

of the St. Louis Court of Appeals has begun the presentation of the course in Missouri Law with several highly practical and instructive lectures on Missouri appellate practice.

The work in the Practice Court has been greatly expanded under the direction of Dean McClain, with the purpose in mind of affording training in the practical application of the law. Pleading, impanelling of jurors, examination of witnesses, arguments, and the other incidents of trial practice have been included in the agenda. The Practice Court is fortunate in having as its presiding justice, Judge John W. Calhoun, widely known for his long and efficient service in the Circuit Court in St. Louis.

A Committee of the Faculty has been appointed to make a thoroughgoing survey of the curriculum of the School of Law. Important among the problems to be considered are the elimination of duplication in course work, the encouragement of a closer relationship between students and members of the bar, the introduction of new courses of modern importance, and similar problems of fundamental importance in legal education. A program of outside reading in materials of scientific and cultural importance in the law is being developed. Also under consideration is the advisability of offering graduate work leading to the LL.M. degree to students who have shown exceptional promise in the work for the LL.B.

Extensive improvements have been made in January Hall. Tile-Tex flooring has been laid in all corridors and in the classrooms. Extensive expansion in library facilities has been completed. The Law Alumni Association is sponsoring a drive to raise funds for the construction of a students' lounge and smoking room.

NOTES

THE INQUISITORIAL POWERS OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Act¹ constitutes the latest step in legislative intervention in the field of industrial relations. The Act, intended to safeguard the privilege of American workers to organize and select representatives for the purpose of collective bargaining,² goes beyond the mere general assertion of

1. 49 Stat. 457, 29 U. S. C. A. sec. 151 (1935). This Act is popularly known as the "Wagner Act."

2. Madden, *The New Labor Relations Board* (1935) 25 *Amer. Labor Leg. Rev.* 179.

workers' rights. It adds specific prohibitions of certain employers' activities deemed incompatible with genuine freedom for workers to organize and bargain collectively, which are branded "unfair labor practices,"³ and provides administrative machinery for the attainment of its objective.⁴ It is against those provisions which concern themselves with the machinery of enforcement that much of the opposition to the Act will be directed.⁵

This note will consider solely the constitutional limitations upon the investigatory power of the National Labor Relations Board, established by the Act.⁶ For the purposes of the present discussion it will be assumed that the Act as a whole is valid;⁷

3. National Labor Relations Act, sec. 8. The first prohibition of an unfair labor practice forbids an employer from interfering with, restraining, or coercing employees in their right to organize, bargain collectively through self-chosen representatives, and engage in other concerted activities. The second outlawed practice is that of dominating the administration of a labor organization—or, in other words, maintaining a "company union." The third bears upon the problem of the closed shop. The employer is forbidden to encourage or discourage membership in any labor organization by discrimination in hiring or in respect to tenure or other terms of employment; but the Act permits closed-shop agreements with labor unions. The fourth unfair labor practice is that of discharging one who has filed charges or given testimony under the Act. The fifth provision makes it unlawful to refuse to bargain collectively with the representatives of employees. For a general discussion see Starr, *National Labor Relations Act (1936)* 10 *St. John's L. Rev.* 358.

5. McCabe, *Recent Legislation and Labor Relations*, *Princeton U. Alumni Lectures* (1936) 11.

6. National Labor Relations Act, sec. 3. The Board is composed of three members appointed by the President with the consent of the Senate for five-year terms. Removal is by the President upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause. The members are not engaged in any other work but are to devote their full time to the Board. Section 4(a) provides that the salary of the Board members is to be \$10,000 per year.

Up to September 1, 1936, the Board had handled 1,255 cases involving 282,015 workers. Of these, 832 cases, involving 161,407 workers were closed; the others were still pending. Of the settled cases, 338, involving 45,769 workers, were closed by agreement of both parties; 139, involving 25,932 workers, were dismissed by the Board or a Regional Director before any formal action was taken; 280, involving 65,992 workers, were withdrawn by the petitioners before such action; and 75, involving 23,714 workers, were closed in some other way, including compliance with the Board's decision. *N. R. L. B. Release No. 188*, Sept. 10, 1936.

7. In most suits in which the validity of the Act will be challenged those attacking it will attempt to show that the Act extends to employment which is not in interstate commerce and does not directly affect such commerce. Other vulnerable provisions of the Act are: 1) the provision giving the Board the power to make restitution of back pay, which it is charged may violate the jury trial provision of the Constitution; 2) the provision which it is claimed permits the Board to conduct "fishing expeditions" in violation of the Fourth Amendment; 3) the provision permitting the Board to conduct hearings without regard to the established rules of evidence,

for whatever may be the ultimate fate of the Act as applied in particular cases, it is unquestioned that the federal government has the power to provide legislation to insure the amicable settlement of labor disputes and to prohibit unfair labor practices in certain fields where the repercussions of labor difficulty in the channels of interstate commerce are undoubted.⁸ The draftsmen of the Act have carefully incorporated this constitutional ground into the Act.⁹

Since the advent of comprehensive regulatory legislation, beginning about 1880,¹⁰ investigatory powers have been conspicuous in federal measures. The power of investigation, even when exercised with discretion, has been regarded by business interests as an intolerable burden.¹¹ It is noteworthy that investigatory

which it is contended denies due process; 4) the provision that the Board's findings of fact shall be conclusive, which it is claimed violates Article III; and 5) the prohibition of unfair labor practices, which is alleged to violate the right of employers to bargain freely with their employees.

8. See for example *Texas & New Orleans R. R. Co. v. Railroad Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. ed. 1034 (1930), where the court upheld a statute aimed at the avoidance of strikes on interstate railroads, which required employers to deal with the chosen representatives of their employees. But cf. *Railroad Retirement Board v. Alton R. R. Co.*, 295 U. S. 330, 55 S. Ct. 758, 70 L. ed. 1468 (1935), where a compulsory pension plan for the employees of interstate railroads was declared unconstitutional. The jurisdiction of the present National Labor Relations Board does not extend to railroads, whose activities come under the authority of the Railroad Labor Board. National Labor Relations Act, sec. 2 (2). The jurisdiction of the present Board does, however, extend to bus and truck lines.

Recently the Fourth Circuit Court of Appeals on the same day held that the Act was invalid as to a concern doing wholly an intrastate business, *Foster Bros. Mfg. Co. v. N. L. R. B.*, 4 U. S. Law Week 133 (C. C. A. 4, 1936) (manufacturing), but valid as to one engaged in interstate commerce. *N. L. R. B. v. Washington, Virginia & Maryland Coach Co.*, 4 U. S. Law Week 134 (C. C. A. 4, 1936) (interstate bus).

