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Thomas A. Rothwell Jr.

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Comment / Antitrust Civil Process Act: An Unreasonable Search and Seizure?—

Petition of Gold Bond Stamp Company

PURSUANT TO THE Antitrust Civil Process Act,¹ the Attorney General is authorized to serve a civil investigative demand on any corporation, association, partnership or other legal entity not a natural person,² whenever he has reason to believe that such party is in possession of any documentary material relevant to a civil antitrust investigation.³ The materials so obtained may be used by the Attorney General in either civil or criminal prosecutions.⁴ This legislation is unprecedented in the annals of American legislative history. Although many administrative agencies, vested with the authority to enforce civil sanctions, have been granted subpoena power,⁵ never before has the Attorney General, in his capacity as federal criminal prosecutor, been afforded such power.

Shortly after the passage of the Act, a demand was served upon the Gold Bond Stamp Company,⁶ a corporation involved in the consumer trading stamp business. The Sherman Act, sections one, two, and three,⁷ was specifi-

¹ 76 Stat. 548-552, 15 U.S.C. §§1311-14 (1962); for an analysis of the Act, see 51 Ky. L.J. 393 (1963); 111 U. PA. L. REV. 1021 (1963).

² 15 U.S.C. §1311 (f).

³ 15 U.S.C. §1312 (a). Privileged materials are not subject to the demand, 15 U.S.C. §1312 (c) (2).

⁴ 15 U.S.C. §1312 (a).

⁵ Secretary of Agriculture, 7 U.S.C. §7a (2), §1373, §1603; Secretary of Labor, 5 U.S.C. §780; Secretary of the Army, 33 U.S.C. §506; Secretary of the Treasury, 31 U.S.C. §548, 26 U.S.C. §7602; Federal Trade Commission, 15 U.S.C. §49; Director, National Science Foundation, 42 U.S.C. §1872 (a) (f) (1); Administrator, Veterans Administration, 38 U.S.C. §3311.

⁶ *Petition of Gold Bond Stamp Company*, 221 F. Supp. 391 (D. Minn. 1963).

⁷ 15 U.S.C. §§1, 2, 3. The demand served upon the petitioner stated as follows:

cally mentioned in the demand as the basis for the inquiry. Violations under the Sherman Act are punishable both civilly and criminally.⁸ Gold Bond Stamp Company petitioned the District Court for an order modifying or setting aside the demand. One of petitioner's contentions was that the power granted to the Attorney General violates the search and seizure clause of the Fourth Amendment to the Constitution. After denying the petition, the court held *inter alia* that the Act did not violate petitioner's constitutional rights under the Fourth Amendment.

This comment will be concerned with the question of whether the civil investigative demand authorized by the Act is an unreasonable search and seizure.

SEARCH AND SEIZURE AND THE CORPORATION

Historically, the term unreasonable search and seizure has been associated with general warrants,⁹ writs of assistance¹⁰ or any type of warrant which is formally defective or improperly executed. It may be difficult to conceive how a demand for the production of documentary materials can amount to an unreasonable search and seizure. There is no physical invasion by unwelcome officials, no rummaging of files and records. Nor is there any actual seizure of records.¹¹

However, the courts have considered a demand for the production of documentary materials as a "constructive" search.¹² The famous *Boyd* case¹³ was the first case to propose the "constructive" search theory. That case involved

"This civil investigative demand is issued pursuant to the provisions of the Antitrust Civil Process Act, 76 Stat. 548-552, Title 15 United States Code Secs. 1311-1314, in the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Secs. 1, 2, 3, 13, 14 and 18 by conduct of the following nature: Restrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith." Petition of Gold Bond Stamp Company, *supra* note 6, at 397.

⁸ Criminal violators under the Sherman Act are guilty of a misdemeanor punishable by a fine up to \$5,000, and/or imprisonment up to one year. 15 U.S.C. §§1, 2, 3. In civil actions the court may order the defendant to divest itself of some of its holdings, and/or forbid the continuance of the prohibited act. *Standard Oil v. U.S.*, 221 U.S. 1, 78 (1911).

⁹ This was a warrant issued by the English State Secretary's Office ordering the arrest (without naming any persons) of the author, printer, and publisher of seditious libels specified in the warrant. Lord Camden in *Entick v. Carrington*, 2 Wils. K.B. 276 (1765) held that such warrants were illegal.

¹⁰ These writs involved goods which had not been processed through customs authorities. They authorized the person to whom they were issued to enter into any house where the goods were suspected to be concealed. See *Goldman v. U.S.*, 316 U.S. 129, 139 (1942), for the better known accounts of writs of assistance.

