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AUTHORITIES

TEXT BOOKS AND STATUTES

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 260.

AMAZON PETROLEUM CORPORATION ET AL., PETITIONERS,

VS.

A. D. RYAN ET AL., RESPONDENTS.

STATEMENT.

I.

The petitioners are oil producers. They each own leases covering separate properties by the terms of which they are vested with the absolute, exclusive right to explore and develop the properties and produce all the oil which the properties are capable of producing. They each produce the oil and sell it and deliver it to pipe line companies on the respective properties, title passing from petitioners as soon as the oil is delivered into the pipe lines of the purchasers. Petitioners have nothing to do with transporting or refining the oil, and are not concerned with whether or not the oil, or its products, is

handled or transported in interstate or foreign commerce.

II.

The petitioners brought this action to enjoin the Railroad Commission of Texas and the law enforcement officers of the State of Texas and the respondents, referred to in the bill of complaint as federal officers, from enforcing certain orders of the Secretary of the Interior and Administrator of the Petroleum Code and the Railroad Commission of Texas curtailing the production of petitioners' wells to less than one per cent of their producing capacity.

III.

The petitioners alleged and proved by undisputed evidence that the Secretary of the Interior decreed that the daily production for the State of Texas should be 880,000 barrels; that this figure was certified by the Secretary of the Interior to the Railroad Commission of Texas as the allowable for the state; that it was accepted and adopted by the Railroad Commission of Texas, and by it allocated to the different fields in the state; that from time to time the Secretary of the Interior would fix the allowable for the state, certify it to the Commission, and on each occasion the allowable fixed by the Secretary was accepted and adopted by the Commission; that the Commission would then make the allocation to the different fields in the state, determine and fix the amount that each well was permitted to produce, and then enter an order prohibiting the petitioners and other producers

from producing in excess of the well allowable so ascertained and fixed by the Commission. Thereafter, the federal and state officers joined hands to compel compliance with the orders of the Commission. (R. 66.)

IV.

The petitioners alleged and proved, and in fact it was admitted by the defendant, that as incident to the enforcement of the aforesaid orders the Secretary of the Interior had promulgated and put into effect certain rules and regulations, requiring the petitioners to furnish reports showing the names, residences and post-office addresses of petitioners, location of their producing properties, number of wells, allowable production as fixed by the Railroad Commission, daily production in barrels from each property, daily production in barrels from each well, amount of all deliveries of petroleum, giving names and places of business of all persons to whom deliveries were made, and the quantity involved in each delivery; also showing all petroleum in storage and a declaration under oath that no part of such petroleum had been produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn by any state law or valid regulation or order prescribed by any board, commission, officer or duly authorized agency of the state.

V.

The petitioners alleged that "In doing the acts and things and carrying into effect the orders herein complained of, the defendants, and each of them, claim to

be acting under authority of and pursuant to powers conferred upon them by the Conservation Act of the State of Texas, and also under and by virtue of authority conferred by the National Recovery Act, but as a matter of fact they and each of them are acting without any authority whatever, and without any intent or purpose of executing the aforesaid laws, or either of them, and they are mere trespassers attempting to enforce compliance with a scheme of proration hereinafter fully defined." (R. 55.)

VI.

The petitioners alleged, first, that the aforesaid orders were not authorized by the Conservation Laws of the State of Texas, or the National Industrial Recovery Act; that the operation and effect of the orders was to deprive them of their property and the use thereof without due process of law, contrary to the Fifth and Fourteenth Amendments to the National Constitution; second, that if the orders were authorized by the State Conservation Law, the law itself was void as being in violation of the Fourteenth Amendment to the National Constitution in that it deprived them of their property without due process of law, and denied them the equal protection of the law. They alleged that the National Industrial Recovery Act was void as being an attempt by Congress to delegate its legislative powers to the President; as an attempt by Congress to vest in the President the powers of a dictator; as an attempt by the national government to usurp the police powers

of the state, contrary to the Tenth Amendment to the National Constitution; as depriving them of their natural and inherent rights, contrary to the Ninth Amendment to the National Constitution; as depriving them of their property without due process of law, in violation of the Fifth Amendment to the National Constitution. They also alleged that the National Industrial Recovery Act, as enforced by the respondents, was in violation of the Fourth and Fifth Amendments to the National Constitution in that it compelled the petitioners to produce their private papers and effects and give evidence against themselves, and that the Act was contrary to the Eighth Amendment to the National Constitution in that it imposed excessive fines and cruel and unusual punishment.

The petitioners alleged that their wells were capable of producing many times the amount of oil which they were being permitted to produce, and alleged and proved that they had a ready market for large quantities of oil in excess of the amount they were permitted to produce under the orders of the Railroad Commission, and by reason of the operation of said orders they were being deprived of producing and selling large quantities of oil and were being compelled to share their markets with others to such an extent as resulted in virtual confiscation of their property, and that by reason of these facts they were daily losing large sums of money. (R. 4-6.)

VII.

The respondents answered and admitted the promulgation and enforcement of the orders complained of, and pleaded in justification, in so far as the respondents

were concerned, Section 9 (c) of the National Industrial Recovery Act and Article III of the Petroleum Code. The Railroad Commission answered, pleading that the orders were authorized by the Conservation Laws of the State of Texas.

VIII.

By reason of the fact that the constitutionality of the orders of the Railroad Commission and the State Conservation Act were challenged, a three-judge court was convened pursuant to Section 380, United States Code.

IX.

When the case was called for trial, it was suggested by the presiding judge that the bill stated two separate causes of action, one against the state officers and the other against the federal officers, and that the three-judge court was without jurisdiction to try the action against the federal officers. Both the petitioners and the respondents disagreed with this suggestion, but in order to facilitate matters it was agreed that the entire case would be tried and submitted to the three-judge court, both on the application for an interlocutory injunction and on the merits, and that if the three-judge court decided it was without jurisdiction to hear and decide the action against the federal officers it might be referred to the district court and be decided by the Honorable Randolph Bryant, district judge, on the evidence adduced at the trial before the three judges.