9. Section 1: "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety or operation of the *instrumentalities of commerce*; (b) occurring in the *current of commerce*; (c) materially affecting, restraining or controlling the *flow of raw materials or manufactured or processed goods from or into the channels of commerce*, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the *channels of commerce*." (Italics supplied.)

10. Freund, *Administrative Powers Over Persons and Property* (1928) 180.

11. Freund, *Ibid.*; Mechem, *Fishing Expeditions by Commissions* (1924) 22 Mich. L. Rev. 765 at p. 776. See Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1926) 39 Harv. L. Rev. 694 at note 104, where special emphasis is placed upon the hardship to witnesses who live far from the place of investigation. The writer there points out the possi-

powers have been bestowed more freely upon administrative commissions than upon the government departments.¹²

The use of the inquisitorial power is greatly affected by the procedure employed by an administrative agency. In the case of the National Labor Relations Board, when charges are filed with a Regional Director¹³ he makes a preliminary investigation of the facts, which ordinarily includes an interview with the employer and with those making the charges. The result of this investigation determines whether a complaint shall be issued in the name of the Board. If the formal complaint is issued it is served on the respondent with a notice of hearing in not less than five days. The hearing is held before a trial examiner, who has no prior knowledge of the issues. The Board has been given the power to subpoena witnesses¹⁴ to the hearings and to require the production of documents in connection with proceedings which it institutes.¹⁵ As a result of the hearing and a report by the examiner to it, the Board may make its findings as do other quasi-judicial tribunals and issue cease-and-desist orders based

bility of interruption of the normal operations of business. The burden of calling railroad employees as witnesses to places remote from their homes became so great during the period of federal control that an order was issued to stop the practice. The validity of the order was upheld in *Alabama & Vicksburg Ry. v. Journey*, 257 U. S. 111, 42 S. Ct. 6, 66 L. ed. 154 (1921).

12. See Freund, *supra*, note 8, where it is pointed out that with the exception of a temporary war-time power the Secretary of Agriculture did not have such authority until the passage in 1921 of the Packers and Stockyards Act (42 Stat. 159, 7 U. S. C. A. sec. 181), which incorporated the corresponding provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U. S. C. A. sec. 41 et seq.). The Postmaster General has no examining powers in connection with fraud orders. The Commissioner of Corporations, the predecessor of the Federal Trade Commission, was given ample power as early as 1903.

13. The Board may not act until charges are filed. National Labor Relations Act, sec. 10 (b).

14. The word subpoena in the act is not used in its technical sense. The subpoena of an administrative agency is a mere formal demand for the appearance of a witness or the production of papers. The tribunal is without power to penalize disobedience to its demands, but is dependent on the proper court for enforcement.

15. National Labor Relations Act, sec. 11 (1). The want of the subpoena power, except in connection with elections was a major factor hampering the operations of the old Board (created by Executive Order No. 6763, pursuant to Public Resolution No. 44, June 19, 1934). The Board was, also, dependent upon the Department of Justice to prosecute violators of its orders, as offenders against the National Industrial Recovery Act. In addition, when suits were brought to enjoin violations at the instance of the old Board the defendants had thirty days to answer, move to dismiss, or apply for a bill of particulars. These procedural delays tended to defeat the very purpose of the Board, which was to provide prompt handling of particular controversies. *Hearings Before the Senate Committee on Educa-*

upon the findings.¹⁵ The Board may not, however, punish disobedience to its orders, whether to cease and desist or to give or produce evidence. That power rests in the federal district court within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which the recusant person is found or transacts business,¹⁷ to which the Board must appeal for enforcement. This procedure provides adequate enforcement of the Board's orders and at the same time avoids a conflict with constitutional guaranties.¹⁸ As applied to compelling testimony it has been accorded judicial sanction.¹⁹ The Board is also given the power to conduct elections to determine the representatives for collective bargaining under the "majority rule" provision.²⁰

Numerous impediments may be placed in the way of the suc-

tion and Labor, 74th Congress, 1st Session, on S. 1958 (March 11-14, 1935) 48 and 60. At p. 93 it is revealed that the Department of Justice instituted no prosecutions of violators of the Board's orders.

16. National Labor Relations Act, sec. 10 (e).

17. National Labor Relations Act, sec. 11 (2).

18. The power to commit for contempt has been labelled a "judicial" function so far as federal jurisdiction is concerned. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485 (1894). Yet, historically, this power was not a judicial one. Fox, *History of Contempt of Court* (1927) 49. It should be remembered that the power is also inherent in American legislatures. Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. of Pa. L. Rev. 780. Rarely is the power given to a legislative committee. Herwitz and Mulligan, *The Legislative Investigating Committee* (1933) 33 Col. L. Rev. 4 at 24. The problem is discussed generally in Note, *The Power of Administrative Agencies to Commit for Contempt* (1935) 35 Col. L. Rev. 578. It is regrettable that the authority of administrative bodies to punish for contempt has been determined largely by conceptual applications of the doctrine of the separation of powers. "If the function of the contempt power is to remove impediments to the administration of justice, it is a narrow view which would distinguish between the administrative and judicial departments" 35 Col. L. Rev. at 587. In New York some local boards are given the powers of Justices of the Peace. *The Public Health Law*, sec. 21; N. Y. Cahill's Consol. Laws (1930) 1783. In some states by judicial decision the right of an administrative agency to commit for contempt is established. See *Ex parte Battel*, 207 Cal. 227, 277 Pac. 725 (1929); *Ex parte Sanford*, 236 Mo. 665, 139 S. W. 376 (1911); *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931). *Contra*, *People v. Swena*, 88 Colo. 337, 296 Pac. 271 (1931); *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190 (1892).

19. See testimony of Mr. Biddle on p. 95 of *Hearings Before the Committee on Education and Labor*, 74th Congress, 1st Session on S. 1958 (March 11-14, 1935). The power to invoke the aid of a court in furtherance of an investigation by administrative bodies, once challenged as requiring the court to exercise a non-judicial function, is now well established. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 S. Ct. 1125, 38 L. ed. 1047 (1894); *Railroad Labor Board v. Robertson*, 3 F. (2d) 488 (D. C. N. D. Ill., 1924); *Cudahy Packing Co. v. U. S.*, 15 F. (2d) 133 (C. C. A. 7, 1926).

20. National Labor Relations Act, sec. 9 (a).

cessful administrative use of the investigatory features of the Act. For example, a contumacious witness may refuse to answer a question²¹ or to produce desired documents and may deny the Board access to his books and papers. A legal battle may be instituted either by the party being investigated, seeking to enjoin the further prosecution of the inquiry, or by the investigating body, making application to the appropriate court to cite the recalcitrant witness for contempt.²² The controversy will then enter upon its long progress through the courts. During the pendency of the litigation, while motions, rulings, etc., delay decision, the Board will find it more and more difficult to secure voluntary compliance with its demands for evidence in other cases. Until a final court decision is rendered the power of the tribunal to pursue the investigation will be dubious.

