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Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—II

The federal inquisitional trend, discussed in the first installment of this Article, has steadily increased to a point where subsidence seems improbable. Yet in some respects, the state inquisitional trend is even more compelling than its federal counterpart. In this installment of his Article, Mr. Rogge examines the inquisitional powers of selected state investigators and investigative bodies, concentrating on those that are common to several states. He points out that in many states administrative investigations have replaced the grand jury. Moreover, states rarely provide for a right to counsel in such investigations. Mr. Rogge concludes that the increasing use of state and federal inquisitions threatens to sterilize the individual civil liberties guaranteed by the Constitution.

O. John Rogge*

VIII. STATE INVESTIGATIVE AGENCIES

In comparison with the federal agencies that exercise investigative subpoena powers, discussed in the first installment of this Article, the number of state agencies with similar powers is multitudinous. California, for example, grants investigative subpoena powers to the head of each governmental department, as well as numerous other subordinate officials. Michigan, on

*Member of the New York Bar.

the other hand, has fewer agencies with investigative subpoena powers but more actual investigations, due to its widespread implementation of judicial inquisitions.\(^3\) New York is probably second to the California and Michigan leadership in these two areas, but it has had the greatest variety of governmentally sanctioned investigations. The remaining 47 states also have numerous provisions for inquisitions by officials, all of which raise compelling constitutional issues. A consideration of the most common state agencies and the provisions that empower them to subpoena witnesses for investigations is therefore essential to an accurate measurement of the force of the current trend toward inquisitional proceedings.

The case of *In re Groban*\(^4\) provides a natural starting point for a study of the investigative subpoena powers of state officials and bodies. In that case an assistant fire marshal, suspecting the appellants of arson, subpoenaed them to appear before him with their business records. They appeared and stated that they would testify only if their counsel could be present during the interrogation. When the investigating official replied that their attorney would not be admitted to the private interrogation, they refused to testify. The official then held them in contempt and ordered them imprisoned until they were willing to testify before him in secret. These commitment proceedings were also secret, so that the appellants had the benefit of counsel neither when they refused to testify nor when they were held in contempt and ordered imprisoned.

This example of state investigative action bears a striking resemblance to the inquisitional system, in use on the mainland of Europe. Yet all courts sustained it, the United States Supreme Court by a vote of five to four. Mr. Justice Reed, writing for the majority, was of the opinion that witnesses in administrative investigations, like those appearing in proceedings before a grand jury, were not constitutionally entitled to counsel.\(^5\)

Mr. Justice Frankfurter, in a concurring opinion in which

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5. In support of this position, he cited Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944). He also cited with approval United States v. Levine, 127 F. Supp. 651 (D. Mass. 1955), in which the court made a passing comment that the defendant was not "entitled to counsel at the grand jury stage of the proceed-
Mr. Justice Harlan joined, commented that "the constitutionality of a particular statute . . . cannot be determined by deriving a troupe of hobgoblins from the assumption that such a particularized exercise of power would justify an unlimited, abusive exercise of power." Perhaps a consideration of the current inquisitional trend, plus the multitude of state agencies with investigative subpoena powers, would have given him more pause than did his rosy view of a single piece of Ohio legislation.

His next paragraph concluded with the observation that "the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitutional principle that no administrative inquiry can be had in camera unless a lawyer be allowed to attend." The almost involuntary response is, why not?

Mr. Justice Black, joined by Mr. Chief Justice Warren and Justices Douglas and Brennan, was never more incisive in dissent. He emphasized that "under the reasoning of the majority every state and federal law-enforcement officer . . . could constitutionally be given power to conduct such secret compulsory examinations. This would . . . go a long way toward placing 'the liberty of every man in the hands of every petty officer.'"

The procedure upheld in In re Groban is available in most of the 50 states. Yet, neither in England, where our accusatorial method had its early development, nor in France, where the inquisitional technique took hold, is it possible today for an official to question a subpoenaed person in secret and without counsel. This poignant illustration of the present force of the inquisitional trend emphasizes the near reality of what Mr. Justice Black, quoting James Otis, warned against.

1. **Fire Marshal**

The Ohio legislation contested in Groban empowers a fire marshal and his assistants to subpoena any person to appear

In Smith v. General Truck Drivers Local 467, 181 F. Supp. 14 (S.D. Cal. 1960), involving an action by a union member against his local for issuing him a withdrawal card without a hearing, the court said, citing Groban: "And the Supreme Court has recognized that a witness before an administrative body is not entitled to representation by counsel." Id. at 20.

6. 352 U.S. at 355-36.
7. Id. at 386.
8. Id. at 337-38.
9. Id. at 331-52 n.82.
before one or more of them to testify under oath. The investiga-
tive hearing may be private, and the official in charge can ex-
clude any person he wishes from the examination, including
counsel for the subpoenaed witness. If the subpoenaed person
refuses to testify or disobeys any of the official’s orders, he may
be summarily punished for contempt “by a fine of not more
than one hundred dollars or commitment to the county jail until
such person is willing to comply with the order of such officer.”
Any statement that the suspect makes during these secret ses-
sions must be turned over to the prosecuting attorney for use in
any subsequent prosecution.

In many states, as in Ohio, the mere disobedience of a sub-
poena can be either a contempt or an offense. In Minnesota, for
example, failure to comply with a subpoena may result in a fine
of not more than 100 dollars or imprisonment until the sub-
poenaed person agrees to comply. A similar fine may be imposed
for a like offense in Iowa, but the jail sentence is limited to 30
days. Louisiana is more stringent; there a recalcitrant sub-
poenaed witness may be fined 1,000 dollars and imprisoned for
one year, or both.

three-fourths of the 50 states give similar powers to a fire marshal or one
of his subordinates, or to comparable officials. See, e.g., ALA. CODE tit. 65, §§
45-49 (1958); ARIZ. REV. STAT. ANN. §§ 20-150, -160 (1956); Ark. STAT.
ANN. § 82-316 (1960); Conn. GEN. STAT. REV. §§ 29-57, -58 (1958); Del.
CODE ANN. tit. 16, §§ 607(1), (g) (Supp. 1962); Fla. STAT. § 633.08 (1961);
Ga. CODE ANN. §§ 92A-729, -730 (1958); Hawaii REV. LAWS §§ 184-1, -5
(1955); Ill. REV. STAT. ch. 127-½, §§ 7, 8 (1961); Ind. ANN. STAT. § 20-508
(1950); Iowa CODE §§ 100.6-9 (1962); Kan. GEN. STAT. ANN. §§ 31-202, -203
(1949); Ky. REV. STAT. §§ 227.280, .290 (1960); La. REV. STAT. §§ 40:1568,
:1569, :1571, :1572 (1950), 40:1621 (Supp. 1962); Maine REV. STAT. ANN.
ch. 97, § 27 (1954); Md. ANN. CODE art. 46A, §§ 87, 88 (1957); Mass. ANN.
LAWS ch. 148, § 3 (1957); Mich. STAT. ANN. § 4.559(7) (1961); Minn. STAT.
§§ 73.04-06 (1961); Miss. CODE ANN. §§ 3700, 3701 (1950); Mont. REV.
CODES ANN. §§ 82-1214 to 82-1216 (1960); Neb. REV. STAT. §§ 81-500,-610
(1950); N.H. REV. STAT. ANN. §§ 163:18-20 (1965); N.C. GEN. STAT. §§ 69-2
to 69-3.1 (1960); N.D. CENT. CODE §§ 18-01-10, -11 (1960); Okla. STAT. ANN.
tit. 74, § 316 (Supp. 1962); Ore. REV. STAT. § 476.250 (1959); Pa. STAT. ANN.
tit. 35, §§ 1184, 1185 (1949), tit. 55, § 37106 (1957); R.I. GEN. LAWS ANN.
§ 23-28-5 (1960); S.C. CODE § 47-1176 (1962); S.D. CODE § 31.0304 (1939);
Tenn. CODE ANN. §§ 53-2428 to 53-2434 (1966); Tex. INS. CODE tit. 5.45
(1952); Vt. STAT. ANN. tit. 20, §§ 2864-69 (1959); Va. CODE ANN. §§ 27-31,
-32 (1950); Wash. REV. CODE § 48.48.070 (1952); W. VA. CODE §§ 2797-800
(1961); Wis. STAT. ANN. § 200.21 (1957).


12. Minn. STAT. § 73.05(S) (1961).

13. IOWA CODE § 100.8 (1962).

sylvernia, add a compulsory testimony (immunity) provision, but only one state, Georgia, makes any specific provision for counsel.

Moreover, the courts in various of these states have sustained the admissibility of evidence gathered under these broad inquisitorial powers. In *State ex rel. Robertson v. Steele*, the Minnesota Supreme Court refused to require a county attorney to give the defendant a copy of his testimony before the state fire marshal, although the court did characterize the proceedings before the fire marshal as "to put it mildly, unusual, drastic, and inquisitorial." In a later case, *State v. Rixon*, the same court, however, quashed a grand jury indictment based on transcripts of such testimony on the ground that the defendants had been compelled to testify against themselves in violation of the state's constitutional guarantee of the privilege against self-incrimination. A confession by an arrested individual to an assistant fire marshal was held admissible by the Indiana Supreme Court in a prosecution for arson. The Kansas Supreme Court has held that the testimony of subpoenaed or detained witnesses in the state's inquisitorial proceedings into the causes of fires was admissible against them in subsequent arson prosecutions, absent claims of the privilege against self-incrimination.

In contrast to the many states that provide for the administrative investigation of fires of suspicious origin, usually in secret inquisitorial proceedings, Nevada provides for a jury of "three good and lawful citizens, who shall be householders in the county." Pennsylvania, in contrast to its more recent provisions for inquiries by officials, still has retained an earlier provision for a jury of not less than three "selected from the vicinity

17. 117 Minn. 384, 155 N.W. 1128 (1912).
18. *Id.* at 385, 155 N.W. at 1129.
19. 180 Minn. 573, 231 N.W. 217 (1930). *But see* State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913).
where the fire occurred. But similar New York jury provisions were repealed as "anachronistic" in 1962.

