

II. VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

Thus § 3 (a) of the Act requires every agency to which it applies, which includes the Federal Trade Commission, to publish in the Federal Register certain statements of its rules, organization and procedure, "including the nature and requirements of all formal or informal procedures available," and adds that, "No person shall in [365] any manner be required to resort to organization or procedure not so published." In addition § 6 (b) proscribes any requirement of a report or other investigative demand "in any manner or for any purpose except as authorized by law."

Principally on the basis of these two sections respondents contend that the current order cannot be enforced except in violation of the Administrative Procedure Act. Have the respondents been ordered to comply with procedure of which they were not put on notice by publication in the Federal Register? And to the extent that the procedure had been defined and published, was it authorized by law?

The pertinent provisions of the Administrative Procedure Act became effective September 11, 1946. On December 11, 1946, the Federal Trade Commission published in the Federal Register its Rules of Practice, 11 Fed. Reg. 14233-14239. The Commission's Rule XXVI, *id.*, 14237, republished without change in 12 Fed. Reg. 5444, 5448, sets the time limit for filing initial reports of compliance with Commission orders and asserts the Commission's right to require, within its sound discretion, the filing of further compliance reports thereafter.⁴ In § 7.12 of its Statement of Organization, Procedures, and Functions, 12 Fed. Reg. 5450, 5452, the Commission restated its right

⁴"§ 2.26. *Reports showing compliance with orders and with stipulations.* (a) In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation: *Provided, however,* That if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination

"(b) Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation. . . ."

to require by order "such supplemental reports of compliance as it considers warranted," and defined the contents of such a report.⁵

We conclude that the Commission's published Rule XXVI announced the [366] right it claims in this case to demand of a party against whom an enforcement decree has been entered that it "file with the Commission from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order. . . ." Taken together with the Commission's Statement of Organization, Procedures, and Functions, *supra*, if indeed not by itself, Rule XXVI amply met the requirements of § 3 (a) of the Administrative Procedure Act.

Respondents hardly challenge this conclusion. Theirs is the more subtle argument that requirement of supplemental reports following court enforcement of a Commission order is unauthorized by statute and *ultra vires*, so that no valid notice of Rule XXVI had been or could be given, as required by § 3 (a) of the Administrative Procedure Act. Also, it is said to be in direct violation of § 6 (b) of that Act. This leads to the question of statutory authority for the order to report, a question we must determine even apart from consideration of the Administrative Procedure Act. Accordingly we turn to the Federal Trade Commission Act itself to see whether it contains statutory authority for the Commission's Rule XXVI, as well as for its order here sought to be enforced, issued, as it was, pursuant to the procedures proclaimed in that Rule. If we find such statutory authority, we must conclude that the objections under the Administrative Procedure Act are taken in vain.

III. STATUTORY AUTHORITY TO REQUIRE REPORTS

The Court of Appeals found the Commission to be without statutory authority to require additional reports as to compliance. Sec-

⁵ "§ 7.12. *Compliance and enforcement.* (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of § 2.26 of the rules of practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

"(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade Commission Act has become final as provided for under section 5 of that act, and the Commission has reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accomplished by way of contempt proceedings in the Circuit Court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings. . . ."

tion 6 of the Federal Trade Commission Act, it thought, could not be invoked in connection with a decree sought and entered pursuant to § 5, which sections the court regarded as insulated from each other and directed to wholly different situations. Section 6, so it was held, authorized requirement only of "special reports" supplemental to "annual reports" and could not be authority for requiring special reports supplemental to a report of compliance required by court decree in a § 5 case.

At the root of this position lies the elaborate and plausible argument of respondents that §§ 5 and 6 of the Act set up self-sufficient, independent and exclusive procedures for dealing with different matters and that therefore neither section can be supported or aided by the other. Respondents also say that the present use of the asserted power is novel and unprecedented in Commission practice and introduces a new method of investigating compliance. Respondents are not without statements by the Commission or its officials, *dicta* from judicial opinions, views of text writers and facts of legislative history which give some support to this theory. But this Court never before has been called upon to deal consciously and squarely with the subject.

The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser.