I.

One of the greatest obstacles to the administration of the Act in its early stages was an influx of suits which greeted the attempt of the Board to conduct hearings and elections, for the purpose of enjoining further prosecution of the inquiries. In the majority of these cases the courts have been disinclined to grant the injunctions.²³ Where the application for a restraining order

21. Onerous and oppressive though it be, upon every member of society rests the duty to testify in the cause of another when called upon. *Blair v. U. S.*, 250 U. S. 273 (1918); 4 Wigmore, *Evidence* (2d ed. 1923) secs. 2175, 2192, 2193. Long before the separation of the American colonies from England, compulsion of witnesses to appear and testify had become established in the mother country. See for a list of statutes, Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1926) 39 *Harv. L. Rev.* 694 at note 1. Originally this duty was present only when the cause was before a judicial tribunal. Freund, "Historical Survey" in *Growth of American Administrative Law* (1923) 17, 18. Now, however, the power of an administrative body to summon witnesses and to require the production of books, papers and other documents relating to the matter under investigation is well settled. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 476, 14 S. Ct. 1125, 38 L. ed. 1047 (1894).

It does not seem that it can be successfully contended that it is more burdensome to testify before an administrative tribunal than to testify in a regularly constituted court. Lilienthal, *supra*, at p. 723, note 39; Lange-luttig, *Constitutional Limitations on Administrative Power of Investigations* (1933) 28 *Ill. L. Rev.* 508, 510.

22. *Handler, The Constitutionality of Investigations By the Federal Trade Commission* (1928) 28 *Col. L. Rev.* 708.

23. *Associated Press v. Herrick*, 13 F. Supp. 897 (D. C. S. D. N. Y., 1936), *aff'd* 85 F. (2d) 56 (C. C. A. 2, 1936); *Precision Casting Co. v. Boland*, 13 F. Supp. 877 (D. C. W. D. N. Y., 1936), *aff'd* 85 F. (2d) 15 (C. C. A. 2, 1936); *E. I. DuPont De Nemours & Co. v. Boland*, 85 F. (2d) 12 (C. C. A. 2, 1936); *Bradley Lumber Co. of Ark. v. N. L. R. B.*, 84 F. (2d) 97 (C. C. A. 5, 1936); *S. Buschsbaum & Co. v. Beman*, 14 F. Supp. 444 (D. C. N. D. Ill., 1936); *Alexander Smith & Sons Carpet Co. v. Herrick*,

is made when the Board is making its investigation and before a formal order has been issued, the courts hold that, even if the Act were wholly unconstitutional, there is insufficient ground for equitable relief against a mere hearing.²⁴ A valid ground of equitable jurisdiction must be shown before the enforcement of an unconstitutional statute will be enjoined. It must appear that the petitioners are being threatened with irreparable injury which cannot otherwise be adequately remedied.²⁵ Courts may not restrain administrative action in the exercise of powers vested by Congress, merely on the assumption that it might in the future result in irreparable harm to the petitioners.²⁶ The inconvenience of an investigation, the interruption of the normal operations of a business caused by the absence of employees who are subpoenaed as witnesses, the odium of publicity, the exposure

85 F. (2d) 16 (C. C. A. 2, 1936); Jamestown Veneer & Plywood Corp. v. Boland, 15 F. Supp. 28 (D. C. W. D. N. Y., 1936); Ohio Custom Garment Co. v. Lind, 13 F. Supp. 553 (D. C. S. D. Ohio, 1936); Bemis Bag Co. v. Feidelson, 13 F. Supp. 153 (D. C. W. D. Tenn., 1936), aff'd. without opinion (C. C. A. 6, 1936); Bethlehem Shipbuilding Corp. v. Nylander, 14 F. Supp. 201 (D. C. S. D. Cal., 1936); Carlisle Lumber Co. v. Hope, 83 F. (2d) 92 (C. C. A. 9, 1936); Dartmouth Woolen Mills v. Meyers, 15 F. Supp. 751 (D. C. D. N. H., 1936); Blood & Co. v. Madden, 15 F. Supp. 779 (D. C. E. D. Pa., 1936); Remington Rand v. Lind, 4 U. S. Law Week 102 (D. C. W. D. N. Y., 1936); General Motors Corp. v. Bajork,—F. Supp.—(D. C. E. D. Mo., 1936), rev'd—F. (2d)—(C. C. A. 8, 1936).

In this connection it should be noted that the present Act, unlike the prior Act (48 Stat. 1183), denies equity review of the Board's decision to hold hearings or conduct elections.

According to Senator Wagner (*Hearings Before the Senate Committee on Education and Labor*, 74th Congress, 1st Session on S. 1958 (March 11-14, 1935) 50): "An election is nothing but an investigation, a factual determination of who are the representatives of employees. There is no more reason why this should be delayed, than why an investigation by the Board as to whether there has been an unfair labor practice should be held up." But when after the election the Board orders an employer to deal with a designated group, the whole conduct of the election becomes part of the record which the court may be asked to review, thus enabling the affected employer to obtain judicial review of the entire matter. To quote from Senator Wagner's testimony again, ". . . it does not stoop to the folly of holding the Board up twice, once by court review before the election, and then by the court review of the order based upon the election."

24. That this rule is well established see *Boise Artisan Co. v. Boyd*, 213 U. S. 276, 285, 29 S. Ct. 426, 53 L. ed. 796 (1909).

25. See *General Motors Corp. v. Bajork*,—F. Supp.—(D. C. E. D. Mo., 1936), citing *Terrace v. Thompson*, 263 U. S. 197, 214 (1923); *Spielman Motor Sales Corp. v. Dodge*, 295 U. S. 89 (1935); *Hegeman Farms v. Baldwin*, 293 U. S. 163 (1934).

26. *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159 (1929); *Dalton Adding Machine Co. v. State Corp. Comm. of Va.*, 236 U. S. 699 (1915); *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 280 Fed. 45 (C. C. A. 8, 1922); *Lewis Publishing Co. v. Wyman*, 228 U. S. 610 (1913).

of confidential information and the disruption of alleged amicable relations with employees are not factors giving rise to irreparable injuries. These injuries are largely conjectural and such as may grow out of ordinary litigation.

If the Board has already issued a formal order based upon the result of its investigation, there is no reason to grant an injunction against its enforcement, since the order is not mandatory and obedience can be compelled only by a court.²⁷ Should the Board apply to a court for an enforcement order, an objection to the court's jurisdiction on the ground that it was conferred by an unconstitutional enactment will provide a complete remedy.²⁸

One other ground has been relied on in an attempt to show the need for equitable relief. The petitioners have maintained that since the Act provides that the findings of the Board as to the facts, if supported by evidence, shall be conclusive,²⁹ a full judicial hearing before a court, allegedly guaranteed by the Constitution, will be denied. The courts generally have not felt that injunctive relief should be afforded on this ground;³⁰ for arbitrary and capricious findings may be set aside.³¹ Even if the provision for the conclusiveness of the Board's fact findings is held to be invalid,³² full judicial review may be accorded and the remainder of the Act be permitted to stand.