2. Judicial Inquirer

Several states have enacted provisions for what may be called judicial inquisitions. These proceedings are conducted by a judge or similar official, who, upon his receipt of a complaint alleging the violation of any state law or a particular state law, will subpoena witnesses to appear before him and testify on matters relevant to the inquiry. If the inquiry reveals that an offense against the laws of the state has been committed, the judge may have the suspected offender apprehended to stand trial at a later date.

Judicial inquisitions are usually conducted in private, pursuant to either express statutory language or the suggestion of the highest court of the state. An example of the influential effect of a state court decision on the method of conducting sub-

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25. N.Y. CODE CRIM. PROC. §§ 952–h to 952–o.
27. See, e.g., KAN. GEN. STAT. ANN. § 62–801 (1949); MICH. STAT. ANN. § 28.943 (1954); VT. STAT. ANN. tit. 13, § 5131 (1958). Michigan judicial inquirers may act upon the complaint of any person, while their Kansas counterparts must act at the request of a county attorney, attorney general or assistant attorney general. The Wisconsin statute is an interesting combination of the Kansas and Michigan provisions. It permits a magistrate to examine witnesses provided by any person who files a complaint, but it requires a magistrate to subpoena witnesses at the request of the district attorney. WIS. STAT. ANN. § 954.025 (1958). The South Dakota provision is similar to Wisconsin’s, except that it allows a magistrate to act upon the verified complaint of the attorney general or a state or city attorney. S.D. CODE ANN. § 34.0901 (Supp. 1960).
28. The Kansas legislature, in addition to its broad grant of judicial inquisitional power, has enacted three provisions that permit investigations into alleged violations of specific laws. KAN. GEN. STAT. ANN. § 50–110 (monopolies and unfair trade), § 50–153 (trusts, monopolies, unlawful discrimination, etc.) (1949), § 50–508 (dairy products) (Supp. 1961). Compare N.Y. JUDICIARY LAW § 90(10).
29. Failure to comply with a subpoena usually constitutes contempt, for which a fine or jail sentence may be imposed. CONN. GEN. STAT. ANN. § 54–47 (1960); KAN. GEN. STAT. ANN. § 62–801 (1949); MICH. STAT. ANN. § 28.945 (1954).
31. In Michigan, a sentence of one year in prison, or a fine of from $100 to $1000, or both may be imposed on a judge, prosecuting attorney, or anyone else admitted to the inquiry who discloses any information about the inquiry. MICH. STAT. ANN. § 28.944 (1954). In Vermont, the stenographer is
sequent judicial inquisitions is found in People ex rel. Karlin v. Culkin. That case involved an investigation into alleged unethical practices of members of the New York bar. When petitioner contested the propriety of such investigations, emphasizing their damaging effect on the reputation of anyone called as a witness, Mr. Chief Justice Cardozo replied that "the remedy is to make the inquisition a secret one in its preliminary stages." As a result of this dictum, judicial inquisitions in New York have traditionally been conducted in private, although the statute does not expressly require this type of procedure.

The rights of a witness subpoenaed to attend a judicial investigation are severely restricted, in comparison with those of a witness in a public trial. Only one state statute refers to the right to counsel, and the highest court of that state has interpreted this provision to apply before or after the witness has been subpoenaed, or before he is called, but not during the actual investigation. The remaining state provisions for judicial investigations sworn to secrecy and may reveal the contents of the record only on the order of the state supreme court, or a county court. Vermont permits a magistrate to hold an investigation in private and denies everyone but the district attorney the right to inspect the record.

The Supreme Court in Anonymous v. Baker, 360 U.S. 287 (1959), held that a member of the bar who claimed his privilege against self-incrimination in a secret inquisitional proceeding could be constitutionally disbarred, without more. In a later case, Cohen v. Hurley, 366 U.S. 117 (1961), affirming 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658 (1960), the Court held, once again in a five to four decision, that a member of the bar who claimed his privilege against self-incrimination in a secret inquisitional proceeding could be constitutionally disbarred, without more.

tions do not refer to the right of representation, and state courts have been unwilling to expand the statutory language in this area.

The justification for this attitude seems to lie in the theory that administrative investigations generally are fact-finding, non-adjudicatory proceedings, in which the guilt or innocence of a witness is not in question; individual rights are not affected, and hence need not be protected. To further justify this approach, some states have enacted immunity provisions that protect witnesses from prosecution in some circumstances. Michigan, for example, permits a witness to refuse to give incriminating answers and, if he is compelled to answer, grants him immunity from prosecution for any crime about which he was compelled to give incriminating testimony; and refusal to answer an incriminating question will not constitute contempt in Michigan. Kansas denies a witness the right to refuse to give incriminating answers, but, like Michigan, protects the witness from a subsequent prosecution for a crime about which he was compelled to testify.

These immunity provisions might seem to overcome any harm resulting from the denial of counsel. This assumes, however, that an unrepresented witness, unaware of his statutory rights, will refuse to give an incriminating answer; an assumption that becomes patently invalid on the realization that an unrepresented witness might not know that his answer will incriminate him. Since the statutes are phrased in terms of compelled testimony, it would seem that an incriminating answer voluntarily given would not invoke the immunity provision. Moreover, 251, cert. denied, 325 U.S. 876 (1945); People v. Doe, 226 Mich. 5, 196 N.W. 757 (1924). The statute provides that “any person called before the grand jury” is entitled, at all times, to legal counsel, unless the proceedings would be delayed. Mich. Stat. Ann. § 28.943 (1954). If a judicial inquirer is thought of as a type of grand jury, it would seem that a witness in a judicial inquisition is entitled to counsel at all times, rather than at the stages dictated by In re White, supra. The “one man grand jury” characterization is, of course, a complete misnomer, a fact that the Michigan Supreme Court has recognized. In re Slattery, supra. Perhaps this phrase is meant to be no more than a convenient reference point, but its connotations, in light of the statutory language, are much broader. Professor Robert G. Scigliano has pointed out that the Michigan judicial inquirer resembles the French Juge d’Instruction. Scigliano, The MICHIGAN ONE-MAN GRAND JURY 14 (1957). But see, Myers, THE AMERICAN LEGAL SYSTEM 130 n.42 (1955).


state immunity provisions are ineffective against federal prosecution,
41 a fact that seriously undermines the very purpose of the
provisions.

The United States Supreme Court has placed but one definite
restriction upon the conduct of judicial inquisitions. In In re
Oliver 42 it held that although an inquisition could be held in
secret, a sentence of imprisonment for contempt of the inquisi-

41. Knapp v. Schweitzer, 357 U.S. 371 (1958), affirming 2 N.Y.2d 913, 975,
141 N.E.2d 825, 142 N.E.2d 649, 161 N.Y.S.2d 437, 163 N.Y.S.2d 613 (1957),
late Division concluded its opinion with the statement that there was no “real
and substantial danger that the testimony compelled by the State will be used in
But the Supreme Court in affirming said: “This . . . [compelling testimony]
cannot be denied on the claim that such state law of immunity may expose the
potential witness to prosecution under federal law.” 357 U.S. at 379. Thereafter
the Appellate Division in two cases, one involving Frank Costello, and the
other, seven individuals whom the authorities wanted to question about an
alleged gangland meeting at the Appalachin, New York home of the late
Joseph Barbara, Sr., held that a state immunity statute did not have to pro-
tect against the danger of federal prosecution, and the New York Court of
Appeals affirmed. People v. Costello, 6 App. Div. 2d 385, 178 N.Y.S.2d 492
(1958), aff'd, 6 N.Y.2d 761, 986, 159 N.E.2d 205, 161 N.E.2d 741, 186 N.Y.S.2d
680, 191 N.Y.S.2d 937 (1959); Commission of Investigation v. Lombardozi, 7
250, 185 N.Y.S.2d 550, cert. denied sub nom. Mancuso v. Commission of In-
vestigation, 361 U.S. 10 (1959); Miranda v. Commission of Investigation, 360
U.S. 930 (1959). For a criticism of Knapp v. Schweitzer, supra, see ROGE,

In the leading case of People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284
(1947), which arose out of the investigation into legislative bribery, the Michi-
gan Supreme Court stated: “It seems like a travesty on verity to say that one
is not subjected to self-incrimination when compelled to give testimony in a
State judicial proceeding which testimony may forthwith be used against him
in a Federal criminal prosecution.” Id. at 651, 29 N.W.2d at 287. Mr. Justice
Douglas in his dissenting opinion in Mills v. Louisiana, 333 U.S. 257, 288
(1948), in which Mr. Chief Justice Warren and Mr. Justice Black concurred,
quoted this language with approval. So too did the Kentucky Court of Appeals
in ruling similarly in Commonwealth v. Rhine, 303 S.W.2d 301 (Ky. 1957). This
court reasoned:

We believe that to render effective the quoted Constitutional provi-
sion against self-incrimination, it is essential that it apply to prosecutions
by the United States as well as to those by the Commonwealth. To hold
otherwise would be to ignore the fact that our citizens are in a very
real sense, as well as in a technical one, citizens of both the State of
Kentucky and of the United States. The jurisdiction of both govern-
ments is coextensive.

Id. at 304; accord, Putnik Travel & Tourist Agency v. Goldbert, 17 Pa.

tion could not be imposed under the same circumstances. In so holding, the Court reasoned that the imprisonment for contempt would have violated the defendant's fourteenth amendment rights, which "include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." Although this holding might be comforting to those who contemplate contumacy, it can hardly be said to have the same effect on one faced with the prospect of being unrepresented in a secret inquisition that may provide the basis for his subsequent criminal prosecution.

3. Attorney General

Many of the states grant investigative subpoena powers in varying degrees to their attorneys general. The inquisitional activities of New Hampshire's Louis C. Wyman have been most controversial, and stirringly illustrate the scope of the inquisitional subpoena power. The 1953 New Hampshire legislature, by a joint resolution, designated this official as its agent for the investigation of subversive activities, and to this end gave him, and any authorized member of his staff, inquisitional subpoena powers. In *Nelson v. Wyman*, the first New Hampshire case decided under the 1953 resolution, the court stated that

43. *Id.* at 273.


