Supplementary Material

Chapter 8: The New Deal/Great Society Era—Criminal Justice/Search and Seizure

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946)

L. Metcalfe Walling was the federal official authorized by law to investigate whether certain businesses were acting consistently with the Federal Labor Standards Act. When the Oklahoma Press Publishing Company refused to let him examine their books and records, Walling asked the local district court to subpoena the records. When the district court issued the subpoena, the Oklahoma Press Publishing Company appealed, claiming that the subpoena was an unconstitutional search and seizure. The Court of Appeals for the Tenth Circuit rejected that claim. The Oklahoma Press Publishing Company appealed to the Supreme Court of the United States.

The Supreme Court by a 8-1 vote ruled the investigation constitutional. Justice Rutledge's majority opinion maintained that federal investigations of businesses were not generally the searches governed by the Fourth and Fourteenth Amendments. Oklahoma Press Pub Co. *was typical of many Fourth Amendment cases decided during the early New Deal Era. The Supreme Court in these years considered a series of challenges brought by businesses who did not want bureaucrats to investigate their books or records. New Deal justices consistently rejected these Fourth Amendment claims. Justice Rutledge, who wrote the opinion below, was perhaps the most civil libertarian justice on the court during the 1940s. Nevertheless, he easily disposed of the constitutional claim. Consider this case in light of cases decided in the 1960s in which judicial liberals routinely found Fourth Amendment violations. What explains the difference in result? Was Rutledge correct that the rules for corporations and administrative investigations are different from the rules for police officers investigating crimes? Is the better explanation that New Deal liberals liked administrators better than businesses?*[1]

JUSTICE RUTLEDGE delivered the opinion of the Court.

. . .

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them.

. . .

The cited authorities would be sufficient to dispose of the Fourth Amendment argument, and more recent decisions confirm their ruling. Petitioners however are insistent in their contrary views, both upon the constitutional phases and in their asserted bearing upon the intention of Congress. While we think those views reflect a confusion not justified by the actual state of the decisions the confusion has acquired some currency, as the divided state of opinion among the circuits shows. Since the matter is of some importance, in order to remove any possible basis for like misunderstanding in the future, we give

[1] For a discussion of these cases that takes this position, see Kenneth I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004), 29–65.

more detailed consideration to the views advanced and to the authorities than would otherwise be necessary.

. . .

The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure. Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

. . .

The confusion, obscuring the basic distinction between actual and so-called 'constructive' search has been accentuated where the records and papers sought are of corporate character, as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions. It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it. And, although the Fourth Amendment has been held applicable to corporations notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson v. United States* (1911) . . . distinguishing the earlier quite different one of *Boyd v. United States* (1886), held the process not invalid under the Fourth Amendment, although it broadly required the production of copies of letters and telegrams 'signed or purport(ed) to be signed by the president of said company during the month(s) of May and June, 1909, in regard to an alleged violation of the statutes of the United States by C. C. Wilson.'

. . .

The *Wilson* case has set the pattern of later decisions and has been followed without qualification of its ruling. . . . [n]o case has been cited or found in which, upon similar facts, the Wilson doctrine has not been followed. Nor in any has Congress been adjudged to have exceeded its authority, with the single exception of *Boyd v. United States*, . . . which differed from both the Wilson case and the present ones in providing a drastically incriminating method of enforcement which was applied to the production of partners' business records. Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken from in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of 'probable cause, supported by oath or affirmation' literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things

to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved. Both were corporations. The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by s 11(a), the latter expressly, the former by necessary implication. It is not to be doubted that Congress could authorize investigation of these matters. In all these respects, the specifications more than meet the requirements long established by many precedents.