After hearing the evidence, the argument of counsel, and having the cause submitted to them on briefs, the three judges concluded that they did not have jurisdiction of the cause of action against the federal officers and proceeded to decide the case between the petitioners and the state officers, and referred the case as between the petitioners and the federal officers to the district court. That court decided the case in favor of petitioners and granted a perpetual injunction, enjoining the respondents from enforcing or attempting to enforce Section 4, Article III, of the Code of Fair Competition, and from requiring the petitioners to furnish the reports required under Regulation IV of the Rules and Regulations of the Secretary of the Interior, and from instituting any actions of a civil or criminal nature against petitioners for alleged violations of the Code or the regulations of the Secretary of the Interior, and from going upon the property of the petitioners under and by virtue of any authority conferred or attempted to be conferred by the provisions of the Code and regulations involved. (R. 131-135.)

X.

The respondents appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and that court reversed the decree of the district court and dismissed the bills for want of equity. (R. 192.)

XI.

The opinion of the circuit court of appeals, to say the least, is perplexing. It found by the undisputed evidence that the petitioners were not in any way engaged

in interstate commerce, but at the same time held that the acts of the federal officers were justified, and in fact authorized, by Section 9 (c) of the National Industrial Recovery Act, which provides that the President is authorized to prohibit the transportation in interstate or foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed therein by any board, commission, officer or other duly authorized agency of a state. It further found that the regulations of the Secretary of the Interior requiring the reports complained of and subjecting the properties of the petitioners to visitations and inspections were reasonably necessary to a proper enforcement of Section 9 (c). Notwithstanding the undisputed evidence that the state allowable was fixed by the Secretary of the Interior and certified to and adopted by the Railroad Commission of Texas, that court held that the question of the power of the federal government to fix the allowable was not involved because the State of Texas had fixed its own quota.

The case was brought to this court on writ of certiorari. The brief in support of the petition for certiorari states the grounds of jurisdiction, gives reference to the opinions of the courts below, together with a specification of errors, and for the sake of brevity those things are here omitted.

SUGGESTION.

While we have not assigned it as error, and do not care to take any advantage of it, if it can be avoided, we feel it our duty to make the following suggestion: It is our opinion that the bill of complaint in this action did not state separate causes of action against the state authorities and the federal authorities. On the other hand, we think it clearly states one cause of action against all of the defendants. The bill alleges that all the defendants were attempting to accomplish the same thing. It alleges that they claimed to be acting under authority of both the National Industrial Recovery Act and the State Conservation Law. By reason of the attack upon the constitutionality of the State Conservation Act and the orders made by authority claimed thereunder, it was necessary that a three-judge court be convened. It is our opinion that when this was done the three-judge court had jurisdiction of all the issues involved in the case, and that it should have decided them, and that it erred in refusing to decide the issues between the petitioners and the federal officers and in referring that part of the case to the district judge.

Louisville & Nashville Ry. Co. v. *Garnett,* 231 U. S. 298.

This is called to the court's attention because it involves an important matter of procedure. If the three-judge court had decided the entire case, as we contend it should have, the appeal should have been taken direct to this court.

Section 380, U. S. C. A.

Stratton v. *St. L. S. W. Ry. Co.,* 282 U. S. 10, 51 S. Ct. 8.

SUMMARY OF ARGUMENT.

Point A.

The petitioners are not engaged in interstate commerce, and their activities do not affect interstate commerce, except incidentally and remotely; their business is, therefore, not subject to regulation by the federal government.

Point B.

The National Industrial Recovery Act, and particularly Section 9 (c), is void as an attempted delegation of legislative power to the President.

Point C.

Section 9 (c) of the National Industrial Recovery Act is void because Congress does not have power under the commerce clause to prohibit the transportation in interstate and foreign commerce of harmless commodities.

Point D.

The National Industrial Recovery Act is void because it is an attempt by the national government to usurp powers reserved to the states and the people by the Tenth Amendment to the Federal Constitution.

Point E.

The national emergency, brought about by the financial depression, did not bestow upon Congress the power to enact the National Industrial Recovery Act.

Point F.

Article I, Section 8, U. S. Constitution, which empowers the Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make laws which shall be necessary and proper for carrying into effect the foregoing powers, does not authorize the Congress to require petitioners to keep their oil underground until such time as the national government may need it in offensive or defensive warfare, without paying petitioners just compensation for it.

Point G.

Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry is void:

(1) Because Section 3 of the National Industrial Recovery Act, which undertakes to delegate to the President and trade or industrial associations or groups power to promulgate Codes of Fair Competition and give them the force of law, is a delegation of legislative power prohibited by the national constitution;

(2) Because Section 3 of said Act is an attempt upon the part of the Congress to regulate and control local and private business and concerns in violation of the Tenth Amendment to the National Constitution;

(3) Because Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry is an attempt upon the part of the President and a part of the Petroleum Industry to exercise powers not

granted to them by Section 3 (a) of the National Industrial Recovery Act;

(4) Because Section 4 of Article III of said Code could not become a national law without first having been introduced as a bill in one of the houses of Congress, then have passed both houses, and last be approved by the President or reenacted over his veto.

Point H.

Regulations IV and VII of the Secretary of the Interior are null and void:

1. Because Section 9 (c) of the National Industrial Recovery Act is void.

2. Because Section 10 (a) of the National Industrial Recovery Act is void.

3. Because said regulations are not authorized by either section of said Act.

4. Because said regulations violate rights guaranteed to the petitioner by both the Fourth and Fifth Amendments to the National Constitution.

Point I.

The circuit court of appeals erred in holding that petitioners have an adequate remedy at law and are, therefore, not entitled to injunctive relief.

ARGUMENT.