The Commission's organic Act, § 5, comprehensively provides substantive and procedural rules for checking unfair methods of competition. The procedure is complete from complaint and service of process through final order, court review, and enforcement proceedings to recover penalties which are not those here sued for. This entire subject of unfair competition, it is true, came into the bill late in its legislative history and dealt with a commercial evil quite different from the target of prior antitrust laws. It is to be noted, however, that although complete otherwise, this section confers no power to investigate this or any other matter. That power, without which all others would be vain, must be [367] found in other sections of the Act. The Commission, for power to investigate compliance with a § 5 order, has turned to § 6, which authorizes it to require certain reports but is not expressly applicable to a § 5 case. Respondents say it might better have turned to § 9, which authorizes it to send in-

investigators to examine their books, copy documents and issue subpoenas, and which is expressly applicable to § 5 proceedings.

Section 6, on which the Commission relies, is entitled, "Additional Powers of the Commission." Among other things and with exceptions not material, it adds the power "to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, . . . and its relation to other corporations and to individuals, associations and partnerships." It also authorizes the Commission "to require by general or special orders, corporations engaged in commerce . . . to file with the Commission in such form as the Commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relationship to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing."

To one informed of no fact apart from this text, it would appear to grant ample power to order the reports here in question. Respondents are in the class subject to inquiry, the call is for what appears to be a special report and the matter to be reported would seem to be as to business conduct and practices about which the Commission is authorized to inquire. But respondents advance several arguments to persuade us that this seemingly comprehensive power is subject to limitations not evident in the text.

Respondents derive from legislative history their contention that Congress divided the duties and powers of the Commission into two separate categories, one in § 6 merely re-enacting the old powers of investigation and publicity in antitrust matters—"essentially a mere continuance of the former powers of the old Bureau of Corporations." The other was a new unfair-competition power, self-contained and sealed off in § 5. It is argued that the reports set forth in § 6 can be required only "in support of general economic surveys and not in aid of enforcement proceedings under Section 5."

While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least. The information was such as the Com-

mission was authorized to obtain and we think it could be required for use in determining whether there had been proper compliance with the court's decree in a § 5 case.

It is argued, however, and the court below has agreed, that the "special report" authorized by statute does not embrace the one here asked as to the method of compliance with the decree. We find nothing in the legislative history that would justify so limiting the meaning of special reports, or holding that the report here asked is not such a one. The very House Committee Report (H. R. Rep. No. 533, 63d Cong., 2d Sess.) which the court below thought sustained respondents' contention, we read in its context to support the Commission. Speaking of this section, the Report said, "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in [368] its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." An annual report of a corporation is a recurrent and relatively standardized affair. The special report was used to enable the Commission to elicit any information beyond the ordinary data of a routine annual report. If the report asked here is not a special report, we would be hard put to define one.

Nor does the fact that § 5 applies to individuals, partnerships, and corporations, while §§ 6 (b) and 10 apply only to corporations, lead us to conclude that the Act must not be read as an integrated whole. The argument that, because the reporting and penalty provisions of the latter extend only to corporations they must not be invoked to implement, as against corporations, a § 5 proceeding which contemplates action against persons and partnerships as well, would have force were there not sound reason for more drastic powers to compel disclosure from corporations than from natural persons. What the former may be compelled to disclose without objection the latter may withhold, or reveal only after exacting the price of immunity from prosecution. Corporations not only have no constitutional immunity from self-incrimination; but the disparity between artificial and natural persons is so significant that differing treatment can rarely be urged as an objection to a particular construction of a statute. Moreover, Congress may have considered that the volume or proportion of unincorporated business or the relatively small size of individually owned enterprises, or even a lesser capacity and disposition to resist made it possible to omit persons from duties and penalties imposed on artificial combinations of capital.

We conclude that the authority of the Commission under § 6 to require special reports of corporations includes special reports of the manner in which they are complying with decrees enforcing § 5 cease and desist orders.

IV. RIGHTS UNDER FOURTH AND FIFTH AMENDMENTS

The Commission's order is criticized upon grounds that the order transgresses the Fourth Amendment's proscription of unreasonable searches and seizures and the Fifth Amendment's due process of law clause.

It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186. Although the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," Brandeis, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd v. United States*, 116 U. S. 616, *Hale v. Henkel*, 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale v. Henkel, supra; United States v. White*, 322 U. S. 694.

While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. *Cf. United States v. White, supra.* They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. *Cf. Graham v. Brotherhood of Locomotive Firemen*, 338 U. S. 232; *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192; *Trunhall v. Brotherhood of Locomotive Firemen & Engineers*, 323 U. S. 210; *Wickard v. Filburn*, 317 U. S. 111, at 129. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n v. American Tobacco Co., supra.* But it is sufficient if the

