

## THE INQUISITORIAL POWER CONFERRED BY THE TRADE COMMISSION BILL

### I.

The anti-trust bills bring before Congress the whole theory and conduct of modern business. They involve in greater or less degree manufacturers, trade unions, agricultural associations, railways, banks, department stores, producers, consumers, wholesalers, middlemen, retailers. Many interests are demanding for themselves recognition, protection, exemption and for others restraint and destruction—each instinctively parading its own merit, its own grievance. The economic controversy between regulated combination and enforced competition is well to the fore and we may not avoid the political controversy over centralization of power.

Much of the running criticism of the anti-trust bills has served to emphasize specific defects and, as a whole, it has performed a greater service in assuring a deliberate consideration for great questions of law and policy. But, as each day brings new suggestions, running criticism is much like trying to keep tab on a kaleidoscope and so it should be paralleled by a study of fundamentals pursued without regard to the daily bulletin. While there is no time to be lost in making this study, sufficient time is assured by the fact that no anti-trust bill will express the will of Congress until it shall have passed the ordeals of committee reports in each House, of thorough debate, in the Senate at least, of a conference report and of final vote, and no bill can become law without executive approval. Until final action the whole anti-trust programme should be treated as in a state of flux—a provision discarded may reappear at the last moment—one seemingly fixed may disappear and I should say that no bill will be given precedence—all will be submitted together in order to assure the final declaration of a homogeneous policy.

Utilizing this opportunity for discussion I will consider several of the leading questions, especially whether the "rule of reason" is to yield to the misrule of unreason, and I present now some thoughts on the Trade Commission Bill (H. R. 14631) and especially on the inquisitorial power it purports to confer.

## II.

The bill in question which was introduced March 16 with the approval of the House Committee on Interstate Commerce is, so far as this committee is concerned, substituted for H. R. 12,120 of January 22.

By Section 3 there is "vested" in the commission all the existing powers, authority and duties of the Bureau of Corporations and of the Commissioner of Corporations contained in an act entitled, "an act to establish the Department of Commerce and Labor," approved February 14, 1903, and all amendments thereto, and contained in resolutions of the United States Senate passed on March 1, 1913, on May 27, 1913, and on June 18, 1913." Turning to the Bureau Act we read: "The said commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct and management of the business of any corporation, joint stock company or corporate combination engaged in the commerce among the several states and with foreign nations, excepting common carriers subject to an "Act to Regulate Commerce, approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public."

By Section 9 "Every corporation, engaged in commerce, excepting corporations subject to the Acts to regulate commerce, which, by itself or with one or more other corporations owned, operated, controlled, or organized in conjunction with it so as to constitute substantially a business unit, has a capital of \$5,000,000 or more, or has less capital and belongs to any class of corporations which the commission may make, shall furnish to the commission annually, such information, statements, and records of its organization, bondholders and stockholders, and financial condition, and also such information, statements and records of its relation to other corporations and its business and practices while engaged in commerce as the commission shall require, and the commission may, to enable it the better to carry

out the purposes of this Act, prescribe as near as may be a uniform system of annual reports."

By Section 10 "The commission shall, upon the direction of the President, the Attorney General, or either House of Congress investigate the organization, management, and business of any corporation while engaged in commerce, to aid in ascertaining whether or not the corporation investigated is violating the acts relating to restraint of trade. And the commission shall make a report of such investigation, which may include recommendations for readjustment of business in order that said corporation may thereafter maintain its organization, management, and conduct of business in accordance with law. Reports made after investigation may be made public in the discretion of the commission."

By Section 11 "When in the course of any investigation made under this act the commission shall obtain information concerning any unfair competition or practice in commerce not necessarily constituting a violation of law by the corporation investigated, it shall make report thereof to the President, to aid him in making recommendations to Congress for legislation in relation to the regulation of commerce, and the information so obtained and the report thereof shall be made public only upon the direction of the President."

By Section 12 "In any suit in equity brought by or under the direction of the Attorney General, as provided in the acts relating to restraint of trade, the court in which said suit is pending may at any time during the progress of the case refer to the commission any question arising in the litigation or any proposed decree therein, whereupon the commission shall investigate the matters referred to it and shall make a full report of its investigation to the court."

### III.

The power given the commission by Section 9 to make "any class of corporation" among those of less than \$5,000,000 capital and take jurisdiction of them suggests constitutional difficulty.

The rule against delegating legislative power to administrative bodies has come to be more liberally construed under the tremendous pressure of the functions assumed by the modern state but the principle and the range of their jurisdiction—whether of

persons or matters—should, if not fully mapped out by the legislature, be indicated sufficiently to preclude a loose right of selection. For if an act of the body be not rooted in jurisdiction duly conferred by the law-making authority it is without warrant—and this is equally true of classification for jurisdictional purposes.