Point A.

The petitioners are not engaged in interstate commerce, and their activities do not affect interstate commerce, except incidentally and remotely; their business is, therefore, not subject to regulation by the federal government.

It is settled beyond cavil that mining, manufacturing, and producing are local businesses, subject to local regulations, and do not constitute interstate commerce or affect interstate commerce in such manner as to empower regulation by Congress.

United Mine Workers of America v. *Coronado Coal Co.,* 259 U. S. 407, 42 S. Ct. 570.

Oliver Iron Mining Co. v. *Lord,* 262 U. S. 172, 67 L. Ed. 929, 43 S. Ct. 526.

Gibbons v. *Ogden,* 9 Wheat. 1.

Hope Natural Gas Co. v. *Hall,* 274 U. S. 284, 71 L. Ed. 1049, 47 S. Ct. 639.

Foster-Fountain Packing Co. v. *Haydel,* 278 U. S. 1, 73 L. Ed. 147, 49 S. Ct. 1.

Utah Power & Light Co. v. *Pfost,* 286 U. S. 165, 76 L. Ed. 1038, 52 S. Ct. 548.

Hammer v. *Dagenhart,* 247 U. S. 251, 38 S. Ct. 529.

Kidd v. *Pearson,* 128 U. S. 1, 32 L. Ed. 351.

Mobile County v. *Kimball,* 102 U. S. 692.

Bailey v. *Drexel Furn. Co.,* 259 U. S. 20, 66 L. Ed. 817, 42 S. Ct. 449.

Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297.

Hill v. *Wallace,* 259 U. S. 44, 42 S. Ct. 453.
Heisler v. *Thomas Colliery Co.,* 260 U. S. 245.
United Leather Workers, etc., v. *Herkert,* 265 U. S. 457.

It has been specifically held by this court that producing oil is not interstate commerce, and that restriction of production, even though such restriction indirectly diminishes the amount of oil entering the channels of interstate commerce and thereby in a measure obstructs the free flow of commerce, is not such a direct interference with the free flow of interstate commerce as to be a violation of the interstate commerce clause of the United States Constitution.

Champlin Refining Co. v. *Corporation Commission,* 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062.

We are not overlooking the contention of respondents that something like 85% of the oil produced in Texas and the products thereof eventually find their way into the channels of interstate commerce. Our answer to this argument is that certainly it was never the intention of the framers of the constitution that Congress should regulate the internal affairs of all businesses, the products of which, in the process of passing from producer or manufacturer to consumer, pass through the channels of interstate commerce. Such a construction would result in congressional regulation of all business. Of course, a large percentage of cotton and the products thereof, corn and the products thereof, wheat and the products thereof, cattle, hogs, and, in fact, all commodities, eventually flow through the channels

of interstate commerce. This, of course, does not mean that the farmer, the cattle raiser, the miner or the manufacturer, is engaged in interstate commerce. Such a distorted and unreasonable construction of the commerce clause beyond question would result in the destruction of our present dual form of government, and the substitution therefor of a centralized government in Washington whereby eventually all businesses, vocations and pursuits would be tediously and minutely regulated by federal bureaus.

Argument to the contrary is predicated upon a misconception of the holding of the court in such cases as the Shreveport rate case, *Houston E. & W. T. Ry. Co.* v. *U. S.,* 234 U. S. 342; the stockyards cases, such as *Stafford* v. *Wallace,* 258 U. S. 495; and the Grain Futures Act case of *Chicago* v. *Olsen,* 262 U. S. 1.

In the Shreveport rate case, the charge was made that the carriers had made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they had made into Texas from Shreveport, Louisiana, a competing point. The Interstate Commerce Commission made an order directing that the intrastate rate maintained by carriers under state authority should be changed to the extent necessary to prevent a result which in the opinion of the Commission operated as an unjust discrimination against interstate commerce. This court held that the intrastate rate resulted in discrimination and caused an obstruction of interstate commerce. The court said:

> "Congress is entitled to maintain its own standard as to these rates, and to forbid any discrimina-

> tory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

In the stockyards cases, it was held, first, that this was a business affected with a public interest; second, that it was controlled by a monopoly; third, that the manipulations of the monopoly were obstructing the free flow of interstate commerce, and, fourth, that the stockyards under all the circumstances were merely a throat through which commerce should continue with an uninterrupted flow.

The grain futures case was based on the same reasoning as the stockyards case.

It is not believed that by any process of reasoning these cases can be made applicable to individual oil producers. It does not appear from the record that they are acting collectively or individually to obstruct or interfere with the free flow of interstate commerce, or that anything they have done, either directly or indirectly, affects the free flow of commerce.

Concluding our argument on this point, we do not believe it is possible that the law could be more succinctly stated than it was by His Honor, Chief Justice Hughes, appearing before the Federal Oil Conservation Board in 1926, we understand, as counsel for the American Petroleum Institute. He stated his opinion of the law as follows:

> "It may therefore be safely taken for granted that under the powers to regulate commerce Congress has no constitutional authority to control the mere

> production of petroleum on lands (other than Indian lands) within the territory of a state. All plans for requiring unit operation or otherwise, which involve the assertion of such a power on the part of Congress do not require discussion. They proceed from an utterly erroneous conception of federal power. It does not further the policy of conservation to take up the public attention with futile proposals which disregard the essential principles of our system of government."

The federal government, therefore, has no constitutional power to regulate petitioners' businesses.

Point B.

The National Industrial Recovery Act, and particularly Section 9 (c), is void as an attempted delegation of legislative power to the President.

> "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain, and by that constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."
>
> Cooley, Constitutional Limitations, 7th Ed. 163.

The rule has been stated by this court as follows:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized

as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field* v. *Clark,* 143 U. S. 649, 36 L. Ed. 294.

This doctrine is confirmed in the following cases:

Buttfield v. *Stranahan,* 192 U. S. 470, 48 L. Ed. 525, 24 S. Ct. 349.