¹¹ Handler, *Constitutionality of Investigations of the Federal Trade Commission*, 28 COLUM. L. REV. 905, 909 (1928).

¹² *Boyd v. U.S.*, 116 U.S. 616, 630 (1886); *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894).

¹³ *Boyd v. U.S.*, *supra* note 12.

a proceeding, instituted by the Government, against a partnership to forfeit a shipment of plate glass imported in violation of the customs regulations. An order was obtained under section 5 of the Act of 1874,¹⁴ compelling the defendants to produce an invoice which would substantiate the charge. The defendants complied with the order but at the trial objected to the introduction of the invoice in evidence. They based their objection on the ground that the Act of 1874 violated the Fourth and Fifth Amendments. The Supreme Court held that the reception of the invoice in evidence was erroneous and reversed the lower court. The statute was declared unconstitutional, since it violated both the Fourth and Fifth Amendments.

In answer to the Government's contention that an order for production of records was not search and seizure within the Fourth Amendment, the Court said:

... Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or forfeit his goods is within the condemnation. . . .¹⁵

The Court then concluded:

... that a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is the equivalent of a search and seizure—and an unreasonable search and seizure within the meaning of the Fourth Amendment.¹⁶

Subsequent cases have uniformly held that a corporation is protected by the guaranty of the Fourth Amendment against unreasonable search and seizure, whether made pursuant to a criminal or a civil proceeding.¹⁷ However, the Supreme Court, in *Wilson v. U.S.*,¹⁸ limited this right where corporate books and records were involved. This limitation is supported by the theory that a corporation is a "creature of the state" and, as such, is subject to broad visitatorial powers of the incorporating state. Its books and records may be examined by the incorporating state to determine whether or not the corporation is complying with the laws of that state.¹⁹ The corporate records have been

¹⁴ This Act was entitled "An Act to amend the custom revenue laws, and to repeal moieties." 18 Stat. 186 (1874).

¹⁵ *Boyd v. U.S.*, *supra* note 12, at 630.

¹⁶ *Id.* at 634-35.

¹⁷ *Silverthorn Lumber Co. v. U.S.* 251 U.S. 385 (1920); *U.S. v. Morton Salt Co.*, 338 U.S. 633 (1950); *Interstate Commerce Commission v. Brimson*, *supra* note 12. However the courts have consistently held the protections against self-incrimination of the Fifth Amendment inapplicable to corporations. *Essgee Co. v. U.S.*, 262 U.S. 151 (1923); *Hale v. Henkel*, *supra* note 12; *Wilson v. U.S.*, 221 U.S. 361 (1911).

¹⁸ *Wilson v. U.S.*, *supra* note 17.

¹⁹ This theory is best expressed by Brown, J. in *Hale v. Henkel*, *supra* note 12, at 74-75 where he states:

"... the corporation is a creature of the state. It is presumed to be incorporated for the

considered public records.²⁰ The investigative power of Congress over corporations involved in interstate commerce has been held to be analogous to the visitorial powers of the incorporating state.²¹

Those cases which follow the "creature of the state" theory contend that the test for the "unreasonableness" of a demand is whether the materials demanded are relevant to the inquiry, and whether they can be fairly determined by the party served.²²

It would appear that such a limitation on the privilege against unreasonable search and seizure would be diametrically opposed to the holding in the *Boyd* case. In the *Wilson* case, the court contended that the *Boyd* case involved private papers, not public documents and was, therefore, distinguishable.²³ In *Okla. Press Pub. Co. v. Walling*,²⁴ involving an administrative subpoena issued while investigating a violation of the Fair Labor Standards Act, the Court was less imaginative. It simply held that the *Boyd* case was limited to criminal proceedings and proceedings for forfeiture of property.²⁵ In *U.S. v. Morton Salt Co.*,²⁶ where the Court considered the issuance of subpoenas by the Federal Trade Commission, the Court agreed with the *Okla. Press Pub. Co.* case in distinguishing the *Boyd* case.²⁷

Even though the original impetus of the *Boyd* case ruling has been greatly reduced, it has never been overruled. Why has the Court permitted the *Boyd* case to survive? Is it a mere derelict on the sea of law?

The *Boyd* case serves a very useful and necessary purpose in a day of widespread governmental controls. It represents a *caveat* to those who would sacrifice private security for the public interest. The Court in the *Okla. Press Pub. Co.* case readily admitted that "there has always been a real problem of balanc-

benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused. . . ." See also *Wilson v. U.S.* *supra* note 17.

