

## INVESTIGATORY POWERS OF CONGRESS AND ADMINISTRATIVE AGENCIES

To perform properly and effectively its legislative functions Congress has constant need of accurate information.<sup>1</sup> Administrative agencies no less constantly require a precise knowledge of the situations with which they have to deal.<sup>2</sup> Access to information has become more difficult with the increased complexity of business and social problems. As a result, knowledge of the facts cannot be obtained except by means of investigations involving meticulous inquiries into the conduct and possessions of private persons. Cherished rights of privacy, consequently, are giving way so that governmental functions may be satisfactorily performed.

### *Scope of Investigatory Powers of the Houses of Congress*

The Constitution gives each house of Congress the power to make inquiries into elections and into the qualifications of its members.<sup>3</sup> This is an auxiliary legislative function. In investigating the qualifications of a member the houses of Congress may compel the attendance of witnesses and the production of documents and generally act as a judicial body.<sup>4</sup> A contumacious witness may be punished for contempt.<sup>5</sup> Upon the House of Representatives is conferred the power to impeach,<sup>6</sup> and on the Senate the duty of trying impeachments.<sup>7</sup> When performing these functions, they employ judicial powers, and may compel the attendance of witnesses and the production of documents and may punish for contempt.<sup>8</sup>

For some time following the case of *Kilbourn v. Thompson*<sup>9</sup>

1. See Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 Harv. L. Rev. 153; Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. of Pa. L. Rev. 691 and 780; *McGrain v. Daugherty* (1927) 273 U. S. 135, 175.

2. See Lilienthal, *The Power of Governmental Agencies to Compel Testimony* (1926) 39 Harv. L. Rev. 694, 720 et seq.; Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 Col. L. Rev. 905, 933 et seq.

3. U. S. Const. Art. 1, sec. 5, cl. 1.

4. *Barry v. United States ex rel. Cunningham* (1929) 279 U. S. 597. See also *Kilbourn v. Thompson* (1881) 103 U. S. 168, 190; *Burton v. United States* (1906) 202 U. S. 344, 366-369; *McGrain v. Daugherty* (1927) 273 U. S. 135, 153; *Reed v. County Comm'rs* (1928) 277 U. S. 376, 388.

5. *Ibid.* Cf. *In re Chapman* (1897) 166 U. S. 661.

6. U. S. Const. Art. 1, sec. 2, cl. 5.

7. U. S. Const. Art. 1, sec. 3, cl. 6.

8. *Kilbourn v. Thompson* (1881) 103 U. S. 168, 190; *Ritter v. United States* (1936) 84 Ct. Cl. 293, cert. denied (1937) 300 U. S. 668.

9. (1881) 103 U. S. 168.

there was doubt as to the scope of the power of Congress to make investigations for the purpose of acquiring information to use in fashioning legislation. That decision seemed to require that there be a detailed and definite legislative purpose in a Congressional investigation.<sup>10</sup> Such a limitation would have seriously hampered the effective performance of Congress' legislative functions.<sup>11</sup> The doubt as to the extent of Congress' power was resolved in *McGrain v. Daugherty*.<sup>12</sup> There it was held that either house might investigate broadly for legislative purposes.<sup>13</sup> The power is implied as necessary for a proper exercise of the legislative functions expressly conferred by the Constitution.<sup>14</sup> The only "limitation on the power of investigation is that it must be germane to some matter concerning which the house conducting the investigation has power to act (whether such action be enactment of statutes or something else)."<sup>15</sup> The question of whether the house has power to act is subject to judicial determination.<sup>16</sup> But the Supreme Court has presumed that inquiries pursued by Congress are legitimate.<sup>17</sup> In these inquiries each house may enforce an order for the production of testimony by declaring those who refuse to obey to be in contempt of its authority, and may itself punish the contempt.<sup>18</sup> The contempt power in investigations carried on for legislative purposes is also implied as necessary for the fulfillment of functions expressly granted.<sup>19</sup> The Supreme Court has held that Congress'

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10. See Landis, *supra* note 1, at 214-217.