Union Bridge Co. v. *U. S.,* 204 U. S. 364, 51 L. Ed. 523.

St. Louis & I. M. Ry. Co. v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616.

Mutual Film Corp. v. *Industrial Commission,* 236 U. S. 230, 35 S. Ct. 387.

The rule as now established seems to be that while Congress cannot delegate its lawmaking power, a discretionary authority may be granted to executive and administrative authorities, first, to determine in specific cases when and how the powers legislatively conferred are to be exercised, and, second, to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed.

A cursory examination of the National Industrial Recovery Act discloses that it not only delegates to the President the absolute power to enact such legislation as he deems expedient pertaining to any and all of the industries in the nation, so long as he does not violate certain inhibitions set forth in the Act, but the Act even attempts to delegate to the industries themselves the power to formulate, codify and adopt such laws as they deem fit and proper to carry into effect the

declared policy of Congress, the declared policy being "To remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups; to induce and maintain united action of labor and management under adequate governmental sanctions and supervision; to elminate unfair competitive practices; to promote the fullest possible utilization of the present productive capacity of industries; to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." (Sec. 1, N. I. R. A.)

It will be noted that the entire enacting part of the Act, if it has an enacting clause, is contained in the foregoing quotation. It is also interesting to note that the policies declared by Congress were nothing more than a reiteration of what has been the policy of the United States Government since it was founded. In brief, Congress has stated that it is its policy to do whatever can be done to relieve the existing depression, and, since it does not know what to do, it attempts, by Section 3 of the Act, to give each industry power and authority to formulate and adopt, subject to the approval of the President, such laws as in the opinion

of a majority of the various industries are best calculated to accomplish that objective.

In overruling us on this point, the circuit court of appeals made the following comment:

> "The Code is a novelty in legislation. Its making was not a delegation by Congress of a power of legislation to the various trade or industrial groups mentioned in Sec. 3. The groups could really do nothing but advise the President, just as Congress itself is often advised by hearing those to be affected. While a very strong influence is accorded to each group, it is the President's act in approving a recommended code or imposing an involuntary one that gives it force."

This, to us, seems to be an unusual holding. As a matter of fact, approval of the President is required before any act of Congress becomes a law, except in cases where his veto is overridden. We do not believe it can be said, however, that merely because acts of Congress become enforceable when approved by the President that acts of the various industries of the country, acting instead of Congress, can become laws when approved by the President. We do not find in the constitution either expressed or implied power in Congress to delegate to the President and to the various trade industries acting cooperatively the power to enact laws governing the industries.

We freely admit that Congress can enact laws and leave the filling in of details to administrative officers, and may provide that certain provisions of laws shall be operative or inoperative upon the happening of

contingencies, such contingencies to be ascertained and determined by the administrative officers, but the Recovery Act goes far beyond this. It gives to the President and the various trade groups and industries the formulation, enactment, codification and enforcement of the law.

Undoubtedly, there could not be a clearer delegation of legislative power than Section 9 (c). This section does not make it unlawful to ship excess oil in interstate commerce. It does not prohibit the shipment of excess oil in interstate commerce. It provides no penalty for shipping excess oil in interstate commerce. It does not provide that it shall be unlawful to ship excess oil in interstate commerce upon the happening of any contingency, or that upon the happening of certain contingencies the President may prohibit the shipment of excess oil in interstate commerce. It merely provides that

> "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a state."

Therefore, whether it is a violation of law to ship excess oil in interstate commerce rests solely in the discretion of the President, and the cases above cited clearly hold that the discretionary powers of Congress cannot be delegated.

Point C.

Section 9 (c) of the National Industrial Recovery Act is void because Congress does not have power under the commerce clause to prohibit the transportation in interstate and foreign commerce of harmless commodities.

It is stated in Willoughby on the Constitution of the United States, Vol. 2 (2nd Ed.), page 721, Sec. 415:

> "There can be but little question that the chief and possibly the entire purpose of the commerce clause was, so far as interstate commerce was concerned, to empower the federal authorities to prevent the states from interfering with the freedom of commercial intercourse between themselves or with foreign nations."

It should be borne in mind that the right of intercourse between the states is not a constitutional right. It is a natural and inherent right, subject to be regulated by Congress by virtue of the commerce clause of the constitution. The proposition was stated by Chief Justice Marshall as follows:

> "In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is accepted by civilized men throughout the world. That is true. The constitution found it an existing right and gave to Congress the power to regulate it."
> *Gibbons* v. *Ogden,* 9 Wheat. 1.

With the foregoing principles in mind, let us consider whether or not Congress has power to prohibit the shipment of petroleum in interstate commerce.

In Willoughby on the Constitution of the United States, Vol. 2 (2nd Ed.), page 994, Sec. 592, it is stated:

> "The facilities of interstate commerce may not be refused by Congress to commodities not dangerous to transport and of such a character that their use or consumption will do no injury, moral or physical, to anyone, simply upon the ground that they have been produced or manufactured in ways or under conditions objectionable to Congress."

This proposition has been squarely settled by this court in the Child Labor Law case.

In this case, this court held that the federal act was void upon the double ground that it was not a *regulation* of commerce, since it was concerned neither with the safety and efficiency of the carrying on of that commerce, nor the prevention of an undesirable result following transportation, and because the act was, in essence, a regulation of production or manufacture, a matter within the exclusive jurisdiction of the states.

Hammer v. *Dagenhart,* 247 U. S. 251.

In this case, the court further said:

> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary *commercial commodities,* to regulate the hours of labor of children in factories and mines within the states—a purely state authority. Thus the act in a *two-fold* sense is repugnant to the constitution. *It not only transcends the authority delegated to Congress over commerce,* but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if

> Congress can thus regulate matters intrusted to local authorities by prohibition of the movement of commodities in interstate commerce, *all freedom of commerce will be at an end,* and the power of the states over local matters may be eliminated and thus our system of government be practically destroyed." (Our italics.)