The commission, however, appears to be free to select some, or to embrace all corporations of less than \$5,000,000 capital by means of one or more classifications formed at pleasure. It may surprise Congress by following its lead and classify by capital—more than \$4,000,000—\$500,000—\$100,000. It may classify generally, as by gross returns of whatever amount; or specially, as by industries—mines, mail order houses, steel companies, department stores, etc. It may classify permanently, for regular reports, etc., or temporarily for a special exploring operation. Whether any or all of the thousands of corporations below the \$5,000,000 mark shall be within or without the law is left to the taste and fancy of the commission.

What is meant by the permission accorded the courts in Section 12 to refer to the commission “any question arising in the litigation”? Many questions arise. What sort is it supposed a court would deem the regular judicial machinery less competent to deal with than a body without judicial power, without legal training—an administrative body immersed in the multitudinous details of corporate industry? If, as we assume, the commission is supposed to be able to obtain outside the court better evidence than the Department of Justice can present inside, what are the defendant’s position and rights? Will there be a proceeding before the commission? Will the commission make private inquiry, and what shall be the evidentiary status of its report?

Vested with all the inquisitorial powers of the Bureau of Corporations the commission is freed from a wholesome restriction imposed on the Bureau in the matter of publicity. While the Bureau reports to the President, who may give out information at his discretion, “the information obtained by the commission in the exercise of the powers, authority and duties conferred upon it by this [third] section may be made public at the discretion of the commission.”

According to newspaper report (*Evening Post*, March 18), Mr. Covington, chairman of the sub-committee that framed the Bill, says: “The independent initiative of the commission is preserved

in every part of the bill except the single section in which the commission is made the investigating agent of the President, the Attorney General or either House of Congress to report to them the facts found as to alleged violations of the Anti-Trust laws. There is nowhere in the bill any restriction on the independent powers which may be constitutionally exercised by the commission to make investigations of any sort, and to make public the facts disclosed in its discretion. In fact, this discretion is simply to safeguard the public by withholding information which discloses such violations as will warrant prosecution through the Department of Justice, and when the publicity might gravely prejudice the government's case." Stating that the provision for the punishment of persons unlawfully disclosing information does not apply to newspapers he says: "That section is simply to punish officials or employees of the commission who may without authority betray information which happens to be a proper trade secret or the disclosure of which would impede the government in trust prosecutions." Are we to infer that "proper trade secrets" may be published by "authority?"

I have noted what are, in my opinion, certain defects in the Trade Commission Bill. These may be cured without substantially affecting its main function and I have dealt briefly with them because this function is my theme—the exercise of inquisitorial power.

#### IV.

Properly to appreciate the inquisitorial power of the Trade Commission we compare this body with the Interstate Commerce Commission on the one hand and the Bureau of Corporations on the other.

The Interstate Commerce Commission has jurisdiction over practically all common carriers engaged in interstate commerce. These carriers are, generally, corporations, but the occasional partnership and the possible individualistic enterprise are as fully within the jurisdiction. And all, because they perform the "public service" of transportation, are subject to a larger public regulation than are those persons, corporate or individual, who engage in ordinary business.

The Bureau has jurisdiction over all "corporations, joint stock companies and corporate combinations" engaged in interstate commerce excepting common carriers and the Trade Commission over "corporations" only, with a similar exception.

The Interstate Commerce Commission is essentially a regulating body—prescribing rules and issuing orders in respect of interstate transportation, especially by rail.

The sole function of the Bureau and the main function of the Trade Commission is to obtain information, the one in aid of legislation, the other, both in aid of legislation and for detecting violations of the Anti-Trust Act.

The Interstate Commerce Commission is sharply differentiated from the other bodies in question. It has jurisdiction over certain common carriers, corporate or otherwise, engaged in the public service of interstate transportation. It is a regulating body with some attributes of a judicial nature. It enjoys inquisitorial powers simply as a means to carry out its main purposes.

On the other hand the Bureau and the Trade Commission have no jurisdiction over “public service” companies—no regulating power, no judicial attributes. They have simply an inquisitorial power over ordinary corporations—chiefly industrial—who are engaged in interstate commerce.

While the nature and purposes of the Commission and the strong phrasing of its powers suggest a sharper inquisitorial activity than the Bureau has felt free to exercise, the powers of the one are not essentially greater than those of the other. Each purports to authorize inquisition without limitation, without cause shown and without proper formalities.

The essential likeness is important as showing that the main constitutional issue is not more deeply involved in the Commission Bill than in the Bureau Act—it is simply presented more pointedly and a mere toning down of phrase will not affect its substance.

#### V.

In *Hale v. Henkel* (201 U. S. 75) the Supreme Court said: “While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises may refuse to show its hand when charged with an abuse of such privileges.” Remarking that the corporation in question was chartered by New Jersey the court said: “but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the

general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations." The court, however, not only affirmed that a corporation is protected by the Constitution against unreasonable searches, but found the *subpoena duces tecum* in question "far too sweeping" to be "reasonable."