11. *Ibid.* See also Note (1936) 45 Yale L. J. 1503; Frankfurter, *Hands Off Investigations* (1924) 38 New Republic 329.

12. (1927) 273 U. S. 135.

13. "Legislative purpose" means, as thus used, any purpose within the jurisdiction of action by the legislature, and it is not confined to the enactment of legislation. *Seymour v. United States* (C. C. A. 8, 1935) 77 F. (2d) 577, 579.

14. *McGrain v. Daugherty* (1927) 273 U. S. 135, 173-175.

15. *Seymour v. United States* (C. C. A. 8, 1935) 77 F. (2d) 577, 580.

16. *Anderson v. Dunn* (U. S. 1821) 6 Wheat. 204; *Kilbourn v. Thompson* (1881) 103 U. S. 168; *In re Chapman* (1897) 166 U. S. 661; *Marshall v. Gordon* (1917) 243 U. S. 521; *McGrain v. Daugherty* (1927) 273 U. S. 135; *Seymour v. United States* (C. C. A. 8, 1935) 77 F. (2d) 577; *Townsend v. United States* (App. D. C. 1938) 95 F. (2d) 352, cert. denied (1938) 303 U. S. 664; *Ex parte Frankfield* (D. C. D. C. 1940) 32 F. Supp. 915.

17. See *McGrain v. Daugherty* (1927) 273 U. S. 135, 179; *In re Chapman* (1897) 166 U. S. 661, 670; *Marshall v. Gordon* (1917) 243 U. S. 521, 545; *Barry v. United States ex rel. Cunningham* (1929) 279 U. S. 597, 619; *Townsend v. United States* (App. D. C. 1938) 95 F. (2d) 352, 361, cert. denied (1938) 303 U. S. 664.

18. *Marshall v. Gordon* (1917) 243 U. S. 521; *Journey v. MacCracken* (1935) 294 U. S. 125.

19. *Ibid.*

power to commit for contempt is restricted to the removal of impediments to the production of evidence.<sup>20</sup> However, the Court has recently recognized that a house may punish for contempt a person who, by non-compliance with a subpoena or by destroying subpoenaed papers, has in the past obstructed the legislative process, although the evidence has been produced or its production has become impossible.<sup>21</sup> As a further sanction Congress has the power to make failure to comply with its subpoenas, or those of its committees, a crime.<sup>22</sup> Where, however, a proper legislative purpose is not served by the investigation,<sup>23</sup> or where a subpoena or question violates rights conferred by the Fourth or Fifth Amendment,<sup>24</sup> a person cannot be compelled to testify or produce documents.

### *Scope of Investigatory Power of Administrative Agencies*

No statute of Congress has been held unconstitutional by the Supreme Court for the reason that it authorized an administrative agency to make investigations. Rather, where such investigations have been successfully attacked, it has been on the ground that they were unauthorized by statute.<sup>25</sup>

Investigations by administrative agencies may be divided into two classes: (1) quasi-judicial, and (2) purely fact-finding. Quasi-judicial inquiries are those in which the governmental agency conducts its proceedings for the purpose of determining legal rights and duties under existing laws, as where a hearing

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20. See *Marshall v. Gordon* (1917) 243 U. S. 521, 542-545; *Potts*, supra note 1, at 783. The view is sustained by the rule making the term of imprisonment coterminous with adjournment, at least of the House of Representatives. See *Anderson v. Dunn* (U. S. 1821) 6 Wheat. 204, 231; *Marshall v. Gordon* (1917) 243 U. S. 521, 542-544.

21. *Jurney v. MacCracken* (1935) 294 U. S. 125; *Comment* (1935) 48 *Harv. L. Rev.* 848.

