that the reports are not questionnaires within the meaning of the Federal Reports Act.

Any isolated analysis of a particular provision of the FTC Act is difficult because the Act itself is not an isolated piece of legislation but rather a part of our general antitrust law.⁴⁸ It may be said in general that the FTC Act, with its broad provisions, supplemented the Sherman Act and acted as a base around which the more specific provisions of the Clayton and Robinson-Patman Acts could be enforced.

The Arguments Against Section 6 (b)

An article entitled "Mail-Order Prosecution: Who's Next?" appeared recently in *NATION'S BUSINESS*⁴⁹ in connection with the industry-wide investigations. As the title implies, business is greatly concerned with the newly exercised power that the FTC claims, an attitude that has attended administrative investigations since their inception.

One of the most frequent attacks on the administrative inquiry that has been raised through the years is that such process is a search and seizure prohibited by the fourth amendment.

The earlier cases, reflecting a more restrictive attitude on the part of the courts, frequently disallowed an inquiry because of excessive breadth. In *Hale v. Henkel*,⁵⁰ the defendant, a corporate officer, had been directed by a Grand Jury to appear and produce an enormous list of papers, without any indication as to the materiality of the various classes of records sought. The Court held that the subpoena was "far too sweeping in its terms"⁵¹ and that some averment as to the relevance of the particular classes or records sought must be made before such an order could be sustained.

Perhaps the most familiar case on search and seizure in this context is *FTC v. American Tobacco Company*.⁵² In consequence of a number of complaints filed with the Commission, American Tobacco was ordered to produce a vast number of documents in the form of letters, telegrams, contracts and other related material. After the company refused to comply, the Commission went to court to enforce the subpoena. The decision, for the defendant corporation, was based on the relatively narrow issue of whether the FTC had the claimed "unlimited right of access to the respondent's papers" ⁵³ In light of the claim, the holding is not surprising. Stronger language in the opinion, written by Justice Holmes, however, has made this case significant.

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

48 The Supreme Court was called upon in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), to determine whether Sections 5 and 6 of the Act were separate and distinct (Morton contended that the Section 6 reports could be required only in support of general economic surveys and not in aid of enforcement proceedings under Section 5), or whether they were to be considered in *pari materia* as part of an integrated antitrust law. The Court said (at 649):

While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding.

This doctrine was recently restated and followed in *United States v. St. Regis Paper Co.*, 285 F.2d 607, 611-12 (2d Cir. 1960).

49 *NATION'S BUSINESS*, July, 1961, p. 34.

50 201 U.S. 43 (1906).

51 *Id.* at 76.

52 264 U.S. 298 (1924).

53 *Id.* at 305.

may disclose evidence of crime. . . . It is contrary to the first principles of justice to, allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up.⁵⁴

The holding in a case identical to *American Tobacco* would doubtless be the same today.⁵⁵ The case has been distinguished so many times in recent years, however, that the "fishing expedition" analogy has lost much of its vitality.

In 1945, the Supreme Court, in *Oklahoma Press Publishing Co. v. Walling*,⁵⁶ distinguished between "actual" and "constructive" searches and drew upon the concept "rule of reason" which had long guided antitrust adjudication and procedure to construct standards which the administrative inquiry had to meet to withstand attack on constitutional grounds. Referring to the requirement of reasonableness, the Court said: "This cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."⁵⁷ This approach was rephrased and affirmed in *United States v. Morton Salt Co.*,⁵⁸ where Justice Jackson said, "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."⁵⁹

These general standards, adopted to lend some uniformity to a complex issue, where each case must turn on its facts, obtain today as guides.

As Professor Davis points out, the judicial attitude since the *Oklahoma Press* and *Morton Salt* cases has been one of deference to the administrative body.⁶⁰ A 1956 case provides an example of this. In *Herman v. CAB*,⁶¹ the Ninth Circuit said,

In order to have the subpoena enforced, the issue as to whether each of the documents subpoenaed is relevant and material is a judicial question which must be passed upon by the court. There are no presumptions that the administrative agency or the hearing officer has subpoenaed only those documents which are relevant and material.⁶²

In a per curiam opinion, the Supreme Court reversed,⁶³ citing *Oklahoma Press*.