The New Hampshire Supreme Court in *Nelson v. Wyman*, 99 N.H. 38, 105 A.2d 756 (1954), and the United States Supreme Court in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), treated this official as part of the legislature. The New Hampshire Supreme Court said:

Having determined that an investigation should be conducted concerning a proper subject of action by it, the Legislature's choice of the Attorney General as its investigating committee, instead of a committee of its own members or a special board or commission, was not in and of itself determinative of the nature of the investigation. His position as the chief law enforcement officer of the State did not transform the inquiry which was otherwise legislative into executive action. When the Legislature chooses to delegate its power of inquiry for the purpose of ascertaining facts upon which it may decide to take action, we see no distinction in principle between the delegation of that authority to the Attorney General and its delegation to a committee or board.

99 N.H. at 38, 105 A.2d at 762-63. The Supreme Court, relying on this language and quoting it in part, 354 U.S. at 237 n.4, termed the attorney general of New Hampshire "a one-man legislative committee." 354 U.S. at 237.
"the examination of witnesses is properly to be conducted in executive session, unless the witness requests otherwise." 47

Attorney General Wyman was an assiduous inquisitor. He issued a considerable number of subpoenas and held hearings in various parts of the state. Those whom he subpoenaed included Paul Sweezy, a socialist who lectured at the University of New Hampshire, Willard Uphaus, executive director of the New Hampshire World Fellowship Forum, and Hugo DeGregory, whom Wyman thought to be a Communist. According to Sweezy, "most of those subpoenaed have fallen into one or both of two groups: first, professors at Dartmouth and the University of New Hampshire who have gained a reputation for liberal or otherwise unorthodox views, and, second, people who have been active in the Progressive Party." 48 Uphaus refused to give names requested by Attorney General Wyman, basing his refusal on the ground that his conscience and religious convictions would not let him become an informer. Both DeGregory and Sweezy declined to answer when asked: "Are you presently a member of the Communist Party?" All three were found in contempt and took their convictions to the United States Supreme Court, Uphaus three times. Sweezy won, but Uphaus, ultimately, and DeGregory lost. 49 The first time Uphans was before the Supreme Court, it vacated the judgment against him and remanded the case for consideration in the light of its decision in Sweezy. The New Hampshire court again affirmed. This time the Supreme Court, by a vote of five to four, let the judgment stand. While Uphaus was in jail he brought his case before the Supreme Court a third time, but his appeal was dismissed. Mr. Justice Black, in a dissenting opinion in which Mr. Chief Justice Warren and Mr. Justice Douglas concurred, observed:

My guess is that history will look with no more favor upon the inquisitions by officials and the lawyers who prosecuted those inquisitors than it has looked upon the inquisition in general. I do not believe that history will be kinder to the inquisitors than it has been to the Inquisition itself.

is submitted that only the people of New Hampshire could make its attorney general a part of its legislature. In any event, since 1957 he has been acting only as an executive or administrative inquisitor.

47. Id. at 45, 105 A.2d at 767.
48. This quotation is taken from a statement which Sweezy read at the outset of his attendance, and which is quoted in Sweezy v. New Hampshire, 354 U.S. 234, 239-40 n.6 (1957).
prisonment of Willard Uphaus than it has upon that of Udall, Bunyan
or the many others like them. For this is another of that ever-
lengthening line of cases where people have been sent to prison because
their beliefs were inconsistent with the prevailing views of the mo-
ment. . . .

The two most populous states, California and New York, also
grant their attorneys general inquisitional subpoena powers. In
California, such powers are broadly vested in the head of each
department, for the purpose of investigating any violation “of
any law or rule or order of the department.” In a recent case,
*Brovelli v. Superior Court*, the California Supreme Court, al-
though annulling a contempt order because it was based on a
default order, nevertheless validated an investigative subpoena
duces tecum of a deputy attorney general, relying on the grand
jury analogy and *United States v. Morton Salt Co.* New York’s
attorney general has investigative subpoena powers under no less
than seven different statutory provisions. The broadest one
permits him to

inquire into matters concerning the public peace, public safety and
public justice . . . to subpoena witnesses, compel their attendance,
examine them under oath before himself or a magistrate and require
the production of any books or papers which he deems relevant or
material to the inquiry. . . .

The remaining six grant similar powers for investigations into

Times, ended a recent piece on Uphaus with the comment: “If the law made
some provision for common sense an upright citizen of advanced years would
not have had to spend a year in jail.” Atkinson, *Critic at Large*, N.Y. Times, July
30, 1963, p. 26, cols. 1, 2. Uphaus restated his case in his autobiographical,

51. CAL. GOV’T CODE §§ 11180, 11181.


53. 338 U.S. 632 (1950). The California court stated:

There is no constitutional objection to a system under which the heads
of departments of government may compel the production of evidence
for purposes of investigation, without instituting formal proceedings
against the one from whom the evidence is sought or filing charges
against him. As has been said by the United States Supreme Court,
the power to make administrative inquiry is not derived from a judicial
function but is more analogous to the power of a grand jury, which
does not depend on a case or controversy in order to get evidence but
can investigate “merely on suspicion that the law is being violated, or
even just because it wants assurance that it is not.”

54. N.Y. EXECUTIVE LAW § 63(8).
violations of more specific laws. The New York Court of Appeals supported the state’s official inquisitors generously. Indeed, some of its early decisions foretold the acceptance of secret administrative investigations. Four recent decisions, three by the Court of Appeals, graphically illustrate the breadth of the New York Attorney General’s inquisitorial subpoena power.

55. N.Y. EXECUTIVE LAW § 68(12) (fraud or illegality in the transaction of business), § 69 (crimes against the elective franchise); N.Y. GEN. BUS. LAW § 345 (monopolies), § 352 (violations of Blue Sky law); N.Y. BUS. CORP. LAW § 109(b)(6) (usurpation of office or franchise); N.Y. GEN. CORP. LAW § 92(2) (unlawful exercise of corporate franchise).

The change in New York on September 1, 1963 from the old Civil Practice Act to the new Civil Practice Law and Rules may give rise to a legal question in three of the seven instances as to the attorney general’s investigative subpoena powers. N.Y. GEN. CORP. LAW § 92(2), as well as N.Y. CIV. PRAC. ACT § 1217(3) and N.Y. EXECUTIVE LAW § 68(12), all authorize the attorney general to proceed “in the manner provided in” N.Y. CIV. PRAC. ACT § 406. Section 406(1) provided for investigative as well as adjudicatory subpoenas. But N.Y. CIV. PRAC. L. & R. § 2302(a), the corresponding provision, contemplates only adjudicatory subpoenas. See generally 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 2302.01–14 (1969).

In the investigations of monopolies the attorney general has the benefit of a compulsory testimony provision. N.Y. GEN. BUS. LAW § 343. Recalcitrance in such investigations is a misdemeanor “punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both.” N.Y. GEN. BUS. LAW § 343. Recalcitrance in Blue Sky investigations is likewise a misdemeanor, and similarly punishable, except that the fine limit is $500. N.Y. GEN. BUS. LAW § 359-g(2).

56. In one early case, Dunham v. Ottinger, 243 N.Y. 423, 154 N.E. 298 (1926), the court compared the Martin Act, N.Y. GEN. BUS. LAW § 362, to several similar statutes, all of which had been upheld as constitutional and valid. Another early case, Ottinger v. Civil Service Comm’n, 240 N.Y. 435, 148 N.E. 627 (1925), stressed the benefits of secrecy in an administrative investigation under the Martin Act: “Secrecy is essential, not only for the prosecution of the guilty, but also for the protection of the innocent, who might be ruined in business or reputation if the mere fact that they were under investigation were to become known to the public.” Id. at 438–39, 148 N.E. at 627. This case, and People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928), involving a judicial inquirer, were cited by the district court as well as by the Second Circuit in In re SEC, 14 F. Supp. 417, 419 (S.D.N.Y.), aff’d, 84 F.2d 316, 318 (2d Cir.), rev’d for mootness sub nom. Bracken v. SEC, 299 U.S. 504 (1936).

Delaware's attorney general and any deputy have broad power “to compel the attendance of persons and witnesses at the office of the Attorney General, or at such other place designated,” and they “may administer oaths and affirmations to any person including witnesses, at any time or in any place.”

The Delaware designated certain “officers of the Department of Law” as the New York Crime Commission to investigate, with subpoena powers, the relationship between organized crime and units of government in the state; North End Democratic Club v. Lefkowitz, 31 Misc. 2d 1000, 222 N.Y.S.2d 0 (Sup. Ct. 1961) (subpoena duces tecum for the Club’s “general ledgers and general journals,” including but not limited to copies of souvenir journals and treasurer reports for the past three years, was proper).

In Lawrence Aluminum Indus. Inc. v. Lefkowitz, 20 Misc. 2d 730, 100 N.Y.S.2d 844 (Sup. Ct. 1960) the court sustained the attorney general’s subpoenas duces tecum in an investigation of “bait” advertising. In Syracuse Co-op. Milk Dists. Bargaining Agency, Inc. v. Attorney Gen., 13 Misc. 2d 26, 177 N.Y.S.2d 107 (Sup. Ct. 1958), the court sustained such a subpoena in an investigation of the marketing of milk, despite a claim that the petitioner was exempt.

The fact that petitioner, its members, and their activities within its capacity as a milk distributors’ bargaining agency may be exempt from antimonopoly restrictions of the Donnelly Act and that they may therefore be immune from prosecution by respondent, if that be so, does not invalidate the subpoena sought to be vacated. Id. at 29, 177 N.Y.S.2d at 110. In Schiff v. Attorney Gen., 4 Misc. 2d 1018, 163 N.Y.S.2d 151 (Sup. Ct. 1956), the court accepted the attorney general’s sworn declaration that he was proceeding officially on complaints of questionable securities activities which, in the public interest, could not safely be disclosed. But cf. Kates v. Lefkowitz, 28 Misc. 2d 210, 216 N.Y.S.2d 1014 (Sup. Ct. 1961), in which the court, on the application of an owner of an apartment development in Rye, New York, and one of its principal officers, vacated a monopoly investigation subpoena of the attorney general “based upon a complaint by a Negro woman that they had refused to rent a vacant apartment to her.” Id. at 211, 216 N.Y.S.2d at 1015–16.