22. *In re Chapman* (1897) 166 U. S. 661; *Sinclair v. United States* (1929) 279 U. S. 263; *Seymour v. United States* (C. C. A. 8, 1935) 77 F. (2d) 577; *Townsend v. United States* (App. D. C. 1938) 95 F. (2d) 352, cert. denied (1938) 303 U. S. 664.

23. *Ibid.* Also *Kilbourn v. Thompson* (1881) 103 U. S. 168; *Marshall v. Gordon* (1917) 243 U. S. 521; *McGrain v. Daugherty* (1927) 273 U. S. 135; *Hearst v. Black* (App. D. C. 1936) 87 F. (2d) 68.

24. See cases cited supra notes 22 and 23. *Strawn v. Western Union Telegraph Co.* (Sup. Ct. D. C. March 11, 1936). The oral opinion is reported in *N. Y. Times*, March 12, 1936 at page 1, col. 4. See *Note* (1936) 45 *Yale L. J.* 1503.

25. See, for example, *Harriman v. Interstate Commerce Comm.* (1908) 211 U. S. 407; *United States v. Louisville & N. R. R.* (1915) 236 U. S. 318; *Federal Trade Comm. v. American Tobacco Co.* (1924) 264 U. S. 298. See also *Mechem, Fishing Expeditions by Commissions* (1924) 22 *Mich. L. Rev.* 765, 775, 776.

is conducted on a complaint of a violation of law.<sup>26</sup> Included in this class are also the investigations carried on by various executive officials who enforce such laws as those governing internal revenue, patents, and immigration. Purely fact-finding investigations are those conducted in order (1) to acquire information for the purpose of recommending to Congress additional legislation,<sup>27</sup> (2) to accumulate information on the basis of which rules and regulations may be prescribed,<sup>28</sup> and (3) to ascertain, preliminary to any action, whether there has been a breach of law.<sup>29</sup> The constitutionality of the exercise of powers of compulsion in quasi-judicial investigations undertaken by administrative agencies was early upheld.<sup>30</sup> The constitutionality of the use of such powers in purely fact-finding investigations was in doubt until recently.<sup>31</sup> Now, it is recognized that where Congress has legislated on a matter within its constitutional power, it may authorize an administrative agency to acquire information concerning that matter, provided that the investigation is a necessary and proper means of carrying the statute into effect.<sup>32</sup> Investigations conducted pursuant to Congressional directions in order to gather information for legislative purposes have been

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26. The following are examples of federal agencies exercising such powers: Interstate Commerce Commission, Rent Commission of the District of Columbia, Federal Trade Commission, United States Employee's Compensation Commission, Veteran's Administration, Federal Communications Commission, and Administrator of Packers and Stockyards Act.

27. The following are examples of agencies exercising such power: Federal Trade Commission, Federal Communications Commission, Securities and Exchange Commission, and United States Tariff Commission.

28. The following are examples of agencies exercising such power: Securities and Exchange Commission, Interstate Commerce Commission, and Federal Communications Commission.

29. The following are examples of commissions which carry on this kind of investigation: Federal Trade Commission, Interstate Commerce Commission, Federal Power Commission, National Labor Relations Board, and Securities and Exchange Commission. See Note (1935) 44 Yale L. J. 819.

30. *Interstate Commerce Comm. v. Brimson* (1894) 154 U. S. 447; *Harri-man v. Interstate Commerce Comm.* (1908) 211 U. S. 407; *Smith v. Interstate Commerce Comm.* (1917) 245 U. S. 33.

31. The constitutionality of such investigations has been upheld in: *Smith v. Interstate Commerce Comm.* (1917) 245 U. S. 33; *Electric Bond & Share Co. v. Securities and Exchange Comm.* (1938) 303 U. S. 419; *Bartlett Frazier Co. v. Hyde* (C. C. A. 7, 1933) 65 F. (2d) 350, cert. denied (1933) 290 U. S. 654; *Fleming v. Montgomery Ward & Co.* (C. C. A. 7, 1940) 114 F. (2d) 384, cert. denied (1940) 61 S. Ct. 71; *Federal Trade Comm. v. National Biscuit Co.* (D. C. S. D. N. Y. 1937) 18 F. Supp. 667. But see cases cited supra note 25, for dictum contra.