27. National Labor Relations Act, sec. 10 (e). There is convincing case authority for the proposition that a provision in an act for the enforcement and review of cease-and-desist orders affords an adequate remedy. *U. S. v. Ill. Central Ry.*, 291 U. S. 457 (1934); *White v. Johnson*, 282 U. S. 367 (1931); *Sykes v. Jenny Wren Co.*, 78 F. (2d) 729 (D. C. App., 1935), cert. denied 56 S. Ct. 147 (1936).

28. This basis is especially well considered in the following cases: *Associated Press v. Herrick*; *Precision Casting Co. v. Boland*; *Bradley Lumber Co. of Ark. v. N. L. R. B.*; all *supra*, note 23.

29. National Labor Relations Act, sec. 10 (e).

30. *Precision Casting Co. v. Boland*, 13 F. Supp. 877, 884 (D. C. W. D. N. Y., 1936); *Bradley Lumber Co. of Ark. v. N. L. R. B.*, 84 F. (2d) 97, 100 (C. C. A. 5, 1936); *Eagle Picher Lead Co. v. Madden et al.*, 15 F. Supp. 407 (D. C. N. D. Ill., 1936).

31. *Voehl v. Indemnity Ins. Co.*, 288 U. S. 162, 166 (1933); *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266, 276-278.

32. It is possible to adopt the view that the N. L. R. B. undertakes to determine the duties of private individuals to one another, while other administrative agencies, such as the Federal Trade Commission, enforce no private rights but simply prohibit harmful conduct in the public interest. In the case of *Crowell v. Benson*, 285 U. S. 22 (1932) at p. 50, Mr. Chief Justice Hughes gave judicial recognition to this distinction when he said, "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority, in connection with the performance of constitutional functions of the executive or legislative departments Famil-

ilar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, the public health, the facilities of the post office, pensions and payments to veterans." In the former type of proceeding, judicial trial de novo of questions of jurisdictional fact was held to be necessary. If the holding in *Crowell v. Benson* applies, the courts will insist upon trial de novo of jurisdictional facts rather than accept as conclusive the findings of the Board, or will conclude that the Act does not permit such review and therefore is invalid.

One commentator (see *Legislation*, 35 Col. L. Rev. 1098, 1112 (1935) at note 100) has suggested that since *Crowell v. Benson*, which announced the requirement of judicial redetermination of jurisdictional facts, specifically exempted findings of administrative bodies performing government functions, such as the removal of burdens from interstate commerce, the Labor Board will come within the acknowledged exception. The commentator states that the analogy to the Federal Trade Commission is unavailing but feels that an analogy may be drawn to the Interstate Commerce Commission, which is empowered to remove obstructions to interstate commerce by enforcing the rights of shippers. It is submitted that this analogy will be rejected by the court. The courts have long placed the railroads in a judicial pigeonhole of their own, and have afforded them treatment differing from that given to any other type of industry. *Texas & New Orleans R. R. v. Railroad Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. ed. 1034 (1930); *Penn. R. R. v. U. S. Railroad Labor Board*, 261 U. S. 72, 43 S. Ct. 278, 67 L. ed. 536 (1923). In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305 (1924) it was said, "The mere fact of carrying on a commerce within state lines and of being organized as a corporation do not make men's affairs public, as those of a Railroad may be." In *Wolff v. Industrial Court*, 262 U. S. 522, 543 (1922) the statement is, "The minutely detailed government supervision . . . to which railroads of the country have been gradually subjected by Congress . . . furnishes no precedent for regulation of the business of the plaintiff in error whose classification as public is at best doubtful." See also the language in *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 43 (1917); *Wilson v. New*, 243 U. S. 332 (1917); *St. Louis, etc. Ry. v. Taylor*, 210 U. S. 281 (1903).

The analogy to the Federal Trade Commission is more persuasive. In the case of both agencies the complaint is brought in the name of the Board, which bears the expense of the proceeding. The party who brings the matter to the agency's attention is not a party to the proceedings and his identity may never be known. 38 Stat. 721, 15 U. S. C. A. sec. 46 (1914); 49 Stat. 453, 29 U. S. C. A. sec. 160 (1935). The Federal Trade Commission is not organized to provide a private administrative remedy for private wrongs. *Federal Trade Commission v. Klesner*, 280 U. S. 19, 50 S. Ct. 1, 74 L. ed. 138 (1930). It would seem that labor practices which have repercussions in the channels of interstate commerce are as "public" as the matters with which the Federal Trade Commission is concerned. Certainly the effects of labor disputes in large industries, involving large numbers of workers, cannot be considered as having no public effect. The private aspect seems merely incidental.

Cases dealing with the Board's activities to date have indicated that judicial review of the jurisdictional facts will be required, but the opinions are not revealing as to the method employed in such review. Probably the courts mean review upon trial de novo, since in all instances they cite *Crowell v. Benson*. *Precision Casting Co. v. Boland*, 13 F. Supp. 877, 884 (D. C. W. D. N. Y., 1936); *Bradley Lumber Co. of Ark. v. N. L. R. B.*, 84 F. (2d) 97 (C. C. A. 5, 1936) at p. 100, "Nor do we think that the Board's findings of facts on which jurisdiction rests will conclude a court

In some instances petitioners have been successful in obtaining temporary injunctions preventing the Board or its agents from conducting investigations.³³ These cases have been decided on the ground that the activities which were being investigated were not subject to the federal power and, therefore, that the Act as applied to them is invalid. It is submitted that the lower federal courts are exceeding their power in enjoining the enforcement of an Act of Congress in the absence of a showing of irreparable injury.³⁴ To enjoin a hearing or election conducted by the Board acting on a formal complain is to surround the labor policies and activities of employers with a needless veil of secrecy.³⁵

Courts granting injunctions have announced that those provisions of the Act which purport to give an adequate remedy at law are ineffective because of the unconstitutionality of the entire Act, thereby leaving the employer without a remedy at law.³⁶ The logical conclusion from such reasoning would seem to place the right to injunctions upon the general equality power of the courts, which requires as a condition precedent to the issuance of an injunction that the probability of irreparable injury be

when reviewing a final order under the procedure fixed by the Act, but under a proper construction of the Act, jurisdictional findings will be subjected to full judicial review."