In In the Matter of Bowers, 203 Misc. 658, 121 N.Y.S.2d 629 (Sup. Ct. 1952), aff’d, 281 App. Div. 861, 119 N.Y.S.2d 920 (1st Dep’t 1959), involving investigative subpoenas of the State Crime Commission and In the Matter of Marcus, 139 Misc. 675, 248 N.Y. Supp. 219 (Sup. Ct.), aff’d, 232 App. Div. 781, 247 N.Y. Supp. 1008 (1st Dep’t), appeal dismissed, 255 N.Y. 630, 175 N.E. 844 (1931) involving investigative subpoenas of Max D. Steuer appointed as a deputy attorney general to inquire into the acts and practices of the Bank of the United States, the courts held that these officials could conduct their investigative hearings in public if they so chose. Moreover, in People v. Spiak, 11 Misc. 2d 1044, 175 N.Y.S.2d 130 (Ct. Spec. Sess. 1958), the court, in adjudging a subpoenaed witness guilty of a misdemeanor under N.Y. Gen. Bus. Law § 343 for refusing to answer a question when ordered to do so by the officer conducting such inquiry under that statute, held that the compulsory testimony provision relating to monopoly investigations did not have to protect against the danger of federal prosecution.

58. DEL. CODE ANN. tit. 29, § 2505(a) (Supp. 1962).
Supreme Court in a recent case, *In re Hawkins*, gave full effect to this grant and, relying on the grand jury analogy, held that the attorney general's subpoena did not have to show the nature of the inquiry or the purpose of the demand.\(^59\)

In Kansas, the attorney general, judicial inquirers, and county attorneys, have inquisitional subpoena powers under the laws relating to gambling, intoxicating liquors, fugitives, monopolies, and unfair trade practices.\(^61\) Recalcitrance is a misdemeanor punishable by a maximum fine of five hundred dollars, or imprisonment for not more than six months, or both.\(^62\) There is a compulsory testimony provision and the Kansas Supreme Court, in characteristic fashion, applied it narrowly against subpoenaed witnesses; it held that compelled testimony could be used against them in ouster proceedings, because these were civil and not criminal in character.\(^64\)

\(^59\). 50 Del. 61, 123 A.2d 113 (1956), affirming 49 Del. 544, 121 A.2d 486 (Super. Ct.).

60. The simple answer to this contention [that the subpoena must show the subject matter of the investigation] is that the limits of the investigation and the relevancy of the documents sought are matters which are of no concern to the witness. Such is the rule when a witness is called before a grand jury . . . . and we think it equally applicable when he is summoned before the Attorney General.

50 Del. at 64, 66, 123 A.2d at 115, 116. In the later case of *In the Matter of Henry C. Eastburn & Son, Inc.*, 51 Del. 446, 147 A.2d 921 (1959), the court, although sustaining the attorney general's subpoenas duces tecum seeking the witnesses' contributions to political parties for three years, did concede that this official's powers were not unlimited: "We also agree that the Attorney General's investigatory powers, though broad . . . [citing *In re Hawkins*, supra 50 Del. 61, 123 A.2d 113 (1956)] are not to be *equated* with those of the Grand Jury. Thus the Attorney General has no power of presentment." *Id.* at 451, 147 A.2d at 924.

61. KAN. GEN. STAT. ANN. § 60-1609 (1949).


63. KAN. GEN. STAT. ANN. § 60-1620 (1949).


Various states have statutes similar to either of the seven New York statutes or the several Kansas statutes that give subpoena powers to their attorneys general in the investigations of monopolies or violations of Blue Sky laws. The Maine attorney general has such power in investigations of "all contracts, combinations or conspiracies in restraint of trade or commerce, and all monopolies." ME. REV. STAT. ANN. ch. 137, § 48 (1954). Although the Maryland attorney general had such power in investigations under its Blue Sky Law, MD. ANN. CODE art. 32A, § 16 (1957), it is not vested in a Securities Commissioner appointed by him, MD. ANN. CODE art. 32A, §§ 30, 31 (Supp. 1962). The new act also contains a compulsory testimony provision. MD. ANN. CODE art. 32A, § 31(d) (Supp. 1962). The Missouri attorney
4. Prosecutor

A number of states give inquisitional subpoena powers to their local prosecutors, variously called state’s attorneys, district attorneys, prosecuting attorneys, county attorneys, and county solicitors. Florida grants to a county solicitor “the process of his court to summon witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated.” For inquisitions into violations of the state’s election code and of its liquor law, there are compulsory testimony provisions. The Florida Supreme Court has held that the compulsory testimony act in its election code applies to a municipal primary, and further ruled that a subpoenaed witness did not have to claim his privilege to obtain immunity.


65. Fla. Stat. § 32.20 (1961); cf. Coleman v. State ex rel. King, 134 Fla. 802, 184 So. 334 (1938). In Campbell v. State, 92 Fla. 775, 109 So. 809 (1926), the court held the county solicitor empowered to administer oaths only to witnesses subpoenaed for him by the process of his court; but a statute now gives him power to administer oaths not only to such witnesses but also “to all witnesses who may voluntarily appear before him to testify to any violation or violations of the criminal law.” Fla. Stat. § 32.22 (1961).


67. State ex rel. Marshall v. Petteway, 121 Fla. 822, 164 So. 872 (1935). But in State ex rel. Hickland v. Coleman, 137 Fla. 102, 188 So. 81 (1939), the court held that the subpoenaed witness did not obtain immunity because his testimony did not throw any light on the offenses which the county so-
In the enforcement of its liquor law, Idaho grants inquisitional subpoena powers, together with a compulsory testimony provision, to the prosecuting attorney of any county, as well as the director of enforcement of the department of law enforcement. 68

New Mexico empowers any of its prosecuting attorneys, on approval of the district judge, to "issue subpoenas in felony cases and call witnesses . . . when the grand jury is not in session and have . . . their testimony reduced to writing and signed by the witnesses." 69 Thus, in felony cases, New Mexico accomplishes by statute what counsel for the federal government in United States v. Standard Oil Co. 70 sought to do without.

5. Public Examiner

Minnesota's public examiner and New York City's Comptroller and Commissioner of Investigation all have inquisitional subpoena powers. The Minnesota public examiner has "the duty and power to supervise all public accounts," 71 and to this end may exercise "the powers possessed by courts of law to issue subpoenas and cause them to be served and enforced." 72 Recalcitrance is "a felony, the minimum penalty whereof shall be a fine of $1,000, or imprisonment in the state prison for one year." 73 The Minnesota Supreme Court, referring to these powers, said that "the public examiner is given the powers possessed by the courts in the matter of securing testimony, thus conferring judicial authority to be exercised in the manner prescribed for courts." 74 Moreover, the court, somewhat contrary to its ruling in State v. Rixon 75 in which it decided that testimony given before the state fire marshal could not be used to obtain a grand jury indictment of the subpoenaed witness, held, in State v. Gensmer, 76 that a transcription of a statement that the defendant was investigating. In State ex rel. Benemovsky v. Sullivan, 37 So. 2d 907 (Fla. 1948), the court held that the state's compulsory testimony provisions did not cover "criminal communism."

70. 316 F.2d 884 (7th Cir. 1963).
75. 180 Minn. 573, 231 N.W. 217 (1930).
76. 235 Minn. 72, 51 N.W.2d 680 (1951), cert. denied, 344 U.S. 824 (1952); cf. State v. Lowrie, 235 Minn. 82, 49 N.W.2d 631 (1951); State v. Nolan, 231 Minn. 522, 44 N.W.2d 66 (1950). In State v. Lowrie, Justice Thomas
ant gave to a representative of the public examiner's office could be used in evidence against him in a prosecution under a bribery statute.

The comptroller of New York City has investigative subpoena power "to investigate all matters relating to or affecting the finances of the city." In addition, the state of New York gives its cities broad powers to subpoena witnesses for investigations "into all matters of concern to the city or its inhabitants." New York City accordingly has a Department of Investigation, headed by a Commissioner, who is to make any investigation directed by the mayor or the council, and may subpoena witnesses to implement "any study or investigation which in his opinion may be in the best interests of the city." Moreover, he may "examine witnesses in public or private hearings."

The New York courts gave ample support to the inquisitions conducted by these officials. In an early case, Matter of Edge Ho Holding Corp., Chief Judge Cardozo reasoned for a unanimous court:

Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.

This was another of the early decisions of the New York Court

Gallagher, dissenting, cited State v. Rixon; the next year, in State v. Lowrie, 237 Minn. 240, 54 N.W.2d 265 (1952), he wrote the court's opinion holding the indictment insufficient to charge attempted bribery.

77. N.Y. CITY CHARTER § 93b.
78. N.Y. GEN. CITY LAW § 20(2).
79. N.Y. CITY CHARTER § 805a.
80. N.Y. CITY CHARTER § 803.
81. N.Y. CITY CHARTER § 805b.
83. 256 N.Y. 374, 381–82, 176 N.E. 537, 539 (1931).
of Appeals that predicated the growth of administrative investigations.

In a more recent case, *Dairymen's League Co-op. Ass'n v. Murtagh*, the Appellate Division, First Department, sustained a subpoena duces tecum of the Commissioner of Investigation over the objection that the information he sought, regarding secret credit allowances by the Dairymen's League to retail stores, was confidential and involved trade secrets. The court relied on Chief Judge Cardozo's opinion in the *Edge Ho* case and introduced a quotation from it with the statement: "A subpoena duces tecum of the Commissioner of Investigation may not be vacated unless the person subpoenaed can demonstrate that it calls for documents which are utterly irrelevant to any proper inquiry." In most instances, such a burden would be impossible to meet.

6. The Governor

Just as the federal government has given inquisitional subpoena powers to the President, so the states of Arizona, Florida, New York, and perhaps California, have given such powers to their governors. Arizona, in its Civil Defense Act of 1951, so empowers its governor "for the purpose of making surveys and investigations and obtaining information, but not for investigation of subversive activities which are the responsibility of the federal bureau of investigation." New York's governor has such powers pursuant to an authorization "at any time, either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs


85. 274 App. Div. at 593, 84 N.Y.S.2d at 764.