32. See *Interstate Commerce Comm. v. Brimson* (1894) 154 U. S. 447, 472-474; *Electric Bond & Share Co. v. Securities and Exchange Comm.* (1938) 303 U. S. 419, 437. Cf. *McGrain v. Daugherty* (1927) 273 U. S. 135; *Seymour v. United States* (C. C. A. 8, 1935) 77 F. (2d) 577.

held constitutional, when properly conducted.<sup>33</sup> Congress may require that reports be made and records kept, and that these be made available to an administrative authority.<sup>34</sup> If authorized by Congress, administrative agencies in conducting investigations may subpoena witnesses and documents and inspect books, records, and premises.<sup>35</sup>

To compel a contumacious witness to comply with its subpoena, an agency is commonly authorized to apply to a federal district court for an order requiring the witness to appear and testify, or to produce requested documents.<sup>36</sup> Disobedience of the order is punishable as contempt of court.<sup>37</sup> This procedure was suc-

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33. *Federal Trade Comm. v. National Biscuit Co.* (D. C. S. D. N. Y. 1937) 18 F. Supp. 667. See *Electric Bond and Share Co. v. Securities and Exchange Comm.* (1938) 303 U. S. 419, 437; *Federal Trade Comm. v. Millers' Nat'l Federation* (App. D. C. 1931) 47 F. (2d) 428, 429; *Hearst v. Black* (App. D. C. 1936) 87 F. (2d) 68, 69, 70.

34. *Interstate Commerce Comm. v. Goodrich Transit Co.* (1912) 224 U. S. 194; *American Tel. & Tel. Co. v. United States* (1936) 299 U. S. 232; *Bartlett Frazier Co. v. Hyde* (C. C. A. 7, 1933) 65 F. (2d) 350, cert. denied (1933) 290 U. S. 654. See *Wilson v. United States* (1911) 221 U. S. 361, 384, 385; *Board of Trade v. Olsen* (1923) 262 U. S. 1, 42. Cf. *United States v. Mulligan* (D. C. N. D. N. Y. 1920) 268 Fed. 893; *Colclough, Security Exchange Commission's Power of Search* (1935) 3 Geo. Wash. L. Rev. 356. Congress, through its census power, may have the power to demand that all men doing business affected with a public interest keep reasonable records and make reports regardless of whether they are in interstate commerce. See *Rush, Expansion of Federal Supervision of Securities through the Inquisitional and Census Powers of Congress—A Suggestion* (1938) 36 Mich. L. Rev. 409.

35. See cases cited *supra* notes 30 and 31. Agents of administrative bodies cannot go on premises to make an investigation without a search warrant. *United States v. Kraus* (D. C. S. D. N. Y. 1921) 270 Fed. 578; *Hearst v. Black* (App. D. C. 1936) 87 F. (2d) 68; *Comment* (1937) 35 Mich. L. Rev. 1380. See, for the power of the Internal Revenue Department to investigate, the following cases: *Internal Revenue Agent v. Sullivan* (D. C. W. D. N. Y. 1923) 287 Fed. 138; *Brownson v. United States* (C. C. A. 8, 1929) 32 F. (2d) 844; *Miles v. United Founders Corp.* (D. C. N. J. 1933) 5 F. Supp. 413. See, for a list of administrative bodies having power to issue subpoenas, *Attorney General's Committee on Administrative Procedure, Final Report* (1941) 414-435. In a quasi-judicial investigation the respondent is generally allowed to have subpoenas issued in his behalf. *Note* (1940) 53 Harv. L. Rev. 842. A requirement that parties desiring subpoenas furnish reasons for their applications has been upheld. *North Whittier Heights Citrus Ass'n v. National Labor Relations Board* (C. C. A. 9, 1940) 109 F. (2d) 76. See *Gellhorn and Linfield, Politics and Labor Relations: An Appraisal and Criticism of N. L. R. B. Procedure* (1939) 39 Col. L. Rev. 339, 380.