It will no doubt be urged by the respondents that this contention is contrary to the holding in the liquor cases, such as *U. S.* v. *Hill,* 248 U. S. 420; the lottery cases, such as *Champion* v. *Ames,* 188 U. S. 321; the Pure Food Law cases, such as *Hipolite Egg Co.* v. *U. S.,* 220 U. S. 45, and *McDermott* v. *Wisconsin,* 228 U. S. 115; the white slave cases, such as *Hoke* v. *U. S.,* 227 U. S. 308, and *Caminetti* v. *U. S.,* 246 U. S. 470; the wild game case of *Rupert* v. *U. S.,* 181 Fed. 87 (C. C. A. 8th, 1910); the Motor Vehicle Theft Act case of *Brooks* v. *U. S.,* 267 U. S. 432; and the oleomargarine case of *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238.

However, there would seem to be a clear distinction between these cases and the case at bar, these cases being based upon the proposition that, as stated in *Brooks* v. *U. S., supra*:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the power, for the benefit of the public, within the field of interstate commerce."

In the automobile theft cases, the court held that the vehicles of interstate commerce could not be used in furtherance of the crime of theft. In other words, the instrumentalities of interstate commerce cannot be used to place the stolen article beyond the reach of its owner.

The liquor cases are based squarely upon the proposition of the inherent vice of the commodity itself, and so are the Pure Food Law cases.

The wild game case is not analogous to the case at bar, because title to wild game is vested in the state. The state holds it in trust for the benefit of its citizens, and has a clear right to say under what circumstances the citizen may kill and acquire title to the game, and therefore it is within the powers of Congress to prohibit the use of the instrumentalities of interstate commerce in transporting the game out of the jurisdiction of the state when it is killed and captured in violation of the state law.

It is quite obvious, too, that this court went to the extreme limit in some of those cases in upholding them under the power granted Congress by the commerce clause. In fact, we are frank to say that it is our opinion that the effect of some of the acts of Congress upheld by this court is to regulate the purely internal affairs of the state under the guise of regulating interstate commerce.

Counsel for respondents stated to us that they intended to ask this court to overrule its decision in the Child Labor case. We think it would be much more in keeping with the intention of the framers of the constitution to reaffirm the doctrine of the Child Labor case,

and, if the occasion arises, frankly overrule any cases which might appear to be in conflict with it. The constitution provides specifically how it should be amended, and those, who are dissatisfied with it, should follow that procedure if they want it amended, instead of imploring the judicial department of the government to do it by judicial construction.

Oil produced in excess of the amount fixed by the state law remains the property of the producer. If the producer has violated a valid law of the state, he is subject to the penalties of the law. Prohibiting shipment of the oil in interstate commerce is merely denying the use of the instrumentalities of commerce to transport a recognized commodity of commerce, the title to which is undisputed. There is no evidence in the record that it would unduly burden interstate commerce, and we all know that the transporting companies are in dire need of business and the revenue derived therefrom. Therefore, it is quite obvious that an act of Congress prohibiting the transportation of such oil in interstate commerce is an attempt on the part of Congress to aid the state in the enforcement of its conservation laws, and thus regulate the production of petroleum—a local matter over which the national government has no jurisdiction.

We take it that no one will argue that crude petroleum is not a lawful article of commerce. This court has said:

> "The general rule to be deduced from the decisions of this court is that a lawful article of com-

merce cannot be wholly excluded from importation into a state from another state where it is manufactured or grown."

Schollenberger v. *Pennsylvania,* 171 U. S. 1, 43 L. Ed. 49.

Point D.

The National Industrial Recovery Act is void because it is an attempt by the national government to usurp powers reserved to the states and the people by the Tenth Amendment to the Federal Constitution.

Ample authorities have already been cited sustaining the proposition that the national government is without power to regulate the internal affairs of the state. In fact, this is conceded. This is a proposition that has been recognized by the sponsors of the National Industrial Recovery Act, as well as almost innumerable acts of similar legislation enacted for the purpose of meeting the present emergency and legislating the nation out of the depression.

Mindful of the limited powers of the national government and at the same time desiring to carry into effect a program demanding united action and cooperation, Congress has sought to confer upon the executive department of the government complete power to regulate and control the internal affairs of the country, and, realizing its lack of authority to do so, has attempted to justify its acts under the guise of regulating interstate commerce, providing for the general welfare and invoking the war powers of Congress, although there is no war.

These facts are so well recognized and known to all informed persons that no proof of them should be required. They should be judicially noticed by the court, and it is then only necessary for the court to decide whether or not Congress is empowered to do these things by a mere statement of its desire to regulate interstate commerce.

To determine the intent of Congress in passing the National Industrial Recovery Act, it is only necessary to briefly refer to the language of the Act itself.

First, Congress declares it to be its policy to remove obstructions to the free flow of interstate and foreign commerce. So far as we know, that has always been the policy of Congress. It at least ought to be. Second, to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups. The commerce clause does not confer this power. Third, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision. However commendable this policy may be, it is an invasion of states' rights.

Hammer v. *Dagenhart,* 274 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101.

Bailey v. *Drexel,* 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817.

Fourth, to eliminate unfair "competitive practices." This vague term leads us far afield and attempts to give the federal government jurisdiction over local concerns not even hinted at in the commerce clause.

Fifth, to promote the fullest possible utilization of the present productive capacities of industries; sixth, to avoid undue restriction of production (except as may be temporarily required); seventh, to increase the consumption of industrial and agricultural products by increasing purchasing power; eighth, to reduce and relieve unemployment; ninth, to improve standards of labor; and, tenth, otherwise rehabilitate industry and to conserve natural resources.