In *Harriman v. Interstate Commerce Commission* (211 U. S. 407, 417-421) the court said in regard to the "enormous scope of the power asserted for the commission": "The legislation that the commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several states. And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. \* \* \* How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission v. Brimson*, (154 U. S. 447, 448, 479). Whether it could delegate the power, if it possessed it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. \* \* \* The power to require testimony is limited as it usually is in English-speaking countries at least to the only cases where the sacrifice of privacy is neces-

sary—those where the investigations concern a specific breach of the law. \* \* \* If by virtue of §21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi-judicial duties of the commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.”

The latest decision of the Supreme Court of interest is *Weeks v. U. S.* (Feb. 24, 1914). The taking of papers from Weeks' house by a United States marshal without warrant was held to be an unlawful seizure. “If letters and private documents can be thus seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” The court supported its opinion by citing *Hale v. Henkel*, “wherein it was held that a *subpoena duces tecum* requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies located in different parts of the United States, was an unreasonable search and seizure within the Fourth Amendment.”

In an opinion on the Bureau's powers, I said in conclusion: “I find that lawful questions should relate to subjects within range of the constitutional powers of Congress and should

be directed as closely as possible to eliciting facts germane to the exercise of these powers, excluding queries prompted by an impertinent curiosity or a vague desire for information. And I find that demands may be lawfully resisted by an assertion of personal rights whenever compliance would involve an unwarrantable disclosure of private affairs or an excessive expenditure of private means x x x. The Act purports to invest the Bureau with inquisitorial power of wide range and great severity. For this reason my treatment has been uniformly critical, as becomes the scrutiny of all inquisitorial laws. For this reason the Bureau's action should be watched with vigilant regard for private rights, so that these be not invaded by unlawful search; and, with special regard for the integrity of state corporations, the first opportunity should be taken to maintain their freedom from a visitorial power in Congress or its delegate. It must be insisted that Congress has no other or greater power over these corporations, as such, than it has over individual citizens of the states.

"A deeper incentive to vigilance is the preservation of the proper jurisdiction of the states. The Bureau of Corporations should never be allowed to exercise powers suggestive of an exclusive federal right to regulate all business of more than parochial interest." In this relation I note that the statement of the case in *U. S. v. Armour* (142 Fed. Rep., p. 812), recites that the Commissioner of Corporations, Mr. Garfield, "testified that he had previously read a pamphlet of Mr. Randolph (being an opinion by Carman F. Randolph on the status and powers of the Bureau of Corporations organized under Section 6 of the Act of Congress creating the Department of Commerce and Labor) and had in mind, in talking with Mr. Krauthoff, that there was a line of privacy which, under the Constitution, Congress could not invade, and that the question as to his investigations invading that line was a matter for discussion between them."

As a matter of fact the Bureau has never so pressed its compulsory powers to provoke a test of their validity. The Report for 1912 states that they have seldom been exercised, the information desired being generally given on request.

The conclusions of the opinion are strengthened by the later decisions cited. *Hale v. Henkel*, while maintaining a proper federal right to see that state corporations respect Federal law, disclaims any general federal visitorial power over them and

affirms to them the protection of the Fourth Amendment. And all the decisions follow the best tradition of our jurisprudence in condemning the drag-net and the short-cut quest even when a breach of the law is in question.

If such rough and roving quests are forbidden even when they are incident to a regular proceeding for vindication of the law how can they be permitted to a purely administrative body in a mere search for information, whether it be undertaken in problematic aid of legislation or on rumor or suspicion of wrong doing.

## VI.

The constitutional argument against inquisitorial power as this is developed in the Bureau of Corporations Act and in the Trade Commission Bill, does not deny a real need for information or cut off means for its reasonable satisfaction. There is enough accessible information of the conduct of interstate business, great and small, corporate and individual, to facilitate the handling of our problem, if it be properly selected, stated and, above all, assimilated. Taking this business by and large, what need the legislator know that requires a permanent inquisition to reveal it? And what knowledge shall the public prosecutor properly gain by substituting a bureaucratic thumbscrew for the judicial proceeding?

Constitutional obstacles apart there is a serious objection to the inquisitorial power in question in its implicit assumption of a widespread wilful violation by industrial corporations of the Anti-Trust Act, which is, like all statutes, officially presumed plainly to lay down the law. As the presumption has been, to a substantial degree, contrary to the fact the assumption unfairly involves much of our interstate business in a cloud of suspicion. This should be dissipated and not thickened for we are beginning to get a judicial interpretation of the Act which, if it be not vexed by new legislation provoking further years of litigation, will clarify the law's commands and promote their authority.

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