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Review of Administrative Subpoena

NOTES AND COMMENTS

ADMINISTRATIVE LAW

REVIEW OF ADMINISTRATIVE SUBPOENA POWER

The Secretary of Labor, suspecting a violation of wage standards set up under the Walsh-Healey Act,[1] issued two subpoenas duces tecum ordering production of appelant's payroll records.[2] Appellant refused to comply, saying that many of its employees were not working in the furtherance of government contracts and hence as to them, the act did not apply.[3] Upon application to the district court,[4] appellant was found to be outside the scope of the act and the court refused to enforce the order.[5] The Circuit Court of Appeals reversed[6] and petition for certiorari was taken to the Supreme Court. Held, for appellant. The determination of jurisdiction under the act is the exclusive function of the Secretary of Labor and not a question for the court to consider. Endicott Johnson Corp. et al. v. Perkins, — U.S. —, 63 Sup. Ct. 339 (1942), Justices Murphy and Roberts dissenting.

Delegation of the subpoena power to administrative agencies has

1. 49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1941). This act gives the Secretary of Labor the power to establish certain minimum wage standards (§35 (b)), and prescribes the number of working hours (§35(c)) for employees engaged in manufacturing for government contracts in excess of $10,000.
2. 41 U.S.C. §38 ("The Secretary of Labor is hereby authorized to administer the provisions of this act. . . . The Secretary of Labor . . . shall have the power to make investigations and findings . . . and prosecute any inquiry necessary to its functions in any part of the United States."); §39 (" . . . the Secretary of Labor . . . shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath.")
3. The appellant's government contracts were for the manufacturing of shoes. Some of its plants, while not manufacturing finished shoes, were making component parts of shoes such as heels, soles, counters, etc. Appellant says the act does not apply to these plants because they are not making shoes.
4. 41 U.S.C. §39 ("In case of . . . refusal of any person to obey such an order [*supra*, note 2], any district court . . . within which the inquiry is carried on or within the jurisdiction of which said person who is guilty of . . . refusal is found, or resides, or transacts business, upon the application of the Secretary of Labor . . . shall have jurisdiction to issue to such person an order requiring such person to appear, . . . to produce evidence, . . . and to give testimony relating to the matter . . . and any failure to obey such order of the court may be punished by said court as a contempt thereof . . . ")
5. Perkins v. Endicott Johnson Corp. et al., 37 F. Supp. 604 (N.D. N.Y. 1941).
6. Perkins v. Endicott Johnson Corp. et al., 128 F. (2d) 208 (C.C.A. 2d, 1942); see Judicial Review of the Administrative Exercise of the Subpoena Power (1942) 52 Yale L. J. 175 for an exhaustive treatment of the ruling of the Circuit Court of Appeals.

been approved by the courts,[7] but if the administrative subpoena is disregarded, there must be an application to the courts to compel compliance.[8]

In considering applications courts have enforced the subpoenas, subject to certain constitutional limitations as to search and seizure.[9] However, the constitutional attack has been displaced in the later decisions by the jurisdictional approach.[10] Whether jurisdiction should be considered by the court under a statute giving an administrative body the power to issue a subpoena has given rise to much confusion. The conventional attitude seems to have been to consider it as an additional avenue for judicial supervision of administrative activities.[11]

7. 1 com Baur, Federal Administrative Law (1942) 74; Willis, Constitutional Law (1936) 536.

8. e.g. Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U.S.C. §49 (1941); Walsh-Healey Act, 49 Stat. 2036 (1936), 41 U.S.C. §39 (1941).