86. The situation has to be one where the inquiring official is clearly acting beyond the scope of his authority, as in Herlands v. Sutherland, 170 Misc. 181, 9 N.Y.S.2d 956 (Sup. Ct.), aff'd without opinion, 257 App. Div. 935, 13 N.Y.S.2d 279 (1st Dep't 1939), aff'd without opinion, 288 N.Y. 708, 43 N.E.2d 91 (1942), in which the courts held that the Commissioner of Investigation had no authority to conduct a survey as to the methods and procedures of the clerks of the Supreme Court in Kings County. For comparable illustrations, see Curtis v. Herlands, 38 N.Y.S.2d 964 (Sup. Ct. 1942); Matter of Bromberger (Erickson), 187 Misc. 593, 62 N.Y.S.2d 47 (Sup. Ct. 1946).


of any department, board, bureau or commission of the state."

Under this provision the governor of New York has appointed
(1) a committee to investigate the state departments, including
state hospitals for the insane, (2) a group known as the More-
land Commission to investigate the administration of the Work-
men's Compensation Law of New York, and (3) a Commission
to Investigate Harness Racing. The New York courts have
sustained the subpoena power of all of these bodies.

California, as has been pointed out, gives inquisitional sub-
poena power to the head of each department. This probably
includes its governor as head of the executive department.

7. Commission of Investigation

New York, in addition to its existing administrative agencies
with inquisitional subpoena powers, created a State Commission
of Investigation, that was to last until 1963; in 1962 the life
of this temporary commission was extended until 1965. The
Commission can conduct either public or private hearings. It
can hold its hearings at any place in the state, but like the
United States Civil Rights Commission, it can not take testi-
mony "unless at least two of its members, one of whom shall
be an appointee of the governor and the other an appointee of
either the temporary president of the senate or the speaker of
the assembly, are present at such hearing." The Commission
was also instructed to "cooperate with departments and officers
of the United States government in the investigation of violations
of the federal laws" within New York. In a recent case the

89. N.Y. EXECUTIVE LAW § 6.
588 (1954); Bleakley v. Schlesinger, 294 N.Y. 512, 82 N.E.2d 85 (1948);
(2d Dept 1954); Schiffman v. Bleakley, 46 N.Y.S.2d 359 (Sup. Ct. 1948);
(investigation that included an examination into the truth of certain rumors
concerning the existence of a conspiracy to obtain the release of Harry K.
Thaw from Matteawan State Hospital by bribery).
91. CAL. GOV'T CODE §§ 11180, 11181.
92. N.Y. Sess. Laws 1958, ch. 989. Originally, investigations were con-
ducted by the office of the Commissioner of Investigation. N.Y. Sess. Laws
1958, ch. 887, § 1. In 1958, this office was abolished and replaced by the
State Commission of Investigation.
New York Court of Appeals sustained one of the Commission's subpoenas that required the purchasing agent of Albany County to come to New York City, despite his objection of harassment, for an investigation of purchasing practices in that county.98

The Commission engaged in strenuous efforts, in cooperation with officials of the federal government, to find out what transpired at an alleged gangland meeting of the Mafia at the Appalachin, New York home of the late Joseph Barbara, Sr. These efforts created a great deal of litigation that supported the Commission and its investigative subpoena powers.99 Nevertheless, neither the Commission, nor the federal government100


However, the Appellate Division, First Department, in Matter of Reuter (Cosentino), 4 App. Div. 2d 22, 164 N.Y.S.2d 534 (1st Dep't 1957), protected the attorney-client privilege: It held that Joseph (Socks) Lanza's lawyer, Sylvester Cosentino, did not have to answer the questions of the Commissioner of Investigation stemming from a conversation between him and his client at the Westchester County jail that state officials surreptitiously recorded. The Appellate Division, referring to the use of electronic devices to intercept and record the conversation, said:

The law does not lie helpless because there may arise ingenious facilities to circumvent its safeguards; it has ingenuity enough of its own to preserve rights which it regards important; and if the constitutional guaranty of the aid of counsel is to be of value, the court must afford to every man the right to talk with his lawyer with the assurance that the lawyer will not be required or permitted to disclose what is said. Id. at 254, 164 N.Y.S.2d at 534. But Lanza's brother Harry could be interrogated about a prison-recorded conversation. People v. Lanza, 10 App. Div. 2d 315, 199 N.Y.S.2d 903 (1st Dep't 1960), aff'd, 9 N.Y.2d 895, 175 N.E.2d 883, 216 N.Y.S.2d 706 (1961), aff'd sub nom. Lanza v. New York, 370 U.S. 139 (1962). Also, the courts would not enjoin the New York State Joint Committee on Government Operations from making public the wired conversation between Joseph Lanza and his lawyer. Lanza v. New York State Joint Legislative Comm., 3 N.Y.2d 92, 143 N.E.2d 722, 164 N.Y.S.2d 9, cert. denied, 355 U.S. 856 (1957).


100. The federal government prosecuted 23 of the individuals in attendance at the Appalachin meeting under a mass conspiracy indictment charging them with conspiring to obstruct justice. Although convicted, their convictions were reversed on appeal for lack of evidence. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960), reversing United States v. Bonanno, 177 F. Supp. 108 (S.D.N.Y. 1959).
found out what took place. Nor did the fact that the Commission had the benefit of a compulsory testimony act help matters; even though, in two of these cases the New York courts held, citing the United States Supreme Court's narrow decision in *Knapp v. Schweitzer*,101 that a state immunity statute did not have to protect against the danger of federal prosecution.

The Commission's inquisitions into the Appalachin meeting illustrate the futility of compulsory testimony provisions.102 After the many unsuccessful efforts of federal and state officials to find out what happened at Appalachin, Mafia member Joseph Valachi, in prison on a narcotics conviction, began telling the FBI — which does not have the benefit of a compulsory testimony provision — what happened.103

8. *Agriculture Department*

A sampling of states from the least to the most populous in this and the following sections will fill in the broad outlines of the investigative subpoena powers of state officials and bodies. Just as the federal government in six different statutes has granted inquisitional subpoena powers to officials of the Department of Agriculture, many states have given such powers to similar officials of comparable units of state government.

Arizona gives inquisitional subpoena powers to its agricultural prorate commissioner.104 The director of the California department of agriculture has general subpoena powers as the head of a department.105 Similar powers are granted specifically by three additional acts,106 the last of which contains a compulsory testimony provision.

Colorado grants such powers to the eight member state agricultural commission107 as well as to the commissioner of agriculture108 and Michigan to the director of markets.109


sota commissioner of agriculture has subpoena powers under two different acts,110 the latter of which contains a compulsory testimony provision.111 Mississippi grants similar powers to the Mississippi Milk Commission or any duly designated employee,112 and Missouri to the commissioner of agriculture in the investigation of unfair milk sales practices113 and under the Missouri grain warehouse law.114

New York gives sweeping investigative subpoena powers and the power to compel testimony to the commissioner of its department of agriculture and markets.115 Recalcitrance, including refusal to subscribe and swear to a deposition, is a misdemeanor.116 An act relating to milk and milk products again gives broad inquisitional powers.117

9. Health Department

In Arkansas the board of health or its secretary may issue subpoenas in the investigation of violations of an act relating to milk, ice cream, and dairy products.118 In California the director of the state department of public health and its state board of public health both have broad inquisitional subpoena powers.119 California also gives such powers to its state department of public health in investigations under an act dealing with cancer and provides that the hearings may be held before a cancer advisory council.120

111. MINN. STAT. § 32A.05(3) (1961).
115. N.Y. AGRIC. & MKTS. LAW §§ 82-34.
116. N.Y. AGRIC. & MKTS. LAW § 34(3).
117. N.Y. AGRIC. & MKTS. LAW § 254(h). This section and § 34 are affected by the change in New York on September 1, 1963 from N.Y. CIV. PRAC. ACT § 406(1), which provided for investigative as well as adjudicatory subpoenas, to N.Y. CIV. PRAC. L. & R. § 2302(a), which contemplates only adjudicatory subpoenas. See N.Y. SESS. LAWS 1962, ch. 310, §§ 11, 12, 34. See generally 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 2302.01-14 (1963). Whether courts in the enforcement of administrative inquisitional subpoenas under affected sections will continue to follow old traces, remains to be seen.

For an early case sustaining the investigative subpoena power of the commissioner of agriculture, see In re Fenton, 58 Misc. 303, 109 N.Y. Supp. 321 (Sup. Ct. 1908).

118. ARK. STAT. ANN. § 82-918(7) (1960).
119. CAL. HEALTH & SAFETY CODE §§ 20, 102; CAL. GOV'T CODE §§ 11180, 11181.
120. CAL. HEALTH & SAFETY CODE § 1704.
Missouri gives broad inquisitional powers to the director of the department of public health and welfare, and New York to the commissioners of its departments of public health and mental hygiene. As if these grants were not sufficient, New York additionally gives such powers to (1) the commissioner of the mental hygiene department in the investigation of alien and nonresident mentally afflicted persons; (2) the same official in the investigation of the financial condition of those in the institutions under his jurisdiction and of those legally responsible for their support; (3) the board of visitors, consisting of seven members, of each institution in the department of mental hygiene; and (4) the director of each such institution or his designated officer.