²⁰ *Ibid.*

²¹ *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904); *Interstate Commerce Commission v. Brimson*, *supra* note 12; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 (1912).

²² *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *U.S. v. Morton Salt Co.*, *supra* note 17.

²³ It is difficult to imagine how an "invoice" (*Boyd* case) would be anymore private than copies of letters and telegrams (*Wilson* case).

²⁴ *Okla. Press Pub. Co. v. Walling*, *supra* note 22.

²⁵ *Id.* at 206.

²⁶ *U.S. v. Morton Salt Co.*, *supra* note 17.

²⁷ *Id.* at 651.

ing the public interest against private security."²⁸ In holding in favor of the public interest, the Court cited the dissenting opinion of Justice Cardozo in *Jones v. Securities and Exchange Commission*.²⁹

In that opinion Justice Cardozo made it very clear that the Securities and Exchange Commission "is without coercive powers, cannot arrest or amerce or imprison though a crime has been uncovered. . . ."³⁰

Justice Murphy, dissenting in the *Okla. Press Pub. Co.* case presented the case for private security as follows:

Excessive use or abuse of authority cannot only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who sent hither swarms of officers to harass our people.³¹

The Antitrust Civil Process Act poses the problem of public interest *versus* private security. Its avowed purpose is to arm the Attorney General with an extra-judicial power to obtain evidence of past antitrust violations, whether civil or criminal.³² It would not have been unprecedented if Congress had limited the Attorney General's power under the Act to civil prosecutions.

The Attorney General has for some time waived his right to institute criminal proceedings for antitrust violations in the so-called "railroad release" procedures.³³

Under this procedure, the Attorney General reviews industrial plans or programs to determine whether or not they violate the antitrust laws. He waives his right to bring criminal proceedings if the corporation cooperates fully, but reserves the right to bring a civil action to challenge the legality of the plan. This procedure seems fair and equitable. The corporation is given immunity from criminal prosecution for its cooperation in furnishing the Attorney General with necessary information.

If this type of immunity provision had been included within the Act, the demand would be within the purview of the *Okla. Press Pub. Co.* case and would undoubtedly be considered constitutional by the courts. However, this is not the case.

Judge Nordby, in his opinion in the *Gold Bond Stamp Company* case, was apparently misled by the term "civil investigative demand." He did not men-

²⁸ *Okla. Press Pub. Co. v. Walling*, *supra* note 22 at 203.

²⁹ 291 U.S. 1 (1934).

³⁰ *Id.* at 33.

³¹ *Okla. Press Pub. Co. v. Walling*, *supra* note 22, at 218. See *Olmstead v. U.S.*, 277 U.S. 438, 478-79 (1928), Brandeis, J. dissenting.

³² H.R. Rep. No. 1386, 87th Cong., 2d Sess. 3-4 (1962). *Hearings on S. 167 Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, 87th Cong., 1st Sess. 15 (1961).

³³ BARNES, Assistant Attorney General, *Theory and Practice of Antitrust Administration in How to Comply with the Antitrust Laws*, Commerce Clearing House (1954).

tion the fact that the potential violations on which the demand was based were of both a criminal and a civil nature.³⁴ He supported his holding on the rulings in the *Okla. Press Pub. Co.* case and the *Morton Salt Company* case. Both of these cases involved civil prosecutions by administrative agencies. In each case the court was careful to distinguish the *Boyd* case, relegating it to cases involving criminal proceedings.

The alarming aspect of the civil investigative demand is the fact that the Attorney General can compel a citizen of the United States to furnish documentary materials which may be used as evidence in a criminal prosecution. This investigative "short-cut," authorized by Congress for the sake of expediency, is a flagrant violation of the individual's personal security guaranteed by the Constitution.

It is submitted that this compulsory production of documentary materials which may be used in a criminal prosecution falls within the condemnation of the *Boyd* case as an "unreasonable search and seizure" under the Fourth Amendment.

The Court of Appeals of the Eighth Circuit will have the opportunity to review the decision of the District Court in the *Gold Bond Stamp Company* case.³⁵ Will the court permit further encroachments on private security in the name of public interest?

Obsta principiis—withstand beginnings—was the warning given by Justice Bradley in the *Boyd* case against the Government's attempt to encroach upon a citizen's constitutional privileges. The warning is repeated here.

THOMAS A. ROTHWELL, JR.

³⁴ See note 7, *supra*.

³⁵ Presently the case is on appeal to the Eighth Circuit Court of Appeals