36. See, for a list of agencies having this power, *Attorney General's Committee on Administrative Procedure, Final Report* (1941) 414-435.

37. See note 36, *supra*. A federal commission cannot punish for contempt. See *Interstate Commerce Comm. v. Brimson* (1894) 154 U. S. 447, 485; *Note* (1935) 35 Col. L. Rev. 578. But see *In re Sanford* (1911) 236 Mo. 665, 139 S. W. 376 (commission authorized to punish for contempt); *Pilsbury, Administrative Tribunals* (1923) 36 Harv. L. Rev. 405, 591. Under

cessfully attacked in *In re Phillips*<sup>38</sup> on the jurisdictional ground that the enforcement of the subpoena did not present a "case" or "controversy" to which the judicial power extended. However, the Supreme Court overruled that position in *Interstate Commerce Commission v. Brinson*,<sup>39</sup> holding that in a proper case the district courts could lawfully issue an order directing compliance with such subpoenas.

The further sanctions of criminal penalties and forfeiture of privileges have been given to administrative agencies' orders seeking to compel the attendance of witnesses and the production of documents. Often when an administrative agency is given the power to issue subpoenas, the same statute makes it a misdemeanor to refuse to give evidence in response to a lawful inquiry.<sup>40</sup> Sometimes, as in the Federal Trade Commission Act, a fine is imposed upon a recalcitrant witness for non-attendance or for failure to produce subpoenaed documents.<sup>41</sup> Apparently there have been no prosecutions under these penal provisions.<sup>42</sup> The threat of their use has generally been sufficient to compel compliance.<sup>43</sup> The provisions for the forfeiture of privileges are an effective and constitutional means of compelling compliance with an administrative agency's orders for the production of evidence.<sup>44</sup> Such provisions are found in the Commodity Exchange

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the Longshoremen's and Harbor Workers' Act, on application of the administrative agency, the district court may immediately punish for the contempt of the administrative subpoena.

38. (D. C. N. D. Cal. 1887) 32 Fed. 241.

39. (1894) 154 U. S. 447.

40. See, for example: Communications Act (1934) 48 Stat. 1064, as amended (1937) 50 Stat. 189, 47 U. S. C. A. (Supp. 1940) sec. 151 et seq.; Federal Alcohol Administration Act (1935) 49 Stat. 977, 27 U. S. C. A. (Supp. 1940) sec. 201 et seq. See note 36, supra.

41. See note 36, supra. Agencies which have the benefit of such statutes are: Federal Communications Commission; Federal Alcohol Administration; Federal Trade Commission; Department of Agriculture, under Packers and Stockyards Act; Wage and Hour Division, under the Fair Labor Standards Act; Federal Power Commission; Bureau of Internal Revenue; Securities and Exchange Commission.

42. Note (1937) 51 Harv. L. Rev. 312.

43. Ibid. Injunctive relief is seemingly not obtainable against the enforcement of administrative orders for the production of information, even where statutory penalties are imposed for non-compliance. *Federal Trade Comm. v. Claire Furnace Co.* (1927) 274 U. S. 160; *Federal Trade Comm. v. Maynard Coal Co.* (App. D. C. 1927) 22 F. (2d) 873; *McDermott v. Bradford* (D. C. W. D. Wash. 1935) 10 F. Supp. 661; *Associated Press v. Herrick* (D. C. S. D. N. Y. 1936) 13 F. Supp. 897. But see *Federal Trade Comm. v. Miller's Nat'l Federation* (App. D. C. 1927) 23 F. (2d) 968, cert. denied (1927) 274 U. S. 743; *Handler, The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 Col. L. Rev. 708, 714-728.

44. *Electric Bond & Share Co. v. Securities and Exchange Comm.* (1938) 303 U. S. 419. See Note (1937) 51 Harv. L. Rev. 312.