We have no quarrel with Congress as to the wisdom of these declarations of policy. But we do assert that, in its efforts to carry them into execution, it cannot wipe out the Tenth Amendment to the Federal Constitution, make the states mere provinces of the Department of the Interior, and inject such strength and power into the commerce clause as to leave it the only effective clause of the constitution, and then draw from it the power to regulate and control, to the minutest detail, the business and affairs of every one who produces, mines, manufactures, or consumes articles, some of which flow in the channels of interstate and foreign commerce.

The wisdom of our dual form of government is, of course, a debatable question, but we have it, and it will remain intact until the constitution is amended in the proper way.

This court has said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm that will come from

> breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half."
>
> *Bailey* v. *Drexel Furniture Co., supra.*

The production of oil in Texas is a private business. The federal government, of course, cannot by a code adopted by a part of the industry and approved by the President fix the amount of oil that a producer may produce from his well, require him to make detailed reports of the amount of his production and the disposition made of it, subject his property to physical examination and inspection, and require him to submit his books and records for examination and audit, without doing violence to both the Fifth and Tenth Amendments to the National Constitution.

This record indisputably shows that respondents, in doing the things enumerated above, had no thought of regulating interstate and foreign commerce, but their sole object was to limit the amount of oil that might be produced in Texas to the amount fixed by the Secretary of Interior and certified by him to the Railroad Commission of Texas. The allowables fixed by the Secretary were adopted by the Commission (R. 66-67) and the respondents were attempting to compel petitioners to comply with those orders and produce from their wells no more than that allotted to them. This is clearly established by the letters of respondent Ryan (R. 70-71), and the various affidavits of petitioners. (R. 67-74.)

The authorities cited under Point A and Point F fully sustain this proposition, and under them the decree of the trial court was right and that of the circuit court of appeals wrong.

Point E.

The national emergency, brought about by the financial depression, did not bestow upon Congress the power to enact the National Industrial Recovery Act.

In the court below, respondents, admitting that "an emergency may not call into life a power which has never lived," but asserting that "nevertheless emergency may afford a reason for the exertion of a living power already enjoyed, *Wilson* v. *New,* 243 U. S. 332 (1917); *Home Building & Loan Association* v. *Blaisdell,* 78 L. Ed. 255 (1934)" (Respondents' Brief Circuit Court of Appeals, page 168) argued "that the existing emergency creates a condition in and affecting interstate commerce which justifies the application of these regulatory measures during the period of the emergency declared by the Congress." (Respondents' Brief, Circuit Court of Appeals, page 166.) And further that "an emergency may create a condition which calls forth the valid exercise of governmental power which under normal conditions would be an unreasonable and arbitrary fiat." (Respondents' Brief, Circuit Court of Appeals, page 168.)

Congress has no power under the Constitution of the United States to prohibit the transportation of crude petroleum and its products in interstate and foreign commerce; it has no power under the constitution to require a producer of oil to render unto it burdensome reports,

giving the minutest details of his business; nor to go upon his property, inspect it, his books and records, gauge his old tanks and dig up his pipe lines to ascertain whether he has produced oil in excess of state allowables. *A fortiori* it could not bestow such power upon the President and the Secretary of the Interior. From the constitution, Congress derives no power to say that an oil producer who produces oil in excess of that allotted to him by state regulations shall be an unfair trade practice, and consequently can confer no such power upon the President and the Secretary of the Interior. If the power is not in the constitution, it cannot come from the emergency. Our thought is better expressed by Judge John J. Parker, in his address before the American Bar Association, August 30, 1933, when he said in part:

> "In saying this I would not have you think that I subscribe for a moment to the heresy that unconstitutional acts may be justified because of an emergency. I hold to no such destructive and revolutionary doctrine. It is unthinkable that our fundamental law, which lays down the principles upon which sovereignty is to be exercised, is to be disregarded at the very time when a guide for the exercise of sovereignty is most needed. Our constitutional structure has been erected to stand and protect our people against the danger arising from the exercise of sovereignty, not only when the skies are blue and the sun is shining, but also when the storms come and the depths are moved."
>
> (American Bar Association Journal, Oct., 1933, page 574.)

Emergencies create no power. In emergencies, in panics, in times of peril, when people stampede, when

sober judgment is submerged, when expediency seeks to triumph over righteousness and correct principles, then is when we need the safeguards of our Constitution.

Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

Wilson v. *New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755.

Home B. & L. Assn. v. *Blaisdell*, 78 L. Ed. 255, 290 U. S. 398, 54 S. Ct. 231.

Nebbia v. *New York*, 291 U. S. 502, 54 S. Ct. 505.

Point F.

Article I, Section 8, U. S. Constitution, which empowers the Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make laws which shall be necessary and proper for carrying into effect the foregoing powers, does not authorize the Congress to require petitioners to keep their oil underground until such time as the national government may need it in offensive or defensive warfare, without paying petitioners just compensation for it.

We freely concede that the United States Government has the power to wage war and to prepare for it. In the court below respondents argued that under Article I, Section 8 of the Federal Constitution, the federal government had the power to restrict production of petitioners' oil wells so that the oil might be conserved and be available for use in the next war. We contend that the government cannot prepare for war at the expense of the oil producers alone. The burden must be borne by the people as a whole.

The Supreme Court of Texas is the proper tribunal to define the rights of a landowner in Texas to the oil and gas in and under his land, and it has done so. Said that court:

> "Gas and oil in place are 'minerals' and realty, subject to ownership, severance and sale while embedded in the sands and rocks beneath the earth's surface, in like manner and to the same extent as coal or any other solid mineral."

And in the same opinion the court said:

> "But so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander as in the case of other property."
>
> *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290.

See, also:

Houston & T. C. Ry. Co. v. *East,* 98 Tex. 146, 81 S. W. 279.

Bender v. *Brooks,* 103 Tex. 329, 127 S. W. 168.

Texas Co. v. *Daugherty,* 107 Tex. 226, 176 S. W. 717.