10. Civil Service Commission

A considerable number of states has granted inquisitional subpoena powers to civil service commissions and similar agencies with various titles. In New York, for example, the state civil service commission and several subordinate officials and agencies have investigative subpoena powers; they possess "all the powers conferred by the legislative law upon a committee of the legislature." In an early case, People ex rel. Bender v. Milliken, the court of appeals, in refusing to restrain the state civil

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123. N.Y. Mental Hygiene Law §§ 7(8), 8(5); see N.Y. Sess. Laws 1902, ch. 310, §§ 272, 273.
124. N.Y. Mental Hygiene Law § 23(8); see N.Y. Sess. Laws 1902, ch. 310, § 275.
125. N.Y. Mental Hygiene Law § 24(5).
126. N.Y. Mental Hygiene Law § 32(7).
127. N.Y. Mental Hygiene Law § 34(13); see N.Y. Sess. Laws 1902, ch. 310, § 277.
129. N.Y. Civ. Serv. Law §§ 6(9), (4), 9, 21; see N.Y. Sess. Laws 1902, ch. 310, § 67.
130. N.Y. Civ. Serv. Law § 6(4).
131. 185 N.Y. 35, 77 N.E. 872 (1906).
The function so performed by the commission is strictly analogous to that of a legislative committee of inquiry of investigation. It is not a valid objection to such an investigation that it may disclose crime or wrongdoing on the part of the individuals, provided its object is the framing and enactment of proper laws or regulations.
service commission from an investigation, analogized it to a legislative committee.

11. Corporation Commission

Many state corporation commissioners have investigative subpoena powers and some have the additional authority to compel testimony in their investigations. In Arizona, the corporation commission and its members have inquisitional subpoena powers both by constitution and statute. The constitution empowers it "to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the State." The statute adds a compulsory testimony provision. The powers of this body are usually exercised in other states by public utilities commissions and public service commissions, as well as corporation commissions. Michigan, in addition to its corporation and securities commission, has a public trust commission with investigative subpoena powers to protect the interests of holders of defaulted securities.

12. Liquor Control Commission

The necessity of supervising the flow of liquor in intrastate commerce has led several states to grant investigative subpoena powers to liquor control commissions. In New York, the state liquor authority, the alcoholic beverage control board of the city of New York, and the county alcoholic beverage control boards, all have such powers. The rules of the state liquor authority provide for counsel in adjudicative hearings, but not in investigative proceedings.

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Id. at 40, 77 N.E. at 873; see Conway v. Kaney, 274 App. Div. 849, 80 N.Y.S.2d 770 (4th Dep't 1948) (memorandum) (subpoenas of the state service commission enforced).


13. Public Utilities Commission

California and Colorado each have a public utilities commis-
sion, and Alabama, Michigan, Mississippi, Missouri, and New
York have a public service commission, with investigative sub-
poena powers.139

The Arkansas public service commission and commerce com-
mission now function in the former sphere of the transportation
division of the public service commission. These bodies have in-
vestigative subpoena powers under five different statutory provi-
sions, the first and third of which also contain compulsory testi-
mony provisions.140

California grants inquisitional subpoena powers both by con-
stitution and statute. Its statute grants them to the public utilities
commission, each commissioner, the secretary and the assistant
secretaries. The state's constitution further empowers the com-
mision and each commissioner to “punish for contempt in the
same manner and to the same extent as courts of record....”141

Missouri has not only a public service commission with inqui-
sitional subpoena powers on a statewide basis, but also a public
utilities commission with such powers for each city of the first
class;142 in each instance there is a compulsory testimony provi-
sion.143

New York's public service commission, any commissioner, and
any officer or employee of the commission specially authorized to
conduct an investigation, have broad inquisitional subpoena
powers under no less than seven different statutory provisions. To
begin with, they have a broad general grant of such powers and a
compulsory testimony provision.144 They further have such powers
under five additional grants relating to (1) railroads, street rail-
roads, and common carriers (2) omnibuses (3) gas and electric
corporations (4) steam corporations and (5) water-works corpora-
tions. A sixth statutory grant vests the commission and each

139. ALA. CODE tit. 48, §§ 55-57, 59, 60 (1958); CAL. CONST. art. 12, § 22;
CAL. PUB. UTIL. CODE § 811; COLO. REV. STAT. ANN. §§ 115-2-6, 115-6-2,
115-6-3 (1953); MICH. STAT. ANN. § 22.13(4) (Supp. 1961); MISS. CODE ANN.
§ 7689 (Supp. 1962), § 7811 (1957); MO. REV. STAT. § 386.320(3) (1959);
N.Y. PUB. SERV. LAW §§ 19, 20, 45, 47, 48, 61(8)-(10), 66(8)-(11), 80(7)-(9),
89-c(7)-(9), 94, 96.
140. ARK. STAT. ANN. §§ 73-123, -130, -131, -222, -1736 (1957).
141. CAL. CONST. art. 12, § 22.
144. N.Y. PUB. SERV. LAW § 20.
commissioner with such powers over telephone and telegraph companies.145 The rules of the commission provide for counsel in adjudicatory hearings,146 but not in investigative proceedings.

The Colorado Supreme Court, in an early case, People v. Swena,147 held that a statutory provision giving its public utilities commission power to punish "for contempt in the same manner and to the same extent as contempt is punished by courts of record" was unconstitutional: "The power to punish for contempt is a judicial power within the meaning of the Constitution. It belongs exclusively to the courts, except in cases where the Constitution confers such power upon some other body."148

The Minnesota Supreme Court’s decision in State ex rel. R.R. & Warehouse Comm’n v. Mees149 represents the outer jurisdictional limit of the judicial enforcement of administrative inquisitional subpoenas. In connection with an investigation of a transit company, the Commission subpoenaed the records of a brokerage firm that handled the stock of the transit company. An intervenor suggested that the use of the subpoena power against persons not subject to the Commission’s regulation would be unconstitutional unless restricted to quasi-judicial proceedings. The court disagreed, relying on the line of cases that began with United States v. Morton Salt Co.,150 and reasoning that

so long as the investigation is for a lawfully authorized purpose and the information sought relevant and material to the investigation, we cannot see where due process is offended by requiring any person possessed of that information to testify.151

14. Tax Commission

One of the most common state agencies with investigative subpoena powers is the tax commission.152 Although judicial treatment of these agencies has been varied, the courts generally have

145. N.Y. PUB. SERV. LAW § 94.
146. Rules of Procedure of the Public Service Commission, Rule II(2), in N.Y. PUB. SERV. LAW, APP.
147. 88 Colo. 337, 296 Pac. 271 (1931).
148. Id. at 340, 296 Pac. at 272.
149. 235 Minn. 42, 49 N.W.2d 386 (1951).
151. 235 Minn. at 53, 49 N.W.2d at 393.
upheld the empowering provisions. In *Redding Pine Mills, Inc. v. State Bd. of Equalization* 153 a California court, relying on the Minnesota Supreme Court's decision in the *Mees* case, held that the state board of equalization could issue investigative subpoenas to those who neither owned property subject to assessment by it, nor were required to report to it.

A New York court has sustained investigative subpoenas of a town board of assessors 154 despite the fact that this body did not have any specific grant of such powers. Moreover, the corporation against whom the subpoenas were directed occupied a plant created by the United States on land owned by the United States, although the corporation did have a limited option to buy.

The Missouri Supreme Court, in *In re Sanford*, 155 extended an implied contempt power to a county board of equalization. The statutory provision in question gave subpoena powers to a county board of equalization "in relation to any appeal before them." 156 The petitioner, seeking his release on habeas corpus from the custody of the sheriff where he was held for contempt under a commitment issued by the county board of equalization, contended that the subpoena powers in question were for the benefit of appealing taxpayers only. The court not only created a previously non-existent power; it further indicated that these powers in the hands of the board were inquisitional. The petitioner contended that at least the board itself did not have power to commit for contempt. Again the court ruled adversely, implying such a power:


155. 236 Mo. 665, 139 S.W. 876 (1911).
What sense would there be in section 11406, which authorizes the board to subpoena witnesses and send for documents, if it is powerless to compel the witnesses to testify upon appearance, in obedience to the subpoenas? None whatever, I submit.157

15. Professional Boards

The 50 states have various professional bodies with inquisitional subpoena powers. For example, attorneys,158 accountants,159 doctors,160 dentists,161 podiatrists,162 optometrists,163 engineers,164 veterinarians,165 cosmetologists,166 masseurs,167 embalmers and funeral directors,168 and foresters169 all are subject to control by a board or commission with investigative subpoena powers.

California apparently gives such powers to a certified shorthand reporters board.170 New York apparently gives them to the commissioner of education or an employee of his department designated by him in the case of the revocation or suspension of certificates of psychologists.171

In Michigan the board of registration in chiropody is empowered "to require sworn statements or affidavits from any and all persons touching or concerning any matter within its jurisdiction," but subpoena power is not specifically given.172

157. 236 Mo. at 691, 139 S.W. at 383.
162. N.Y. Educ. Law §§ 7004(3), 7011(6).
171. N.Y. Educ. Law § 7607(2).
In this area particularly, the many grants of subpoena powers present a variegated pattern, not only between the different states, but even within the same state. Where there was a doubt as to whether such a grant was for adjudicatory or inquisitorial purposes, the courts have given the benefit of the doubt to adjudicatory subpoenas. For instance, the Kentucky grant of subpoena powers to the state board of accountancy or any member “in connection with or at the hearing,” might be considered a grant of subpoena powers for adjudicatory purposes. In Smith v. State Bd. of Accountancy, however, the Kentucky Court of Appeals held that the accountancy board under the section in question was authorized to conduct an investigation before making a charge, and would thus probably sustain the use of these subpoena powers for inquisitorial purposes. This case illustrates how easy it is for administrative bodies to use a grant of subpoena powers for investigative purposes.

16. State Sovereignty Commission

Mississippi and Arkansas each have established a State Sovereignty Commission with inquisitional subpoena powers. Its composition includes, in each case, the governor, the attorney general, and members of the legislature. The stated purpose of these agencies is to protect the state “and her sister states, from encroachment thereon by the Federal Government.” Each act contains a compulsory testimony provision, and the Arkansas act specifically indicates that the Commission may conduct its inquisitorial hearings either in “public or in executive session.”

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The same is true of Mississippi and Missouri. See, e.g., Miss. Code Ann. § 8632-15(g) (state board of architecture), § 8738 (board of barber examiners), § 8910 (board of public accountancy), § 8915–14 (state board of cosmetology) (1956); Mo. Sup. Ct. R. 8.06 (board of law examiners); Mo. Rev. Stat. § 327.330(1) (state board of registration for architects and professional engineers), § 329.160(1) (state board of cosmetology), § 330.175(1) (state board of chiropody), §§ 332.160(3), .340(1) (Missouri dental board), § 335.100 (state board of nursing), § 339.080(2) (Missouri real estate commission) (1950), § 333.035(3) (state board of embalming) (Supp. 1961).