Various objections have been made to the use of the FTC's Section 6(b) power and similar powers of other agencies, which all fall within the purview of the fifth amendment.

The first of these objections is that such compulsory process violates the self-incrimination privilege of the fifth amendment. The first case asserting this privilege against administrative inquirers was *Boyd v. United States*,⁶⁴ a controversy involving use of the subpoena powers under the customs revenue statute. The Supreme Court said:

[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment of the Constitution.⁶⁵

As the administrative form of inquiry became more prevalent however, the basic attitude of the courts began to change. Exceptions to the self-incrimination privilege appeared. In 1906, the Supreme Court enunciated the first such exception, that corporations do not have the same status as a natural person for pur-

54 *Id.* at 305-06.

55 Loughlin, *Investigation and Trial of Robinson-Patman Act Cases Before the Federal Trade Commission*, 4 ANTITRUST BULL. 741, 761 (1959).

56 327 U.S. 186 (1945).

57 *Id.* at 209.

58 338 U.S. 632.

59 *Id.* at 652.

60 DAVIS, ADMINISTRATIVE LAW TREATISE § 3.06 (1958).

61 237 F.2d 359 (9th Cir. 1956).

62 *Id.* at 362.

63 353 U.S. 322 (1957).

64 116 U.S. 616 (1886).

65 *Id.* at 634-35.

poses of the self-incrimination privilege.⁶⁶ In *Wilson v. United States*,⁶⁷ five years later, this holding was quoted with approval. The Court then went on to indicate another exception to the privilege, holding that it did not apply,

to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.⁶⁸

A legislative provision removing a reason for the self-incrimination privilege appears in Section 9 of the Federal Trade Commission Act:

But no natural person shall be prosecuted . . . on account of any transaction . . . concerning which he may testify . . . before the commission in obedience to a subpoena issued by it.⁶⁹

This device was first utilized in connection with the Interstate Commerce Act in 1893.⁷⁰ Its constitutionality was upheld in subsequent litigation⁷¹ and has been included in this type of legislation consistently.⁷² Two fairly recent cases have been resolved which are consistent with the judicial trend of generally extending the investigatory power. In *United States v. White*,⁷³ the Supreme Court extended the corporate exception to include also non-corporate economic societies:

The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.⁷⁴

In the second case, *Shapiro v. United States*,⁷⁵ a 5-4 Court held that the immunity provision cannot be invoked where the records to be disclosed are those required by law to be kept.⁷⁶

A second argument based on the fifth amendment is that delegation of the subpoena power in the absence of adjudication or probable cause amounts to a deprivation of property without due process.

The economic and social structure in the days before "big business" was of such a relatively simple nature that the necessity of administrative inquiry and the administrative subpoena power as a means of putting some substance to the inquiry were non-existent. With this in mind, the holding of an 1887 case is not surprising: "[F]orcible intrusion into, and compulsory exposure of, one's private affairs and papers, . . . is contrary to the instincts of a free government. . . ."⁷⁷

Considered within the framework of the society in which Judge Field uttered it, the above dictum is perfectly reasonable. This attitude, however, carried over into a period when the administrative inquiry was, increasingly, becoming recognized as a necessary tool in abolishing certain predatory business practices in restraint of competition.

In 1908, pursuant to its powers under the Interstate Commerce Act, the ICC conducted an investigation of the activities of railroads for the purpose of recommending legislation. In *Harriman v. United States*,⁷⁸ a case which arose out of

66 *Hale v. Henkel*, 201 U.S. 43 (1906).

67 221 U.S. 361 (1911).

68 *Id.* at 380.

69 38 Stat. 722 (1914), 15 U.S.C. § 49.

70 27 Stat. 443 (1893), 49 U.S.C. § 6. (Commonly referred to as the Compulsory Testimony Act.)

71 *Brown v. Walker*, 161 U.S. 591 (1896).

72 A footnote in *Shapiro v. United States*, 335 U.S. 1, 6, n.4 (1948), gives an extensive list of statutes in which the immunity proviso appears.

73 322 U.S. 694 (1944).

74 *Id.* at 700.

75 *Shapiro v. United States*, 335 U.S. 1.