Act<sup>45</sup> and the Securities Exchange Act,<sup>46</sup> where continuous access to information is made a condition precedent to the right to do business.

*Limitations Imposed by the Fourth and Fifth Amendments*

To escape the necessity of testifying or of producing documents, witnesses called before administrative agencies have relied primarily on the Fourth and Fifth Amendments.<sup>47</sup> To circumvent the provision of the Fifth Amendment that no person shall be compelled to be a witness against himself, Congress has usually granted witnesses before such agencies immunity from prosecution. At first this grant consisted in a statutory guarantee that evidence obtained from a witness in an administrative proceeding should in no manner be used against him in a criminal proceeding.<sup>48</sup> But in *Counselman v. Hitchcock*<sup>49</sup> it was held that this immunity was not sufficient, because the witness was not protected from prosecution through other evidence discovered indirectly as a result of disclosures made in his testimony. But the Supreme Court has sustained as sufficient the provision of the Interstate Commerce Act that

No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence documentary or otherwise, before said commission or in obedience to its subpoena \* \* \*.<sup>50</sup>

Where such statutory immunity is granted, the objection against disclosure of self-incriminating evidence before administrative bodies is successfully avoided.<sup>51</sup> However, the privilege provided by the Fifth Amendment must still be claimed by the witness.<sup>52</sup> Moreover, the immunity does not extend to corporations, which

45. (1922) 42 Stat. 998, amended (1936) 49 Stat. 1491, 7 U. S. C. A. (1939) sec. 1 et seq.

46. (1933) 48 Stat. 74, 15 U. S. C. A. (Supp. 1940) sec. 77, amended (1934) 48 Stat. 881, 15 U. S. C. A. (Supp. 1940) sec. 78.

47. A witness or person producing evidence is protected by statutory and administrative regulatory limitations placed on the use of evidence. Note (1939) 48 Yale L. J. 1427.

48. (1878) R. S. 860.

49. (1892) 142 U. S. 547.

50. *Brown v. Walker* (1896) 161 U. S. 591. See also *Hale v. Henkel* (1906) 201 U. S. 43; *United States v. Nelson* (1906) 201 U. S. 92.

51. *Ibid.* Also *Moore v. Backus* (C. C. A. 7, 1935) 78 F. (2d) 571, cert. denied (1935) 296 U. S. 640.

52. *Vajtauer v. Comm'r of Immigration* (1927) 273 U. S. 103; *United States v. Elton* (D. C. S. D. N. Y. 1915) 222 Fed. 428 (interpreting (1893) 27 Stat. 443, 49 U. S. C. A. (1929) sec. 46); *Pandolfo v. Biddle* (C. C. A. 8, 1925) 8 F. (2d) 142.

are not protected by the Fifth Amendment from being compelled to furnish self-incriminating evidence.<sup>53</sup>

The Fourth Amendment guarantees the individual against unreasonable searches and seizures.<sup>54</sup> In *Boyd v. United States*<sup>55</sup> and *Hale v. Henkel*,<sup>56</sup> the Supreme Court extended this protection to cover more than the mere physical invasion of premises and other trespasses. These cases extended the prohibition of the Fourth Amendment to subpoenas *duces tecum*. They defined as an unreasonable search and seizure any subpoena issued in derogation of rights under the self-incrimination clause of the Fifth Amendment.<sup>57</sup> *Hale v. Henkel*<sup>58</sup> held, also, that a subpoena *duces tecum* was an unreasonable search and seizure when it was too broad and indefinite in scope,<sup>59</sup> or demanded evidence not relevant to a lawful inquiry.<sup>60</sup> Moreover, that case decided that a corporation was protected by the Fourth Amendment from an unreasonable search and seizure.<sup>61</sup>

Where administrative agencies act in a quasi-judicial capacity, their subpoenas must satisfy the same requirements of relevancy and specificity as those of the courts. However, the requirements

53. *Wilson v. United States* (1911) 221 U. S. 361; *Hale v. Henkel* (1906) 201 U. S. 43; *Davis v. Securities and Exchange Comm.* (C. C. A. 7, 1940) 109 F. (2d) 6.