174. 271 S.W.2d 875 (Ky. 1954).
Each act also contains an inspection provision.\textsuperscript{178} The Mississippi act permits the members of the commission and their employees to examine "all records, books, documents and other papers touching upon or concerning the matters and things about which the commission is authorized to conduct an investigation."\textsuperscript{179} Failure to comply with one of the commission's inspection orders is a misdemeanor punishable by a fine of from 100 to 1,000 dollars or by imprisonment for not more than six months, or both.

The Arkansas Supreme Court, in Smith \textit{v.} Faubus,\textsuperscript{180} a suit by Negro ministers to have the act creating the commission and another act requiring persons engaged in certain activities to register with the Commission adjudged void, held that the Arkansas inspection provision violated the state constitutional guarantee against unreasonable searches and seizures.\textsuperscript{181}

The Arkansas act, surprisingly enough, establishes a right to counsel that extends beyond ear-whispering, allowing witnesses "to be accompanied by counsel, of their own choosing, who shall have the right to advise witnesses of their rights and to make brief objections to the relevancy of questions and to procedure."\textsuperscript{182}

\section*{17. Un-American Activities Commission}

Over 12 states have set up committees or commissions to investigate un-American activities. Of these bodies the most active were the Tenney Committee in California, the Broyles Commission in Illinois, the Lusk (1919–1920) and Rapp-Coudert (1940–1942) Committees in New York, the Ohio Un-American Activities Commission, and the Canwell Committee in the state of Washington.\textsuperscript{183} Some of the acts creating these bodies are still in force,

\begin{itemize}
\item 180. 230 Ark. 331, 327 S.W.2d 562 (1950). Additionally, the court held the provision in this act for the appointment to the Commission of members of the legislature, as well as the registration act, to be void. But in Golding \textit{v.} Armstrong, 231 Miss. 889, 97 So. 2d 379 (1957), a suit that did not challenge the constitutionality of any part of the Mississippi act, the Mississippi Supreme Court held that a member of the legislature could serve as the executive director of the Commission.
\item 181. Ark. Const. art. 2, \S\ 15.
but those bodies composed wholly of members of the legislature, as in Ohio\textsuperscript{184} and South Carolina,\textsuperscript{185} are beyond the scope of this

In Tenney v. Brandhove, 341 U.S. 367 (1951), \textit{reversing} 188 F.2d 121 (9th Cir. 1952), the Court held that the plaintiff had not stated a cause of action under the Civil Rights Act against members of the California Senate Fact-Finding [Tenney] Committee on Un-American Activities.

The Supreme Judicial Court of Massachusetts gave an advisory opinion that the Special Commission which the legislature created to investigate communism could not punish for contempt, for its membership included persons not elected to the legislature. Opinion of the Justices, 331 Mass. 764, 119 N.E.2d 885 (1954).


\textsuperscript{184} \textsc{Ohio Rev. Code. Ann.} §§ 103.31–38 (Page 1954). The Ohio Supreme Court sustained a number of contempt convictions for refusal to answer questions of the Ohio Un-American Activities Commission, some of which in turn were affirmed by the United States Supreme Court. In Slagle v. Ohio, 366 U.S. 259 (1961), \textit{affirming in part, by an equally divided Court, and reversing in part} 170 Ohio St. 216, 163 N.E.2d 177 (1959), the Court affirmed in part as to three individuals, while reversing as to two; in Raley v. Ohio, 360 U.S. 423 (1959), \textit{affirming in part, by an equally divided Court, and reversing in part} 167 Ohio St. 295, 147 N.E.2d 847 (1958), it affirmed as to one individual, while reversing as to three.

\textsuperscript{185} \textsc{S.C. Code} §§ 30–141 to 30–145 (1962).

Florida in 1956, 1957, 1959 and 1961 set up a joint legislative committee to investigate the activities in that state of organizations and individuals advocating violence or a course of conduct that would constitute a violation of its laws. Fla. Laws 1956, ch. 31498, at 396; Fla. Laws 1957, ch. 57–125, at 203; Fla. Laws 1959, ch. 59–207, at 835; Fla. Laws 1961, ch. 61–62, at 90. The last three acts all recite that the committee’s records disclose “that the Communist party, its fronts and apparatus and other subversive organizations are seeking to agitate and engender ill-will between the races of this and other states.” The 1956 committee began an investigation of the NAACP. The 1957 committee continued the inquiry and sought by subpoena to obtain the entire membership list of the Miami branch of the NAACP. Production was refused and the committee obtained a court order that the list be produced. On appeal, the Florida Supreme Court held that the committee could not require production and disclosure of the entire membership list of the organization, but that it could compel the custodian of the records to bring them
study. The Hawaiian Commission on Subversive Activities, however, is representative of those commissions that are relevant to this study; it may meet at any place in the state, in public or executive session. Although this commission has the benefit of a compulsory testimony provision, the act does give witnesses the right to be accompanied and advised by counsel, in addition to the right to be informed of the subject of the investigation, to supplement their testimony with matters covered in previous investigations, to inspect the record of their testimony, and to be unhindered by photographers and radio and television broadcasters while they are testifying.

18. Anti-Discrimination Commission

Colorado has an Anti-Discrimination Commission, and New York a State Commission for Human Rights, formerly named the State Commission Against Discrimination. Both agencies have investigative subpoena powers and are empowered with compulsory testimony provisions.

to the hearings and to refer to them to determine whether specific individuals, otherwise identified or suspected of being Communists, were NAACP members. Gibson v. Florida Legislative Investigation Comm., 108 So. 2d 729 (Fla. 1958), cert. denied, 360 U.S. 919 (1959).

The 1959 committee continued the investigation. The president of the Miami branch of the NAACP was ordered to appear before the Committee with the membership list; he appeared, but without the list. A Florida court adjudged him in contempt and sentenced him to six months imprisonment and fined him $1,200, or, in default of payment, an additional six months imprisonment. The Florida Supreme Court affirmed, but the United States Supreme Court reversed. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), reversing 126 So. 2d 129 (Fla. 1960).

In Graham v. Florida Legislative Investigation Comm., 126 So. 2d 133 (Fla. 1960), the Florida court reversed a contempt conviction of one who refused to tell the committee whether he was a member of the NAACP.

188. HAWAI'I REV. LAWS § 361-11 (1955).
190. COLO. REV. STAT. ANN. § 80-24-5 (Supp. 1960); N.Y. EXEC. LAW § 295.
191. COLO. REV. STAT. ANN. § 80-24-5 (Supp. 1960). In Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963), reversing 368 P.2d 970 (Colo. 1962), the Court held that federal legislation had not pre-empted the field. In Board of Higher Educ. v. Carter, 16 App. Div. 2d 443, 228 N.Y.S.2d 704 (1st Dep't 1962), the New York court held that the powers of the New York State Commission for Human Rights, with respect to investigations, extended to the activities of the Board of Higher Education in the City of New York, saying: "The provisions of the statute should be construed and applied liberally to accomplish the purposes thereof." Id. at 447, 228 N.Y.S.2d at 707.
19. Waterfront Commission of New York Harbor

In addition to the hundreds of state administrative agencies with inquisitional subpoena powers, there is one bi-state agency with such powers—the Waterfront Commission of New York Harbor. This body was established by the Waterfront Commission Act adopted by New York and New Jersey in 1953. Part I of the act, which embodies the interstate compact between New York and New Jersey, was submitted to Congress for its consent, pursuant to Article I, section 10 of the Constitution, and Congress consented. The purpose of the act was to improve waterfront labor conditions in the port of New York district.

The Commission has broad inquisitional subpoena powers, supplemented by a compulsory testimony provision. In adjudicatory hearings, a 1954 amendment provides that “applicants, prospective licensees, licensees and registrants shall have the right to be accompanied and represented by counsel.” Yet the act contains no provision for counsel in investigative proceedings. Moreover, the commission’s regulations provide for counsel in adjudicative proceedings, but not in inquisitional hearings; in such hearings, although the Commission permits witnesses to be accompanied by counsel, the role of such counsel is limited.

Strenuous attacks were made on the constitutionality of the section of the act relating to the collection of funds for unions and upon the commission’s powers, but they all failed. In De Veau v. Braisted, the United States Supreme Court, affirming the New York Court of Appeals, sustained the validity of the challenged section against contentions that it conflicted with the supremacy clause of Article VI, violated the due process clause of the fourteenth amendment, and was an ex post facto law and bill of attainder forbidden by Article I, section 10, of the Constitution.

197. Id. § 1.14.
INQUISTIONS BY OFFICIALS

Subsequently, in *Cleary v. Bolger*, the Court, reversing the Second Circuit, refused to enjoin one of the commission's detectives from testifying, either at a commission proceeding or in a state criminal trial, as to statements made by one defendant during his illegal detention by federal officers.

The courts, New York, New Jersey and federal, in many cases sustained the Commission's position in the enforcement of its subpoenas as generously as the federal courts enforced the subpoenas of the Price Administrator of the OPA. In *Bell v. Waterfront Comm'n*, the Second Circuit refused to vacate two of the Commission's subpoenas duces tecum on the president of two locals of the International Longshoremen's Association for the production of the basic financial records and minutes of these locals. The court held that the Waterfront Commission Compact did not conflict with the National Labor Relations Act, nor was the Compact pre-empted by the Labor-Management Reporting and Disclosure Act of 1959. The New Jersey Supreme Court ruled that the Commission could investigate a waterfront work stoppage. The same court and the Supreme Court, New York County, held that the Commission had jurisdiction to investigate alleged misappropriation of trust funds held for the benefit of longshoremen and other waterfront workers registered with or licensed by the Commission. According to the New Jersey Supreme Court, the Commission's jurisdiction was "clear." The New York courts, in *Gleason v. Waterfront Comm'n*, held that the Commission could require the production of the books and records of a union welfare fund.