33. *Stout v. Pratt*, 12 F. Supp. 865 (D. C. W. D. Mo., 1936), aff'd 85 F. (2d) 172 (C. C. A. 8, 1936); *Independent Workers of Clayton-Mark & Co. v. Beman*, 13 F. Supp. 627 (D. C. N. D. Ill., 1936); *El Paso Electric Co. v. Elliott*, 15 F. Supp. 81 (D. C. W. D. Tex., 1936); *Bendix Products Corp. v. Beman*, 14 F. Supp. 58 (D. C. N. D. Ill., 1936); *N. L. R. B. v. Friedman-Harry Marks Clo. Co.*, 85 F. (2d) 1 (C. C. A. 2, 1936); *N. L. R. B. v. Jones & Laughlin Steel Corp.* 83 F. (2d) 998 (C. C. A. 5, 1936); *Eagle Picher Lead Co. v. Madden*, 15 F. Supp. 407 (D. C. N. D. Okla., 1936); *Bethlehem Shipbuilding Corp. v. Meyers*, 15 F. Supp. 915 (D. C. D. Mass., 1936); *General Motors Corp. v. Bajork*,—F. (2d)—(C. C. A. 8, 1936); *Fruehauf Trailer Co. v. N. L. R. B.*, 85 F. (2d) 391 (C. C. A. 6, 1936); *Oberman & Co. Inc. v. Pratt*, 4 U. S. Law Week 184 (D. C. W. D. Mo., 1936).

34. Allegations of irreparable injury based upon the threat of issuance of a cease-and-desist order by the Board are prematurely made. *Dalton Adding Machine Co. v. State Corp. Comm.*, 236 U. S. 699, 701 (1915); *Continental Baking Co. v. Woodring*, 286 U. S. 352, 369 (1932). At this stage of the proceeding it cannot be shown with any degree of certainty, if at all, what the findings and subsequent order of the Board will be. There are no penalties provided in the Act for failure to obey the Board's order. The only thing to fear is punishment for contempt of a court order which affirms an order of the Board. Note, 4 Geo. Wash. L. Rev. 391, 394 (1936).

35. "When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private." 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2192.

36. *Stout v. Pratt*, 12 F. Supp. 865 (D. C. W. D. Mo., 1935), aff'd 85 F. (2d) 172 (C. C. A. 8, 1936); *Eagle Picher Lead Co. v. Madden*, 15 F. Supp. 407 (D. C. N. D. Okla., 1936).

established. Some courts apparently have felt that unless they enjoined the Board the petitioners would be "harassed and annoyed."³⁷

II.

The power to compel the production of company records is explicitly granted by the Act to the Board.³⁸ Although the power has been exercised sparingly, it remains to be considered how far the Board may pursue its demands should it elect that course. In demanding the production of books and records the Board must not traverse the "search and seizure" guaranties³⁹ of the Fourth Amendment.⁴⁰ This amendment was intended to prevent the tyrannical administration and enforcement of the law⁴¹ and has been construed as embodying those principles of constitutional liberty and security which forbid unwarranted invasions of private premises by the government and its agents.⁴²

Few constitutional provisions have received such universal judicial protection against legislative encroachment.⁴³ In cases

37. *Eagle Picher Lead Co. case*, supra, note 36 at p. 408.

38. Thus avoiding the problem of whether in the absence of express power it could come within the general power given to administrative bodies to make all rules and regulations necessary for the performance of the functions vested in them. See note, *Investigatory Powers of the Securities and Exchange Commission* (1935) 44 *Yale L. J.* 819, 822, where the commentator discusses the difficulty which arose in this connection under the N. I. R. A. (15 U. S. C. A. sec. 701), which did not expressly grant the power. But many of the Industrial Codes promulgated under the N. I. R. A. granted this power to the Code Authorities. See *Amazon Petroleum Corp. v. Ry. Comm. of Texas*, 5 F. Supp. 639 (D. C. E. D. Tex., 1934); contra, *Ryan v. Amazon Corp.*, 71 F. (2d) 1 (C. C. A. 5, 1934).

39. The term "search and seizure" has so long been associated in the minds of the public with the crudities of prohibition enforcement, that effects it with a stigma, but its association with an orderly investigation by an administrative body in connection with the issuance of subpoenas and requests for reports is all-important. Its inter-relation with the visitatorial powers of administrative tribunals is evidenced by the many adjudicated cases. Handler, *Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 *Col. L. Rev.* 905, 909.

40. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . ."

41. Cooley, *Constitutional Limitations* (8th ed. 1927) 612; Fraenkel, *Concerning Searches and Seizures* (1921) 34 *Harv. L. Rev.* 362, 364; Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 *Col. L. Rev.* 905, 910.

42. *Boyd v. U. S.*, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. ed. 746 (1886).

43. *Sgro v. U. S.*, 287 U. S. 206 (1933); *Boyd v. U. S.*, 116 U. S. 616 (1886); *Byars v. U. S.*, 273 U. S. 28 (1927); *Marron v. U. S.*, 275 U. S. 192 (1927); *U. S. v. Lefkowitz*, 285 U. S. 452 (1932); *Safarik v. U. S.*, 62 F. (2d) 892 (C. C. A. 8, 1933), reh. denied, 63 F. (2d) 369; *Benton v. U. S.*, 70 F. (2d) 24 (C. C. A. 4, 1934), cert. denied, 292 U. S. 642.

Weeks v. U. S., 232 U. S. 383, 391-392 (1914): "The effect of the Fourth

of doubt the courts have generally chosen to uphold the constitutional immunities rather than to attempt to find a basis for circumventing them.⁴⁴

When, in an endeavor to peruse company records, an administrative agency is confronted with a protesting party, it makes use of its subpoena power.⁴⁵ In this connection the order must

Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws."

Bram v. U. S., 168 U. S., 532, 544 (1897); "... both (Fourth and Fifth) of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which have been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibility of future legislative change."

In *re Pacific Railway Commission*, 32 Fed. 241, 250 (1887): "... of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of her person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." Cited with approval in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894).

44. *U. S. v. Di Corvo et al.*, 37 F. (2d) 125 (D. C. D. Conn., 1927). This view finds encouragement in an opinion by the Supreme Court in *Byars v. U. S.*, 273 U. S. 28 (1927): "The Fourth Amendment was adopted in view of the long misuse of power in the matter of searches and seizures . . . and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of the constitutional right."

Bradley, J., in *Boyd v. U. S.*, 116 U. S. 616 (1886): "Illegitimate and unconstitutional practices get their first footing . . . by silent deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachment thereon."