76 *Id.* at 16.

77 *In Re Pacific Railway Comm'n*, 32 Fed. 241, 251 (C.C.N.D. 1887).

78 211 U.S. 407 (1907).

that investigation, the power of compulsory production of evidence was challenged. Justice Holmes, speaking for the majority, said:

[T]he purposes of the act for which the commission may exact evidence embrace only complaints for violations of the act, and investigations by the commission upon matters that might have been made the object of complaint.⁷⁹

There was never a definite pronouncement by the Court that the *Harriman* dictum had been abandoned. Even that case did not expressly overrule delegation of the subpoena power but merely held Congress did not intend such a delegation.⁸⁰ The attitude of that Court, however, is effectively expressed in the result, regardless of how that result was reached.

Several factors intervened, however, to change the judicial attitude toward delegation of the subpoena power. The practicalities of ordering a huge, expanding economic complex, the interplay and gradual displacement of economic and social theories,⁸¹ and the insistence of Congress on delegating the subpoena power were significant among these forces, which eventuated in the Supreme Court's pronouncement in 1946 that

It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. . . . The requirement of "probable cause supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that . . . the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.⁸²

The Court seemed to go even further in the *Morton Salt* case.

Even if one were to regard the [FTC's] request for information in this case as caused by nothing more than official curiosity, nevertheless, law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.⁸³

The ideas and attitudes expressed in these cases apply today and are in no danger of being overturned.⁸⁴ More interesting questions that have arisen recently in connection with the power to compel testimony and the production of documentary evidence involve the utilization of the investigatory power to obtain evidence of trade irregularities against third parties with whom the investigated party has dealt. In two separate cases, this power has been upheld.⁸⁵

Another recent development in this area arose with a 1961 case, *St. Regis Paper Co. v. United States*.⁸⁶ The petitioner contended that specific questions within the questionnaire were vague and unreasonable and therefore violative of due process. Under the doctrine of the *FTC v. Claire Furnace Co.*⁸⁷ case, it was argued that the validity of the Commission's request could not be tested until the FTC brought an action on the penalties for refusal. Therefore defendant could (1) spend money on an investigation he claimed illegal, or (2) permit ruinous penalties to accumulate with the attendant risk that the enforcing court may adjudge the questions reasonable.

In answer, the Court distinguished *Claire Furnace*, saying that in that case, an action was not brought by the FTC as was the case here, and that petitioner could have applied for a stay on the penalties.⁸⁸ The Court also noted that the

79 *Id.* at 419-20.

80 *Id.* at 419.

81 See Rodes, *Due Process and Social Legislation in the Supreme Court*, 33 NOTRE DAME LAWYER 5 (1957).

82 *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09 (1945).

83 *United States v. Morton Salt Co.*, 338 U.S. 632, 652.

84 See Davis *supra* note 61, § 3.06. See generally *id.* §§ 3.01-3.14.

85 *FTC v. Bowman*, 218 F.2d 456 (7th Cir. 1957); *FTC v. Tuttle*, 244 F.2d 605 (2d Cir. 1957).

86 30 U.S.L. WEEK 4060 (U.S. Dec. 12, 1961).

87 274 U.S. 160 (1926).

88 30 U.S.L. WEEK 4065.

Declaratory Judgment Act was not available during the *Claire Furnace* period, intimating that under the Act, the validity of a specific order may be tested.⁸⁹

Present State of the Law

Potential litigants desiring to escape the tendrils of Section 6(b) of the FTC Act are, as we have seen, at a distinct disadvantage. The 1940's saw a great deal of change in the law regarding administrative inquiries and all the changes were in favor of the power. The *Oklahoma Press* and *Morton Salt* cases have set up broad bases upon which the agency may rest its power.

The test in regard to search and seizure requirements is one of reasonableness, controlled by two elements: breadth and relevance. By adopting programs broad in their scope to realistically deal with correspondingly broad and complex antitrust problems, the FTC has affirmatively determined what is relevant and how extensive the investigations may permissibly be.