9. Since the ones to whom subpoenas duces tecum are directed in these cases are corporations, there is no immunity on the basis of the privilege against self-incrimination under the Fifth Amendment. A corporation however, is entitled to protection under the Fourth Amendment against unreasonable search and seizure of its papers. Jones v. Securities and Exchange Comm., 298 U.S. 1 (1936); Federal Trade Comm. v. American Tobacco Co., 264 U.S. 298 (1924); Silverthorne Lumber Co., Inc., et al. v. United States, 251 U.S. 385 (1920); Ellis v. Interstate Commerce Comm., 237 U.S. 434 (1915) (Justice Holmes brands broad subpoenas as "a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up"); Wilson v. United States, 221 U.S. 361 (1911). "A subpoena duces decum . . . may constitute an unreasonable search and seizure. It is such if it is too broad and sweeping in its terms . . . ". Rottschaefer, Handbook of American Constitutional Law (1939) 746; "If the subpoena . . . is too broad, it becomes a general warrant or writ of assistance of the type that so inflamed colonial America. . . . If the subpoena duces tecum . . . does not specify [the material] satisfactorilly, it is . . . unreasonable." Hart, Introduction to Administrative Law (1940) 216.

10. Electric Bond and Share Co. et al. v. Securities and Exchange Comm., 303 U.S. 419 (1938); United States v. Louisville & Nashville R.R. Co., 236 U.S. 318 (1915); General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596 (C.C.A. 6th., 1942); see Willis, Constitutional Law (1936) 533 and Unreasonable Searches and Seizures (1929) 4 Ind. L. J. 211, 313 pointing out the awkwardness of the relation of subpoena duces tecum to the constitutional guarantee.

11. Meyers et al. v. Bethlehem Ship Building Corp., 303 U.S. 41 (1938); Newport News Shipbuilding & Dry Dock Co. v. Shauffler et al., 303 U.S. 54 (1938) (holding that the National Labor Relations Act does not vest in the Labor Board exclusive power to determine its own jurisdiction); Interstate Commerce Comm. v. Brimson, 154 U.S. 447, 485 (1894) ("The inquiry whether a witness before a commission is bound to . . . produce books, papers, etc. in his possession . . . is one that cannot be committed to a subordinate administrative or executive tribunal for final determination"); General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596, 599 (C.C.A. 6th, 1942) ("The seal of a United States court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency");

It is argued that where resort to the judiciary is required by Congress, the court should be more than a mere rubber stamp; otherwise, no application to the courts would have been required.[12] While this argument is logical, it fails to disclose the real reason behind the requirement. Since administrative bodies have no power to punish for contempt of its orders,[13] there would be no way in which they could be enforced unless by a court having the power to punish for contempt. Thus it would seem that reference to the judiciary is required merely for the purpose of securing enforcement through the courts' contempt power rather than for the purpose of any inquiry by the courts as to jurisdiction.

In view of the newness of administrative activity in this field and the reluctance with which courts have approved of administrative regulation generally,[14] it would seem only natural that Congress, in trying to stay within the bounds previously prescribed by courts regarding delegation of the dangerous subpoena power, should require application to the courts for enforcement even though it be only a formality incorporated into the legislation to provide a method of enforcement and to appease the vestige of strict judicial supervision.[15]

Goodyear Tire & Rubber Co. et al. v. N.L.R.B., 122 F. (2d) 450 (C.C.A. 6th, 1941); Securities and Exchange Comm. v. Tung Corp. of America et al. 32 F. Supp. 371 (N.D. Ill. 1940). "These determinations as to jurisdiction are said to be so basic that their existence is a condition precedent to administrative action. Consequently, it has been held that where the administrative agency makes a finding, regardless of whether it is purely factual or not, which incidentally involves a determination of its jurisdiction over a particular subject matter or transaction, that determination must remain open to the independent judicial review by the trial court." Blachly and Oatman, Federal Regulatory Action and Control (1940) 124; Freund, Administrative Powers over Persons and Property (1928) 293.

12. Mr. Justice Murphy, dissenting in the instant case, points out at 345 that "in conditioning enforcement of the Secretary's administrative subpoenas upon application to the district court, Congress evidently intended to keep the subpoena power within limits and . . . must have meant for the courts to perform more than a routine ministerial function in passing upon those applications. If this were not the case, it would have been much simpler to lodge the power of enforcement directly with the Secretary"; see General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596 (C.C.A. 6th, 1942) supra, note 11.