Various cases held that the Commission could subpoena union members as well as union books and records. In one of these,
the New Jersey Supreme Court, in affirming a civil contempt judgment, stressed the grand jury analogy, citing United States Supreme Court cases. In another, the New Jersey superior court held that there was "no merit" to the contention that it was violative of due process for the Commission to subpoena a New Jersey resident to attend a hearing in New York. The Supreme Court, New York County, has held that the Commission could subpoena witnesses to testify in a public inquisitional hearing after these witnesses had testified on several occasions before it in private inquisitional hearings. This court also held, citing federal cases, that a subpoenaed witness was not entitled to a transcript of his testimony. Subpoenaed witnesses sought relief in the federal and state courts; they lost both places. Officials of the International Longshoremen's Association sought the help of the state courts of New Jersey as well as New York; again they lost both places. Yet these state courts granted the Commission's motions to have the same witness held in contempt.

Waterfront Comm'n, 16 Misc. 2d 632, 182 N.Y.S.2d 481 (Sup. Ct. 1958), cert. denied, 361 U.S. 835 (1959). In Connolly v. O'Malley, 17 App. Div. 2d 411, 234 N.Y.S.2d 889 (1st Dep't 1963), the court stated that the Waterfront Commission Act "by virtue of its beneficient purposes, is to receive a most liberal construction and application." Id. at 419, 234 N.Y.S.2d at 896-97.

207. Application of Waterfront Comm'n (In re Marchitto), 32 N.J. 323, 339, 340, 160 A.2d 832, 841 (1960): "The same considerations dictating that grand jury subpoenas need not reveal the subject matter under inquiry also persuade us that an investigating agency need not forecast or limit by specification the scope of its examination merely to gain jurisdiction of a person whose testimony is relevant to a matter properly under investigation."


209. Waterfront Comm'n v. Barone, 20 Misc. 2d 327, 329, 192 N.Y.S.2d 829, 832 (Sup. Ct. 1959): "The privilege extended . . . as to representation . . . by counsel does not carry with it the right, as in the case of an adversary-party proceeding, to a copy of his testimony." But in State v. Murphy, 36 N.J. 172, 188, 175 A.2d 622, 631 (1961), the New Jersey Supreme Court stated that the Commission could not "by its own enactment relieve itself of the obligation to make disclosure in a criminal proceeding or immunize itself from a judicial order to enforce that obligation."


20. Inspection Orders

Added to the multitude of state statutes for inquisitions by officials, are the almost countless municipal provisions for official inspections of various kinds. There are provisions for the inspection of premises to locate fire hazards or determine the origin of suspicious fires. There are also provisions for the inspection of premises for health or safety reasons, and for the inspection of books and records of businesses, nonprofit organizations, banks, insurance companies, and utility companies.

Two ordinances allowing the issuance of inspection orders for matters concerning the public health were sustained by the United States Supreme Court in Frank v. Maryland and Ohio ex rel. Eaton v. Price. The Frank decision was by a five to four vote, while Eaton divided the Court evenly, Mr. Justice Stewart not sitting.

In the Frank case a Baltimore health inspector demanded to inspect the petitioner’s basement area. The petitioner refused. The next day the inspector came again, this time accompanied by two policemen. He knocked on the door, but there was no response. He then swore out a warrant for the petitioner’s arrest under a section of the Baltimore City Code that imposes a 20 dollar fine for each refusal to permit the commissioner of health to enter a premises when he has cause “to suspect that a nuisance exists.” The petitioner was arrested, tried, convicted, and fined. The Supreme Court sustained the ordinance and affirmed petitioner’s judgment of conviction. Mr. Justice Douglas, in the opening paragraphs of a dissenting opinion in which Mr. Chief Justice Warren and Justices Black and Brennan concurred, criticized the Court’s dilution of “the right of privacy which every homeowner had the right to believe was part of our American heritage.”

In the Eaton case the ordinance was even more drastic, and the facts even more striking. This ordinance empowers a housing inspector “to enter, examine, and survey at any reasonable hour. . . .” The penalty for refusal to give this official “free access” is a fine of not less than 20 dollars nor more than 200 dollars or imprisonment of not less than two days or more than 30 days.

215. Mr. Justice Stewart’s father was on the Ohio Supreme Court that decided the Frank case.
216. Quoted by the Court, 359 U.S. at 361.
217. 359 U.S. at 374.
days or both, and each day of failure constitutes a separate violation.

The facts in the Eaton case demonstrate how far we have traveled the inquisitional road. They are summarized by Mr. Justice Brennan in a statement in which Mr. Chief Justice Warren and Justices Black and Douglas joined, and deserve at least a partial recital here:

One day three men who were housing inspectors came to his [petitioner's] door, and said they wanted to come into the house and go through the house and inspect the inside of the house. They had no credentials, only a sheet of yellow note papers, and Taylor [petitioner] said to them, "You have nothing to show me you have got a right to go through my house." The response was, "We don't have to have, according to the law passed four years ago." Replied Taylor, "That don't show me that you got anything in there that you want for inspection, and, further, I don't have nothing in my house that has to be inspected." The man said, "Well, you know, according to this ordinance, that we got a right to go through your house and inspect your house." "No, I don't think you have, unless you got a search warrant," answered Taylor.

The men went away, but tried by telephone to get permission for access to Taylor's house. They were not successful. Then two of the three men returned:

One had some sort of credential with a photograph on it. Neither had a warrant of any kind. One said the housing inspector wanted to inspect Taylor's house. Taylor said, "What do you have in there that you want to inspect? I have nothing in my house for inspection." He was told, "We have a right to come into your house, go through your house, inspect the whole inside of your house." Taylor's reaction to this was: "You have nothing wrote down on paper. You don't have a thing to show me you are going to come in there to inspect anything, and as far as that goes you aren't coming in unless you have a search warrant to get in." The men never came back with a search warrant, but as they left, one said, "If you ain't going to let us in, we are entitled to get in, and if you don't let us in, I am going to leave it up to the Prosecutor." Whereupon Taylor said: "I don't care what you do. You aren't coming in."219

Taylor was subsequently committed to jail, not being able to make bond of 1,000 dollars. One Eaton, a lawyer, filed a petition for habeas corpus in the Common Pleas Court on Taylor's behalf. This court found the ordinance unconstitutional, and discharged Taylor from custody, but the Ohio Court of Appeals reversed. Its judgment was upheld by the Ohio Supreme Court, whose judg-

IX. STATE INQUISITIONAL TREND

In two respects the force of the state inquisitional trend is even stronger than the federal one. For one thing, many states have completely abandoned the use of the grand jury. For another, there is a lack of provision for counsel for witnesses in investigative proceedings. Such provisions do occur, but they are the rare exception rather than the rule. Of the 39 states that provide for investigations into suspicious fires, only one, Georgia, provides specifically for counsel. Even when counsel are permitted to accompany witnesses in state inquisitional proceedings, the role of such counsel is usually limited to ear-whispering.

In inquisitions by federal administrative officials, section 6(a) of the Administrative Procedure Act does provide some protection for constitutional rights, but there is nothing comparable on a state level. There was a Model State Administrative Procedure Act, approved by the National Conference of Commissioners on Uniform State Laws at its annual meeting in 1946, after the enactment of the Administrative Procedure Act. There is also the Revised Model State Administrative Procedure Act, approved by the National Conference at its annual meeting in its seventieth year in the summer of 1961. But these documents make no provision for counsel for witnesses in investigative proceedings.

If one takes the state inquisitional trend, consisting of the hundreds of state agencies with inquisitional subpoena powers, the even greater number of provisions for the inspections of premises and of books and records, and the abandonment by many states of the grand jury, and adds to this trend such decisions as *In re Groban*221 and *Anonymous v. Baker*222 — sanctioning secret inquisitional proceedings from which counsel for subpoenaed witnesses are excluded — *Shapiro v. United States*223 — with its required records exception to the fifth amendment's right of silence — and the repeated decisions in which the United States Supreme Court upheld the validity of compulsory testimony acts,

220. When the Court noted probable jurisdiction in this case, the four Justices who voted against it, Justices Frankfurter, Clark, Harlan, and Whittaker, filed a separate memorandum in which they expressed their view that the Ohio case was controlled by, and should be affirmed on the authority of the Maryland case. Ohio ex rel. Eaton v. Price, 360 U.S. 240, 248 (1959).
221. 352 U.S. 30 (1957).
223. 335 U.S. 1 (1948).
one will see that we have arrived at the point, to use the living words of James Otis in his argument against the legality of writs of assistance[^224], quoted by Mr. Justice Black in his dissenting opinion in *In re Groban*,[^225] where we have placed "the liberty of every man in the hands of every petty officer."[^226]

[^224]: A writ of assistance was the chief weapon for the enforcement of the revenue laws. It was a blanket permit issuable to anyone, authorizing him to search any suspected place. The only limitation was that the search had to be in the daytime. Otis was advocate general for the crown, and as such it became his duty to argue for the validity of these writs; instead he resigned his office and took the other side of the case. In a masterful address he denounced writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law-book." See 2 *The Works of John Adams* 523 (App.) (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 63 (1823). The judges, almost convinced, sent to England for advice; but subsequently, in obedience to orders from the ministry, they recognized the writs. Although the case was lost, the cause was not. John Adams, who heard Otis' argument, later wrote: "Every man of a crowded audience appeared to me to go away as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." Letter to William Tudor, March 20, 1817, printed in 8 *Boston, Directors of the Old South Work, Old South Leaflets*, 57, 60 (No. 179, p. 4).


[^225]: See 2 *The Works of John Adams* 524 (app.) (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 66 (1823). Counsel for the subpoenaed witnesses in *In re Eastburn & Son, Inc.*, 51 Del. 446, 147 A.2d 921 (1959), drew attention to the objections in colonial times to writs of assistance, but the court made light of his argument:

... Counsel, in his zeal for his clients, is led to the somewhat extravagant statement that if this subpoena is sustained the Attorney General is superior to the law, and has in effect been clothed with the power to issue an obnoxious Writ of Assistance. The simple answer to all this is that the Attorney General has no power himself to seize anything. If his subpoena is not heeded he must apply to the court . . . .

*Id.* at 453, 147 A.2d at 925.

*(Part III of this Article will be published in Volume 48.)*