45. Although a "search" implies a quest by an officer and a "seizure" brings to mind a forcible dispossession, the Supreme Court has held that a subpoena *duces tecum* comes within the purview of the Fourth Amendment. *Hale v. Henkel*, 201 U. S. 43 (1906); *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385 (1920). But see 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2264 for a criticism. It is to be noted that subpoenas have been upheld even where very broad in their requirements, the court in each case apparently being satisfied that the documents demanded were material to the matter under investigation and were reasonably specified. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908): "books relating to any dealings or busi-

not require access to irrelevant or insufficiently specified papers and records.⁴⁶

There is no set formula for the determination of the reasonableness of a subpoena.⁴⁷ Each case must be decided with respect to its own facts and circumstances, guided by the "rudimentary principles of justice."⁴⁸ The courts have been fairly consistent in holding that no inquisitorial board should be permitted of its own volition to compel one to produce documents, books, and papers of whatever nature, to the scrutiny of the tribunal, without a judicial check looking to the safeguard of the rights of the party or company whose records are being demanded.⁴⁹ Before an investigating agency may demand documents, it must show that such documents are evidentiary, *i. e.*, contains relevant evidence.⁵⁰

Investigations based upon complaints^{50a} cannot in themselves

ness between Jan. 1, 1904, and the day of notice"; *Wheeler v. U. S.*, 226 U. S. 478 (1913): "All cash books, ledgers, journals and other books of accounts"; *Wilson v. U. S.*, 221 U. S. 361 (1911): books relating to corporate matters"; *Brown v. U. S.*, 276 U. S. 134 (1928): "All papers, etc., during a specified period relating to manufacture and sale of a special class of goods."

46. The requirements of relevancy and specificity in judicial subpoenas are often mentioned interchangeably. Note, 45 *Yale L. J.* 1503, 1506 (1936).

47. *Rocchia v. U. S.*, 78 F. (2d) 966 (C. C. A. 9, 1935); *U. S. v. Vatune*, 292 Fed. 497 (D. C. Cal., 1923); *Parks v. U. S.*, 76 F. (2d) 709 (C. C. A. 5, 1935), cert. denied 56 S. Ct. 111 (1936); *Peru v. U. S.*, 4 F. (2d) 881 (C. C. A. 8, 1925).

48. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 307, 44 S. Ct. 336, 68 L. ed. 696 (1924). The question of reasonableness is relegated in reality to the views of the judges who comprise the majority of the court at any particular time. The rule of reason is an elastic yardstick.

49. *Cornelius, Searches and Seizures* (1926) 44, citing *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908) and *Foster v. Kenny*, 124 N. Y. Supp. 667 (1910).

50. *Federal Trade Commission v. Smith*, 34 F. (2d) 323 (D. C. S. D. N. Y., 1929); *Federal Trade Commission v. American Tobacco Co.*, supra, note 48.

50a. This is the only kind of an investigation the N. L. R. B. is authorized to carry on. National Labor Relations Act, sec. 10 (b). As to whether statutory investigations conducted by an administrative agency on its own motion are permissible as applied to businesses affected with a public interest, see Note, 44 *Yale L. J.* 819, 831 (1935). See discussion at note 74, *infra*.

Investigations instituted prior to the filing of a complaint or charge of impropriety or violation giving rise to far reaching subpoenas have been denounced as "fishing expeditions" conducted in the hope of securing something of public interest for publication. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305 (1924).

Cudahy Packing Co. v. U. S., 15 F. (2d) 133 (C. C. A. 7, 1926), where the court held that in advance of any complaint alleging impropriety in the keeping of the records the Secretary of Agriculture could not examine and copy all books, records, papers, etc. "Legislative intent to permit unlimited

be condemned as "fishing expeditions," and a subpoena issued in pursuance thereof could hardly be considered violative of the constitutional guaranties of the Fourth Amendment,⁵¹ unless the issuing body is unable to satisfy the court as to the relevancy of the papers subpoenaed.⁵²

III.

The Board has indicated that it does not intend to misuse its investigatory powers and has shown that it intends to keep within legal bounds, so as not to invite judicial challenge of its pow-

inspection . . . to learn if there may be cause to believe that a highly penal statute has been transgressed will not be lightly presumed."

Clair Furnace Co. v. Federal Trade Commission, 285 Fed. 936 (D. C. App., 1923) rev'd. 274 U. S. 160 (1927) on ground that petitioner had a remedy at law. "Common justice would seem to demand that before business methods pursued by a corporation or an individual should be investigated, the party should be apprised either by a formal charge or by notice of the extent of the proposed investigation in order that a day in court may be accorded."

51. Federal Trade Commission v. Nulomoline Co., 254 Fed. 988 (C. C. A. 2, 1918); Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 Fed. 45 (C. C. A. 8, 1922); Royal Baking Powder Co. v. Federal Trade Commission, 32 F. (2d) 966 (D. C. App., 1929).

52. United States et al. v. Union Trust Co. of Pittsburgh, 13 F. Supp. 286 (D. C. W. D. Pa., 1936). The reasonableness of the scope of the subpoena may depend upon the nature of the business affected. See Cudahy Packing Co. v. U. S., 15 F. (2d) 133 (C. C. A. 7, 1926), where it is indicated that a broader subpoena *duces tecum* would be valid as to stockyard owners or railroads than as to packers. In Bartlett Frazier Co. et al. v. Hyde, 65 F. (2d) 351 (C. C. A. 7, 1933), cert. denied 54 S. Ct. 70 (1934), the acts of the Secretary of Agriculture and the Grain Exchange Supervisor in searching records and books of a Board of Trade member and requiring reports as authorized by the statute and regulations promulgated, were challenged but upheld as not violative of the Fourth Amendment. The court said, "The Amendment, which declares the right of the people to be secure in their persons and papers against unreasonable search, cannot be applied to regulations which require reports and disclosures in respect to a business which is affected with a public interest, so far as such disclosures may be reasonably necessary for the due protection of the public. . . . Indeed, where public interest requires it, the right of visitation and disclosure has been extended even to business not charged with a public interest, as witness the taxing power . . ." citing U. S. v. First National Bank of Mobile, 295 Fed. 142 (D. C. S. D. Ala., 1924), aff'd. 267 U. S. 576 (1925).