Prairie Oil & Gas Co. v. *State,* 231 S. W. 1088.

It necessarily follows, therefore, that the national government has no more right to confiscate these petitioners' oil for use in war than it has to confiscate their other private property for such use. True, the government may take their oil for the national defense, but it is also true that if it does so it must pay them for it. The Fifth Amendment so declares.

U. S. v. *Cohen Grocery Co.,* 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516.

U. S. v. *New Rivers Collieries Co.*, 262 U. S. 345, 43 S. Ct. 565, 67 L. Ed. 1014.

Hamilton v. *Kentucky Distillers & Warehouse Co.*, 251 U. S. 146, 40 S. Ct. 106, 64 L. Ed. 194.

Below, the respondents relied upon *U. S.* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 16 S. Ct. 427, but in that case the government conceded that it must pay the owners for the land appropriated.

Point G.

Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry is void:

(1) Because Section 3 of the National Industrial Recovery Act, which undertakes to delegate to the President and trade or industrial associations or groups power to promulgate codes of fair competition and give them the force of law, is a delegation of legislative power prohibited by the national constitution;

(2) Because Section 3 of said Act is an attempt upon the part of the Congress to regulate and control local and private business and concerns in violation of the Tenth Amendment to the National Constitution;

(3) Because Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry is an attempt upon the part of the President and a part of the Petroleum Industry to exercise powers not granted to them by Section 3 (a) of the National Industrial Recovery Act;

(4) Because Section 4 of Article III of said Code could not become a national law without first having

been introduced as a bill in one of the houses of Congress, then have passed both houses, and last be approved by the President, or reenacted over his veto.

1. Section 3 (a) of the National Industrial Recovery Act provides that "Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the

provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." (R. 152.)

Paragraph (b) makes an approved code the standard of fair competition for the trade or industry covered by it, and provides that any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of Chapter 2 of this title.

Paragraph (c) provides for injunctions in favor of the government to restrain violations of the Code; and Paragraph (f) imposes a fine, upon conviction, for each violation of the Code of not more than $500.00 for each offense. Paragraphs (d) and (e) are not material here.

Subheadings 1 and 2 have, we think, been sufficiently argued under Points B and D and we pass them without further comment, except as to adopt here as authority for these propositions the authorities cited under Points B and D.

Section 4 of Article III of the Code should be considered in connection with Section 3 of Article III. Section 3 of Article III as it now stands reads as follows:

> "Section 3. Required production of crude oil to balance consumer demand for petroleum products shall be estimated at intervals by a Federal Agency designated by the President. In estimating such required production, due account shall be taken of probable withdrawals from storage and of antici-

pated imports. The required production shall be equitably allocated among the several States by the Federal Agency. The estimates of required production and the allocations among the States shall be submitted to the President for approval, and, when approved by him, shall be deemed to be the net reasonable market demand, and may be so certified by the Federal Agency. The allocations when approved by the President shall be recommended as the operating schedule for the producing States and for the industry [and thereupon Section 4 of this Article shall apply]. In any States where oil is produced on account of back allowables, total current allowables shall be reduced accordingly." (The brackets indicate new matter.)

Section 4 of Article III of the Code as it now stands reads as follows:

"Section 4. The subdivision into pool and/or lease and/or well quotas of the production allocated to each State is to be made within the State. Should quotas allocated in conformity with the provisions of this Section [and/or Section 3 of Article III of this Code] not be made within the State or if the production of petroleum within any State exceeds the quota allocated to said State, the President may regulate the shipment of petroleum or petroleum products in or affecting interstate commerce out of said State to the extent necessary to effectuate the purposes of the National Industrial Recovery Act and/or he may compile such quotas and recommend them to the State Regulatory Body in such State, in which event it is hereby agreed that such quotas shall become operating schedules for that State.

If any subdivision into quotas of production allocated to any State shall be made within a State any production by any person, as person is defined in Article I, Section 3 of this Code in excess of any such quota assigned to him, shall be deemed an un-

fair trade practice and in violation of this Code." (The brackets indicate new matter.)

The words in brackets in Sections 3 and 4 and the last paragraph of Section 4 were omitted from the Code as approved by the President, September 13, 1933. All parties to this suit, however, and the courts below labored under the belief that Sections 3 and 4 contained those provisions, and petitioners were threatened with prosecutions for violating the last paragraph of Section 4. (R. 71-72.) Furthermore, respondents contend that one who produces oil in excess of the allowable fixed by the state agency violates Section 4 of Article III of the Code and may be punished for such violation by fine of not to exceed $500.00 for each offense, and each day such violation continues to be deemed a separate offense. (R. 71-72.) (Sec. 3 (f), N. I. R. A.) The government concedes, now, however, that it has no legal ground upon which to base prosecutions, criminal or otherwise, against respondents for violating the Code prior to September 25, 1934. (Supplemental Memorandum for Respondents, this case, page 2.) But, if respondents produce oil in excess of the amount allotted to them by the State Railroad Commission after September 25, 1934, the government will contend that the violations of the Railroad Commission's order also constitute violations of Section 4, Article III of the Code. Whether any of the respondents have violated the proration orders of the Texas Railroad Commission since September 25, 1934, we do not know. Of what they intend to do in the future we have no knowledge. Many of them, however,

inherently believe and have deeply embodied in their nature the doctrine expressed by the Supreme Court of Texas in *Stephens County* v. *Mid-Kansas Oil & Gas Company, supra,* and by Circuit Judge Joseph C. Hutcheson, Jr., in *Macmillan* v. *Railroad Commission,* 51 Fed. (2) 400, when he said:

> "Certainly when a subordinate body like the railroad commission of Texas undertakes as here to deal in a broadly restrictive way with the right of a citizen to produce the oil which under the law of this state he owns, it must be prepared to answer his imperious query, 'is it not lawful for me to do what I will with mine own' by pointing to a clear delegation of legislative power";

and one who assumes that most of them will continue in their efforts to defeat the railroad commission of Texas and the federal government in their persistent efforts to deprive petitioners of their properties and the use of them without due process of law will not go far wrong. It appears that Sec. 4, Article III of the Code, under the authorities cited by the government on page 2 of the supplemental memorandum for respondents, is properly before this court for determination of its validity.