13. California v. Lattimer et al., 305 U.S. 255 (1938); Federal Power Comm. v. Metropolitan Edison Co. et al., 304 U.S. 375 (1938); Langenberg v. Decker, 131 Ind. 471, 483, 31 N.E. 190, 194 (1891) (holding that only the courts and the General Assembly can punish for contempt, and the power to do so can not be conferred upon any other official or board of officials [State Board of Tax Commissioners]); In re Whitcomb, 120 Mass. 118, 21 Am. Rep. 502 (1876) (city council). 2 vom Baur, Federal Administrative Law (1942) 599.

14. Pound, Administrative Law (1942) 27; Freund, The Growth of American Administrative Law (1923) 10.

15. "With the legislation still novel, its requirements may seem somewhat outlandish. Increased familiarity will further reveal the potentialities of this type control." Handler, Constitutionality of Investigations (1928) 28 Col. L. R. 905, 937. "If in the en-

It seems certain now that most administrative agencies' findings of fact are conclusive so long as supported by some evidence.[16] Conceding this, it seems logical for the courts to recognize, as some have done,[17] that the power conferred by statute does not confer on the court authority to consider the jurisdiction or "coverage" of the act. Indeed, the facts determining coverage are often unavailable at the time the subpoena is issued and hence, there is no evidence upon which the court can judge the applicability of the act at that stage of the proceedings.[18]

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forcement suit the court makes extensive inquiry, it defeats the restraints otherwise imposed upon interlocutory appeals from agencies' orders." Judicial Review of the Administrative Exercise of the Subpoena Power (1942) 52 Yale L.J. 175, 176.

16. Gray et al. v. Powell et al., 314 U.S. 402 (1941); Meyers et al. v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Securities and Exchange Comm. v. Tung Corp of America et al., 32 F. Supp. 371 (N.D. Ill. 1940). Blachly and Oatman, Federal Regulatory Action and Control (1940) 122; Rottschaefer, Hand Book of American Constitutional Law (1939) 844.

17. Cudahy Packing Co. v. Fleming, 122 F. (2d) 1005, 1008 (C.C.A. 8th, 1941) ("Administrative functions and relationships are no concern of the judiciary unless fundamental rights are being violated or unless the statute has imposed a specific duty on the courts with respect to them") rev'd on other grounds, 315 U.S. 357 (1942); Fleming v. Montgomery Ward & Co., 114 F. (2d) 384, 390 (C.C.A. 7th, 1940) ("When Congress . . . has the power to regulate and supervise the conduct of any particular business under the commerce clause, an administrative agency may be authorized to inspect books and records . . . regardless of whether . . . there is any pre-existing probable cause for believing that there has been a violation of the law"), cert. den. 311 U.S. 690 (1940); In re Standard Dredging Corp., 44 F. Supp. 601, 602 (S.D. N.Y., 1942) ("The [Wage and Hour] administrator is not obliged as a condition of obtaining an enforcement order of his subpoena to make any showing that the respondents are engaged in commerce"); Fleming v. G. & C. Novelty Shoppe, 35 F. Supp. 829 (N.D. Ill., 1940); cf. Graham v. Federal Tender Board, 118 F. (2d) 8 (C.C.A. 5th, 1941); President of the United States v. Skeen, 118 F. (2d) 58, 59 (C.C.A. 5th, 1941) ("The officers [of the Federal Tender Board] would not be bound by the denial of any person operating in the field that he was engaged in interstate commerce"); National Mediation Board v. Virginian Ry., 2 Pike and Fischer, Adm. Law Serv. §§44g.31-4 (1941) ("The board has authority to examine the records of the railway and ascertain who are the employees in a particular class").

18. Fleming v. Montgomery Ward & Co., 114 F. (2d) 384 (C.C.A. 7th, 1940) supra, note 17. Judge Treanor says at 392 that there is no restraint upon the use of a subpoena duces tecum which limits its use to cases where the subpoenaed property is the sole source of information.