The courts are more likely to be liberal toward a Congressional subpoena. When Congress subpoenas a witness or documents the courts generally regard only two issues: 1) possible legislative purpose, and 2) rational connection with the subject matter of the inquiry. As regards Congressional investigations any possible invasion of the "right of privacy" erected by Supreme Court dicta would seem to be outweighed by the beneficial social interest in making possible further legislation. See for the most recent judicial expression, Strawn v. Western Union Telegraph Co., 3 U. S. Law Week 646 (D. C. S. Ct., 1936); commented on and discussed in 36 Col. L. Rev. 841 and 45 Yale L. J. 1503. See also McGrain v. Daugherty, 273 U. S. 135, 161 (1927); Landis, Constitutional Limitations upon the Power of Investigations (1926) 40 Harv. L. Rev. 153, 219.

ers by those to whom its activities are inimical.⁵³ So far the Board has not attempted to conduct "posthumous" investigations.⁵⁴

While it has been advanced that the enforcement of the investigatory provisions of the Act⁵⁵ would be tantamount to a disregard of the principles laid down in the Fourth Amendment,⁵⁶ the few cases which have dealt with the problem have held otherwise. In *S. Buchsbaum & Co. v. Beman*⁵⁷ the court held that the authority of the Board to inspect the books of the company under investigation is not an invasion of constitutional rights since judicial protection is afforded by the provisions requiring court enforcement. In another case⁵⁸ where the Board applied for an order requiring the respondent to comply with a subpoena, the court granted the application. The subpoena called for the "payroll" of the entire company except for the supervisory employees. The investigation and contemplated election

53. Rules and Regulations of the N. L. R. B., Art. 2, sec. 21, "Any member may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents that *relate to any matter under investigation* or in question, before the Board, its member, agent, or agency, conducting the hearing or investigation. Application for the issuance of such subpoenas may be filed by any party to the proceedings with the Regional Director, or, during the hearing with the Trial Examiner. Such application shall be timely and shall *specify* the name of the witness and the nature of the facts to be proved by him, and must *specify* the documents, the production of which is desired, *with such particularity* as will enable them to be *identified* for the purposes of production." (Italics supplied.)

In N. L. R. B. Release No. 164, August 1, 1936, we find the statement, "It is not the practice of the Board to give publicity to charges of unfair labor practices filed against an employer. The Board only makes these public when its investigation shows sufficient ground for issuing a formal complaint. For that reason, disputes which reach satisfactory endings 'out of court' seldom receive public notice."

54. Such investigations by the Securities and Exchange Commission have been condemned. *Jones v. Securities and Exchange Commission*, 56 S. Ct. 654 (1936); commented on in 24 *Georgetown L. J.* 936; 49 *Harv. L. Rev.* 1369; 34 *Mich. L. Rev.* 1031. At p. 662 of 56 S. Ct. the court said, "An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made, and if the purpose disclosed is not a legitimate one, he may not be compelled to answer."

55. Section 11 enumerates the extent of the Board's investigatory powers discussed throughout.

56. Bamberger, *Is the National Labor Relations Act Unconstitutional?* (1935) 40 *Comm. L. J.* 570, 571.

57. 15 *F. Supp.* 444, 450 (D. C. N. D. Ill., 1936).

58. *N. L. R. B. v. New England Transportation Co.*, 14 *F. Supp.* 497 (D. C. D. Conn., 1936).

related only to the respondent's mechanical department. Yet the court held that the application was not unreasonably broad, since certain employees may have overlapping duties and nothing short of a complete list of employees would suffice to enable the Board to make an accurate classification.

IV.

Another constitutional provision which may be opposed to the compulsory investigatory power is the Fifth Amendment which protects an individual from compulsory self-incrimination,⁵⁹ in both administrative and judicial proceedings.⁶⁰ The privilege against self-incrimination, which has found sanction in all state constitutions but two,⁶¹ as well as in the Fifth Amendment, operates as a rule of evidence to prevent the exaction of forced testimony.⁶²

With the rise of governmental regulation of business, the privilege has been employed to hamper officials in obtaining necessary information to combat outlawed practices.⁶³ To overcome this difficulty, "immunity statutes" have been passed, which compel the giving of desired testimony and grant immunity from resulting prosecution.⁶⁴

As to the individual, statutory immunity against prosecution or subjection to a penalty on account of matters concerning which the person is compelled to testify or produce books and other documentary evidence, renders the compulsion unobjectionable.⁶⁵

59. ". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . ."

60. *McCarthy v. Arndstein*, 266 U. S. 34, 40, 45 S. Ct. 16, 69 L. ed. 158 (1932).

61. Iowa and New Jersey recognize it as part of their common law. *State v. Height*, 117 Iowa 650, 91 N. W. 935 (1902); *State v. Zdanowicz*, 69 N. J. L. 620, 55 Atl. 743 (1903).

62. 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2250; note, 41 Yale L. J. 618 (1932).

63. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 Mich. L. Rev. 191.

64. The first enactment was in 1893, 27 Stat. 443, 49 U. S. C. A. sec. 46. The provision of Section 11 (3) of the National Labor Relations Act is typical. The immunity statutes are uniformly qualified by the proviso that the immunity they create shall not extend to punishment for perjury committed while testifying in compliance with them. The justification for this exception is found in the rationale that the power to compel the giving of testimony includes the power to punish the giving of false testimony. The Supreme Court has put it this way: "The immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein v. U. S.*, 222 U. S. 139, 141-142 (1911); Corwin, *supra*, note 69, at p. 196, note 99.

65. 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2281. The immunity to be effective must be coextensive with the protection afforded by the Constitu-

The protection of the Fifth Amendment, however, does not extend to corporations.⁶⁶ When it is recognized that in the large majority of instances the National Labor Relations Board will be dealing with corporations, this construction may be of great effect. Apart from policy, there is little to support this construction and it has been suggested that it would be wiser to grant to corporations the protection of the Fifth Amendment and then to extend to them the benefits of the immunity clause.⁶⁷

V.

The inquisitorial provisions of the National Labor Relations Act have been carefully drafted.⁶⁸ Except in four instances, the

tion (*Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Brown v. Walker*, 161 U. S. 591 (1896)) which has been construed to mean full and complete immunity against prosecution by the government compelling the witness to answer. *U. S. v. Murdock*, 284 U. S. 141, 149 (1931); *Nelson v. U. S.*, 201 U. S. 92 (1906). The court has said that the danger of prosecution in another jurisdiction is too remote to be considered. That the danger is great and not merely remote is pointed out in a note on the subject, 41 *Yale L. J.* 618 (1932). The reasoning is analogous to that concerning the admissibility of evidence obtained through an unlawful search in violation of the Fourth Amendment. Where this evidence is obtained by a government official it is inadmissible. *Weeks v. U. S.*, 232 U. S. 383 (1914); 30 *Mich. L. Rev.* 461 (1932). The immunity attaches, however, only when the testimony is given in obedience to a subpoena and not where it is voluntarily given. *Sherwin v. U. S.*, 268 U. S. 369 (1925), where the petitioner maintained that the prosecution should be dismissed because the indictment rested upon information which the Commission had compelled him to give. The facts showed that they gave the information to an agent of the Federal Trade Commission who demanded it but no order was issued in the matter, no subpoena served, etc. The court held the indictment valid.

So far as the states are concerned, West Virginia seems to have gone the farthest of any state in that it has a statute granting a blanket immunity to cover all administrative investigations. *West Virginia Code* (1932) sec. 5742.