54. The Fourth Amendment protects only from search and seizures of one's own possessions. *United States v. De Vasto* (C. C. A. 2, 1931) 52 F. (2d) 26, cert. denied (1932) 284 U. S. 678; *McMann v. Securities and Exchange Comm.* (C. C. A. 2, 1937) 87 F. (2d) 377, cert. denied (1937) 301 U. S. 684; *Newfield v. Ryan* (C. C. A. 5, 1937) 91 F. (2d) 700; *Zimmerman v. Wilson* (C. C. A. 3, 1939) 105 F. (2d) 583; *In re Andrews' Tax Liability* (D. C. Md. 1937) 18 F. Supp. 804.

55. (1886) 116 U. S. 616.

56. (1906) 201 U. S. 43.

57. *Boyd v. United States* (1886) 116 U. S. 616; *Hale v. Henkel* (1906) 201 U. S. 43. The Fourth Amendment has been declared to be limited to cases where a criminal offense has been charged against the person seeking its protection. *United States v. Bank of Mobile* (D. C. S. D. Ala. 1924) 295 Fed. 142, aff'd (1925) 267 U. S. 576. The prevailing custom is the contrary. See *Weeks v. United States* (1914) 232 U. S. 383, 392; *In re Tri-City Coal & Coke Co.* (D. C. W. D. Pa. 1918) 253 Fed. 605, 606.

58. (1906) 201 U. S. 43.

59. (1906) 201 U. S. 43; *Federal Trade Comm. v. American Tobacco Co.* (1924) 264 U. S. 298; *Essgee Co. v. United States* (1923) 262 U. S. 151.

60. *Hale v. Henkel* (1906) 201 U. S. 43; *Smith v. Interstate Commerce Comm.* (1917) 245 U. S. 33; *McGrain v. Daugherty* (1927) 273 U. S. 135; *Jurney v. MacCracken* (1935) 294 U. S. 125; *Electric Bond and Share Co. v. Securities and Exchange Comm.* (1937) 303 U. S. 419; *Fleming v. Montgomery Ward & Co.* (C. C. A. 7, 1940) 114 F. (2d) 384, cert. denied (1940) 61 S. Ct. 71. See Comment (1941) 26 WASHINGTON U. LAW QUARTERLY 270; Note (1936) 22 WASHINGTON U. LAW QUARTERLY 81, 93, 94; Landis, *supra* note 1, at 219; Note (1936) 45 Yale L. J. 1503.

61. *Hale v. Henkel* (1906) 201 U. S. 43; *American Tobacco Co. v. Werchmeister* (1907) 207 U. S. 284.



are flexible, since it is usually said that the degree of specificity required is that which is practicable under all the circumstances.<sup>62</sup> In fact-finding investigations the question of what is relevant is a more elusive one, because the scope of the inquiry is broader. The test of relevancy is also not precise; it is a rule of thumb.<sup>63</sup> It involves the weighing of two factors: the immediate need of the investigating body for the information, and the burden on the persons directed to appear or to produce the evidence.<sup>64</sup> As Learned Hand, J., said in *McMann v. Securities and Exchange Commission*,<sup>65</sup> a search is unreasonable "only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds."

Subpoenas issued by Congress are open to the same objections under the Fourth and Fifth Amendments as those issued by the administrative agencies which it establishes.<sup>66</sup> As a result, witnesses called before its committees are granted an immunity from prosecution somewhat similar to that granted those who testify before administrative agencies.<sup>67</sup> Courts have applied the test of relevancy and specificity to Congressional subpoenas for the attendance of witnesses and for the production of documents and papers.<sup>68</sup>

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62. 4 Wigmore, *Evidence* (3d ed. 1940) sec. 2200. See also *Brown v. United States* (1928) 276 U. S. 134, 143.

