

MEMORANDUM.

No. 250

FEDERAL TRADE COMMISSION, et al.

Appellants,

vs.

CLAIRE FURNACE COMPANY, et al.

I.

AS AN AID TO CONGRESS.

(1) Congress has power to compel persons or corporations to give information to enable that body to legislate upon or deal with any matter within the scope of its constitutional powers;

(2) This it may do directly through its own committees or it may devolve the authority required upon an outside body or individual;

(3) But it has no power to compel disclosures on the part of persons or corporations for the mere sake of eliciting information or for the mere purpose of publishing information, even though such information may be interesting or useful to the public;

(4) Since the authority to compel disclosures must be exercised only to enable Congress to exercise its constitutional powers, when an attempt is made to compel disclosures the power or powers to the exercise of which the information relates must be made in some way to appear and not be left to mere conjecture. In other words, private persons or corporations may not be compelled to disclose their affairs upon the mere suggestion that the information may in

the future become useful in the possible exercise of unspecified powers, where no such purpose is disclosed.

To hold otherwise would be to allow a power which in principle is conditioned to become in practice unconditioned, since the failure to disclose the matter of legislative cognizance in respect of which the information is to be elicited would be to compel the citizen to disclose his private affairs, without regard to any contemplated legitimate use of the information.

Upon what, then, does the Commission base its present attempt to compel these various corporations to disclose information in respect of cost of production, etc? We first turn to the appropriate act under which the Commission assumes to proceed. That act simply appropriates \$150,000 for expenses in connection with the collection of information **** “within the scope of its powers, regarding production, ownership, manufacture, storage and distribution of food-stuffs,” etc., “and the products or by-products connected with the preparation and manufacture thereof, together with figures of costs, and wholesale and retail prices.” 41 Stat. 328. ** Govt.’s brief, p. 7, 8.

** No additional power conferred. May be complied with by gathering such information of the kind named as may be voluntarily furnished.

In pursuance of this appropriation and as the basis of its proceeding, the Commission adopted a resolution (Transcript, pp. 11, 12) which recites that at a hearing of the Appropriations Committee of the House the Commission “was requested to suggest what it might undertake to do to reduce the high cost of living” and the Commission thereupon recommended “that it would be desirable to obtain and publish from time to time current information with respect to the production,” etc., and resolved that, by virtue of Section 6 (a) and (b) of the Trade Commission Act, the Commission “proceed to the collection and publication of such information,” etc. Thereupon, the Commission issued orders to the various appellees and others, requiring them to furnish information in great detail in respect of their business. Failure to do so was to be visited with the penalties prescribed by the Trade Commission Act.

It will therefore be seen that nothing in the circumstances leading to or in connection with the appropriation act, or in connection with the contemplated exercise of the Commission’s power suggests that the information is to be such as is related to interstate commerce or as will enable Congress to exercise its legislative power in respect of that matter or in respect of any other matter within its authority. The purpose expressed from beginning to end, relates only to the reduction of the high cost of living, and this was to be effected, not by legislation (even if Congress had power to deal with the subject) but by “collection and publication.” See Tr. p. 88.

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 419, it was held that the Interstate Commerce Commission had no power to enter upon investigations except in connection with some violation, or claimed violation, of the act or upon matters that might have been made the object of complaint. “*** in other words 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 necessary – those where the investigations concern a specific breach of the law.”

The dragnet has been condemned, even when attempted to be used in relation to a specific breach of the law. How then can such a method be justified when it is utilized not with reference to some specific wrongdoing or directed to some specific and lawful end, but in aid of possible, undisclosed, uncertain and purely problematical future legislation. The language of Judge Sawyer in *Re Pacific Railway Commission*, 32 Fed. Rep. 241, 263, is cited 237/445 pertinent: “A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end.” In *Kilbourn v. Thompson*, 103 U.S. 168, 190, this court said: that the House

of Representatives was without authority to punish a witness for contumacy unless his testimony be required in a matter within the jurisdiction of the House, “and we feel equally sure that neither of these bodies [House and Senate] possesses the general power of making inquiry into the private affairs of the citizen.” *

* Congress cannot regulate a corporation (any more than an individual) because it is engaged in interstate commerce. The power extends only to regulating the interstate commerce activities of the corporation. It cannot, for example, regulate the intrastate activities (or inquire into the intra-state activities) of an interstate passenger, or one who intends to become such, because he is that kind of a passenger. It may regulate his inter-state activities only. An illustration may be helpful: A state at one time could regulate the sale of intoxicating liquor, but that did not mean that it could regulate the saloon-keeper or the outside activities of the saloon-keeper simply because he was engaged in a regulation business.

I cannot see that a corporation, more than an individual, simply because it is engaged in interstate commerce, may be required to compile facts concerning its productions, costs, etc., merely to aid in the proper understanding or solution of the problem of high prices.

(6)

II.

NOT WITHIN SCOPE OF COMMISSION'S POWERS.

The power conferred by Section 6 (a) is to “investigate *** the organization, business, conduct, practices and management of any corporation engaged in commerce ***” The power contemplated is to investigate the corporation. 284 Fed. 890. Section 9 provides that the Commission may examine and copy documentary evidence “of any corporation being investigated or proceeded against.” The investigation here authorized and undertaken is not of the corporation but of an economic question, and the corporations are required to furnish facts bearing upon this economic question, viz: “The high cost of living.” The purpose in view was to afford a remedy for an undesirable economic condition, not to compel the corporations to mend their ways or to continue, alter or refrain from any specific or any general conduct. For the purpose named, and to that end and no other, so far as the appropriation act, the resolution of the Commission and the answer itself (aside from some general suggestions as to possible use by Congress) disclose the corporations were required to furnish facts relating to their business affairs. The Constitution will be searched in vain to find any such power, express or implied. Congress has no express power to legislate with regard to “prices,” or the cost of living, and consequently can have no implied power to obtain information, by compulsion, to aid it in so doing. If either may be affected by congressional legislation it would be only as an indirect result of the exercise of some other power actually conferred. It does not then appear directly or inferentially that the information sought “pertains to a subject over which Congress has jurisdiction,” and that at least this test must be applied is conceded by the Government. (Brief, p. 33).

(7)

The official ascertainment of facts is not an end but a means to an end and it is a mere truism to say that the end must be a legitimate one to justify the means. Since paragraphs (a) and (b) do not indicate the ends for which the information specified may be obtained, we must look for them elsewhere, and they are to be found in the substantive provisions of the act in regard to unfair competition, violations of the Anti-trust Act, etc. The citizen when interrogated about his private affairs has a right, before answering, to know why the inquiry is made, and if the purpose disclosed be not a legitimate one he may not be compelled to answer. Since it does not appear that the inquiries were for purposes of legislation or related to specific violations of law, but only to aid in the solution of an economic problem by giving information upon the subject to the public, it follows that the disclosures sought cannot be compelled.

If (a) and (b) include power to investigate for reasons and ends beyond and apart from interstate commerce, they are too broad and void within the principles of

Emp. Liability Case, 207 U.S. 463

Adair v. U.S., 208 U.S. 161

Trade Mark Cases, 100 U.S. 82.