66. *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. ed. 652 (1906). Not only may an officer not refuse to produce corporate records in his custody which tend to incriminate the corporation, but he is not even privileged to refuse to disclose such documents as may incriminate himself. *Hale v. Henkel*; *Nelson v. U. S.*, 201 U. S. 92 (1906); *Wilson v. U. S.*, 221 U. S. 361 (1913); *Wheeler v. U. S.*, 226 U. S. 478 (1913); *Drier v. U. S.*, 221 U. S. 394 (1913); *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 211 U. S. 612 (1911).

67. Freund, *Administrative Powers Over Persons and Property* (1928) 193: "If the protection against self-incrimination is based upon considerations of wise policy, the subtlety of distinction between the corporation and the officer or employee through whom alone the corporation can testify is to be deprecated, and the reason for making a difference between protection against self-incrimination (which is denied) and the protection against unreasonable search and seizure (which is conceded) is difficult to understand." Accord, Willis, *Constitutional Law* (1936) 855.

68. Lloyd K. Garrison, Dean of the Wisconsin University Law School and past Chairman of the first National Labor Board testified before the Senate Committee on March 15, 1935 and said, "I have gone over it (the Act) very

provisions extend the investigatory power as far as possible without overstepping the bounds fixed by constitutional guarantees of personal liberty and personal immunity.

In some instances the investigatory powers seem to have been unduly restricted. For example, the Board is given the authority "to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act."⁶⁹ But no investigatory power is given the Board in aid of its rule-making power.⁷⁰ This is unfortunate. An intelligent exercise of this power would seem of necessity to require knowledge of all matters concerning which rules are to be prescribed.⁷¹ Nor has the Board been given the power to require that certain records be kept,⁷² or to subpoena the records of third persons.⁷³

carefully. I think it is drawn with extreme care and intelligence." *Hearings Before the Senate Committee on Education and Labor*, 74th Cong., 1st Sess., on S. 1958 (March 15-19, 1935) 125; and at p. 131 he is reported as having said, "I think these words are chosen with great care, and I think they hit the nail right on the head. I think it is as far as Congress can go."

69. National Labor Relations Act, sec. 6.

70. The investigatory powers of the Board are confined to those powers given to them in sections 9 and 10 of the Act.

71. Perhaps the reason is that the Supreme Court has denied the right of administrative agencies to compel private businesses to submit to an examination of their books and papers in a general fact finding investigation. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298 (1924). Note that under the Packers and Stockyards Act, 42 Stat. 168, the Secretary of Agriculture has been prevented from inspecting the books and records of a packer to determine whether the records were properly kept. *Cudahy Packing Co. v. U. S.*, 15 F. (2d) 133 (C. C. A. 7, 1926). But the Interstate Commerce Commission has not been similarly restrained. *Smith v. Interstate Commerce Commission*, 245 U. S. 33 (1917), which seems to overrule or at least greatly weaken the holding in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908). The Fourth Amendment is an effective barrier to such investigations.

There does not seem to be any reason why administrative tribunals should not be given the power of investigation in connection with their rule-making power. It would seem that the situation is analogous to that of a Congressional subcommittee. See *McGrain v. Daugherty*, 273 U. S. 135 (1927); *Sinclair v. U. S.*, 279 U. S. 263 (1929); *Strawn v. Western Union*, 3 U. S. Law Week 646 (D. C. S. Ct., 1936).

72. There is some doubt whether a provision authorizing the Board to demand that certain records be kept would be constitutional. State acts dealing with businesses which they regulate have been upheld. *St. Joseph v. Leven*, 128 Mo. 588. 31 S. W. 101 (1895); *State c. Davis*, 68 W. Va. 142, 69 S. E. 639 (1910); *Reaves Warehouses Corp. v. Comm.*, 141 Va. 194, 126 S. E. 87 (1925).

The Interstate Commerce Commission requires special reports and records. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194 (1912); *B. & O. R. R. v. Interstate Commerce Commission* 211 U. S. 612 (1911). The Federal Reserve Board requires member banks to maintain certain records. 38 Stat. 261, 12 U. S. C. A. sec. 248 (1913). The Federal Power Commission may examine the books of its licensees. 41 Stat. 1353, 16 U. S. C. A. sec. 797 (1921). The same power is given the Secretary of

The greatest deficiency probably lies in that the National Labor Relations Board, unlike other administrative agencies,⁷⁴ has not been given the power to conduct investigations for the sole purpose of obtaining information deemed of value to it in recommending further legislation to Congress along designated lines.⁷⁵

Except for these deficiencies, adequate power seems to have been given the Board to enable it serviceably to administer the Act.

WALTER FREEDMAN.

Agriculture under the Grain Futures Act. 42 Stat. 1003, 7 U. S. C. A. sec. 12 (1922). Admittedly all of the above agencies are dealing with businesses affected with a public interest. Whether the requirement under the N. I. R. A. was valid was never decided by the Supreme Court. In the most recent legislation (74th Congress, H. R. No. 8442, 15 U. S. C. A. sec. 13 (b), June 19, 1936) dealing with price discrimination the burden is placed on the respondent to rebut the *prima facie* case made by evidence of price discrimination outlawed by the Act; which means that the party must have his records to prove his innocence.

73. The Bureau of Internal Revenue has such power. 45 Stat. 878, 26 U. S. C. A. sec. 1514 (1928). The Federal Trade Commission and the Interstate Commerce Commission are only given the power to obtain access to the books and papers of such corporations as are being directly investigated. 41 Stat. 493, 49 U. S. C. A. sec. 20 (5) (1920); 33 Stat. 722, 15 U. S. C. A. sec. 49 (1914).

74. See for example the power given to the Securities and Exchange Commission. Securities Act, 48 Stat. 905, 15 U. S. C. A. sec. 78jj; sec. 211 (1934); Securities Exchange Act, 48 Stat. 881, 15 U. S. C. A. sec. 78a; secs. 11 (e), 12 (f), 19 (c), 23 (a) (1934). See also the power given the Interstate Commerce Commission in connection with the recommendation of legislation concerning the reorganization of railroads. 11 U. S. C. A. sec. 205 (p) (1935).

The Supreme Court has indicated that a more complete investigatory power will be permitted agencies conducting investigations based upon complaints charging breaches of the laws which they have a duty to enforce, than is permitted when the body seeks information upon which to base recommendations for future legislation. *Harriman v. U. S.*, 211 U. S. 407, 417-418 (1908); *Federal Trade Commission v. Baltimore Grain Co.*, 284 Fed. 886 (D. Md. 1922). See generally, Lilienthal, *Power of Governmental Agencies to Compel Testimony* (1926) 39 Harv. L. Rev. 694, 709-719.

75. The investigatory powers of the Board are limited in so far as they extend only to the functions granted in sections 9 and 10 of the Act.