63. See *Go-Bart Importing Co. v. United States* (1931) 282 U. S. 344, 357; *United States v. Union Trust Co.* (D. C. W. D. Pa. 1936) 13 F. Supp. 286, 287; *United States v. Kaplan* (D. C. E. D. N. Y. 1936) 17 F. Supp. 920, 922, rev'd (C. C. A. 2, 1937) 89 F. (2d) 869; Note (1936) 45 Yale L. J. 1503.

64. See *McMann v. Securities and Exchange Comm.* (C. C. A. 2, 1937) 87 F. (2d) 377, 379, cert. denied (1937) 301 U. S. 684; *Zimmerman v. Wilson* (C. C. A. 3, 1939) 105 F. (2d) 583, 585; Colclough, *Security Exchange Commission's Power of Search* (1935) 3 Geo. Wash. L. Rev. 356.

65. (C. C. A. 2, 1937) 87 F. (2d) 377, 379.

66. See *Strawn v. Western Union Telegraph Co.* (Sup. Ct. D. C. March 11, 1936). The oral opinion is reported in *N. Y. Times*, March 12, 1936 at page 1, col. 4. *McGrain v. Daugherty* (1927) 273 U. S. 135; *Jurney v. MacCracken* (1935) 294 U. S. 125. See note 22, supra.

67. The present statute granting this immunity is as follows: "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. *But an official paper or record produced by him is not within the said privilege.*" (1938) 52 Stat. 943, 28 U. S. C. A. (Supp. 1940) sec. 634. (Italics supplied.) Compare this statute with the one quoted in the text supra page 537. The immunity granted by this statute is very similar to that declared insufficient in *Counselman v. Hitchcock* (1892) 142 U. S. 547.

68. See cases cited supra note 66.

### Conclusion

If the aims of Congress in its current social legislation are to be adequately effectuated, even further access to information may be required. The census power has been suggested as a constitutional basis for collecting data not obtainable otherwise, as where the matter concerned is in the exclusive jurisdiction of the states.<sup>69</sup> The war power has been used effectively in the past for the accomplishment of the same purpose.<sup>70</sup>

Although private persons are protected by the courts from unreasonable demands for information, they must primarily rely on the forbearance and discretion of the investigating body. Recent studies show that administrative bodies are not abusing their power.<sup>71</sup> The present administrative agencies have had the voluntary cooperation of the persons affected in the accumulation of information.<sup>72</sup> Moreover, some of them are now able to make decisions and rules as occasion arises on the basis of information which has already been compiled.<sup>73</sup> As a result, there is little use of compulsory process.<sup>74</sup>

LEONARD E. MARTIN.

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## DELEGATION OF POWERS TO PRIVATE GROUPS IN MISSOURI

### I. INTRODUCTION

The constitutionality of the delegation of public powers to private groups and citizens is an important subject today, partly because it often becomes necessary for the state to draft the services of qualified individuals or groups to participate in the exercise of public functions, and partly because these groups ask for the power to govern themselves. This results from the limited ability of officials to give adequate attention to all mat-

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69. See *United States v. Moriarity* (C. C. A. 2, 1901) 106 Fed. 886, 891; *Rush, Expansion of Federal Supervision of Securities through the Inquisitorial Census Powers of Congress—A Suggestion* (1937) 36 Mich. L. Rev. 409.

70. See *United States v. Mulligan* (D. C. N. D. N. Y. 1920) 268 Fed. 893; *Colclough, Security Exchange Commission's Power of Search* (1935) 3 Geo. Wash. L. Rev. 356.

71. See Attorney General's Committee on Administrative Procedure, *Final Report* (1941) cc. 3 and 7. Cf. *Note, Legislative Investigations* (1941) 9 I. J. A. Bul. 73.

72. *Ibid.*

73. *Id.* at 113.

74. See Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 414.