Shifting then to the program that the Commission selects, how much discretion will they be allowed to use? The Court's *general* attitude may be learned from *Moog v. FTC*⁹⁰ where the Court said: "If the commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion."⁹¹ This patent abuse of discretion, then, is the point where the Court will draw the line.⁹² At the present time, it appears that the FTC's power, though used vigorously, has been used judiciously.

Restrictions as to self-incrimination do not seriously hamper Commission activities at the present time. Corporations and other economic associations have been denied the privilege and individuals are now protected by immunity statutes.

Arguments based on the validity of exercising the subpoena power in the absence of probable cause have also been overruled. The *Oklahoma Press* and *Morton Salt* cases have affirmed this power, once at issue, and later cases have cemented the current position.

As stated above, however, the Section 6 power is not without restrictions. Patent abuse of discretion by the Commission in selecting improper and unauthorized objectives will disqualify the inquiry. Even pursuant to an inquiry that is authorized, questions that are irrelevant to this purpose or that tend to put an unreasonable burden on the party investigated may well be declared unenforceable. It is significant to note here that under *St. Regis*, the investigated company can now test the validity of the questionnaire. The lower court held that twelve per cent of the questions were too vague and did not have to be answered.⁹³ The Commission won an appeal on other grounds, so arguably, they did not question the validity of this holding. The rules of procedure and the Federal Reports Act provide other technical safeguards and guides for the protection of those subject to the Commission's jurisdiction. Complete and thorough familiarity with these rules and the statutes as they have been interpreted is the most certain safeguard. It is to be noted, for example, that parties who respond voluntarily to the questionnaires will probably not be allowed to claim the Section 9 immunity, inasmuch

89 *Ibid.*

90 355 U.S. 411 (1957).

91 *Id.* at 414. See also note 84 and accompanying text.

92 Justice Jackson, speaking for the Court in *United States v. Morton Salt Co.*, 338 U.S. 632, said, at 652,

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power . . . We are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not be reasonably contemplated within that term as used by Congress in the context of this act.

93 *United States v. St. Regis Paper Co.*, 181 F. Supp. 862, 868.

as the questionnaires are sent out under authority of Section 6 rather than the subpoena authority of section 9.⁹⁴

Although the new method of investigation by the FTC is yet experimental, it has been used in almost 700 cases and, aside from one challenge on procedural grounds,⁹⁵ has not been contested by the companies on which it has been used. The advantages of the new method are impressive. Most important, it provides a method of applying, equitably, laws such as the Robinson-Patman Act, thereby circumventing the difficulty that arose in the *Moog* and *Niehoff* cases. Secondly, the new method is economical. On the FTC's side, it eliminates investigation by organic FTC personnel, the problems of excessive travel, and increases the productivity of the FTC budgeted tax dollar. On business' side, it frees busy executives from traveling to hearings and giving testimony.

One obstacle that many companies have complained about is the excessive cost of conducting the questionnaire investigation.⁹⁶ The short answer to this, of course, is that regulation is one of the costs of doing business today. More in line with the general attitude of cooperation and compliance that both sides of the antitrust bar urge today, it would seem that more consideration should be given to this problem and attempts made to alleviate it. A possible solution may lie in a standardization of records by way of coordinating the answers that government wants with the figures that business uses in ordering the affairs of the company.

As has been said above, the new method of investigation is not yet old enough to permit detached observation and evaluation. Once restrictive constitutional barriers of the Holmes era have now given way to an attitude of judicial deference. On the basis of this, the new method does not at the present time face a severe test. The courts have at times, however, implied that if ever the inquiry grew unreasonable, they would not be unwilling to step in. To date, this prerogative has not been exercised by the Supreme Court. But if at any time the abuse of discretion becomes apparent, such abuse will render the inquiry a nullity.

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⁹⁴ *Sherwin v. United States*, 268 U.S. 369 (1924); *cf.* *Cannan v. United States*, 19 F.2d 823 (5th Cir. 1927).

⁹⁵ *Armour & Co.* challenged the questionnaire report on several procedural grounds, maintaining that they are subject to the Department of Agriculture, under the Packers and Stockyards Act, rather than the FTC. 23 FDC Reports, August 28, 1961.

⁹⁶ *Armour* estimated that the cost of the investigation would run as high as \$100,000. 23 FDC Reports, August 28, 1961.