Texas Co. v. *Brown,* 258 U. S. 466, 42 S. Ct. 375.

Pugh v. *McCormick,* 14 Wall. 361, 81 U. S. S. Ct. 789.

Watts, Watts & Co. v. *Unione Austriaca, etc.,* 248 U. S. 9, 39 S. Ct. 1.

American Foundries v. *Tri-City Council,* 257 U. S. 184, 42 S. Ct. 72.

If the court finds that Section 3 of the Recovery Act is a valid enactment of Congress, these provisions of the Code are valid and enforceable against petitioners, who are not parties to the Code, if the statute authorizes such Code.

It is at once apparent from a reading of the above provision of the Code that their purpose is to limit the production of crude oil to the point necessary to *balance it with consumer demand for petroleum products.* They have nothing to do with the regulation of interstate and foreign commerce. Only a violation of the standards of the Code in any transaction in or affecting interstate or foreign commerce is deemed an unfair method of competition in commerce. Thus, the Act, as found by the trial court, does not authorize the adoption and promulgation of a code to limit production of crude oil to balance consumer demand for petroleum products, and the above sections of the Code are void for lack of statutory authority. If the statute does authorize such provisions, both the statute and Code are void under the authorities cited under Points A and F.

We further submit that to permit such a document as the Code of Fair Competition for the Petroleum Industry to become a law of the land, agreed to merely by a part of the industry and approved by the President, without ever having been before the Congress, much less passed by it, is to permit a flagrant violation of Section 7 of Article I of the National Constitution.

Point H.

Regulations IV and VII of the Secretary of the Interior are null and void:

1. Because Section 9 (c) of the National Industrial Recovery Act is void.

2. Because Section 10 (a) of the National Industrial Recovery Act is void.

3. Because said regulations are not authorized by either section of said act.

4. Because said regulations violate rights guaranteed to the petitioners by both the Fourth and Fifth Amendments to the National Constitution.

1 and 2. The constitutionality of Section 9 (c) has already been argued. (Points B, C, D, E and F.)

If Section 9 (c) is void, it necessarily follows that Section 10 (a) which provides that "The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this chapter"; * * * "and any violation of such rule or regulation shall be punishable by a fine not to exceed $500 or imprisonment not to exceed six months, or both," is also void.

3. But the regulations are void whether the law be valid or void.

Regulation IV requires every producer of oil—not transporter—to file a statement under oath, sworn to before any duly authorized state or federal officer, not later than the 15th day of each and every calendar month, beginning with August 15, 1933, with the Division of In-

vestigations of the Department of the Interior, unless otherwise ordered to report at more frequent intervals by the division, which statement shall contain the following information for the given field involved covering the preceding calendar month: (1) Residence and post-office address of the producer; (2) location of his producing properties and wells, the allowable production for each property and well as prescribed by the proper state agency for both property and wells; (3) the daily production in barrels from each property and well; (4) report of all deliveries of petroleum showing the names and places of business of all persons to whom such petroleum was delivered whether purchasers, consignees or transporting agencies, and the quantity involved in each delivery, transportation or other disposition thereof, together with a report of all petroleum in storage, wherever located, at the beginning and at the end of said calendar month, the place of storage and the amount of storage at each place; and (5) a declaration that no part of the petroleum or the products thereof produced and shipped has been produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder by any board, commission, officer, or any other duly authorized agency of the state in which the petroleum was produced. (R. 44-45.)

Regulation VII provides that all persons, natural and artificial, embraced within the terms of Section 9 (c) of the National Industrial Recovery Act (Public No. 67, 73rd Congress) and the executive orders and regula-

tions issued thereunder, shall keep and maintain available for inspection by the Division of Investigation of the Department of the Interior adequate books and records of all transactions involving the production and transportation of petroleum and the products thereof. (R. 43.)

The amended orders now in effect are not materially different. (Memorandum for respondents herein, pages 4 and 17-20.)

Petitioners, who produce oil and sell it on their leases, refused to comply with the above orders and brought this suit to enjoin respondents from requiring them to do so and to enjoin respondents from prosecuting them to subject them to the fines and penalties prescribed for not doing so by Section 10 (a), N. I. R. A. Unless respondents are enjoined they will proceed with such prosecutions. (R. 71-72.)

It is plainly evident from the information required by the above reports that the regulation of the production of oil—not its transportation in interstate and foreign commerce—is the objective. The Secretary of the Interior seeks to accomplish the prohibited thing under the guise of regulating interstate commerce, the trier of the facts so found. (R. 137.) If there was ever any doubt about it the distinguished Secretary of the Interior dispelled the doubt, speaking to the American Petroleum Institute at Dallas, Texas, Wednesday, November 14, 1934. As reported by the Associated Press, he said, among other things:

> "Our hope has been that this oil question could be worked out, in the main, by industry itself in co-

operation with the states, with the federal government giving such general and incidental assistance as might be necessary."

And further:

"Unless this whole question is solved without undue loss of time on a basis that will commend itself to the sound judgment of the people, the federal government may conclude that it is its duty to consider declaring the oil industry to be a public utility."

Further:

"If you would escape the heavy hand of the government, which, sooner or later, will be charged with the duty of carrying out the grim purpose of the people that such abuses as exist in the oil business shall no longer be tolerated, then set your house in order and do it without delay."

Again:

"I assure this state and all others that, so far as the federal government is concerned, subject only to its paramount right to prevent the waste of an irreplaceable natural resource, it would be happy to be relieved of any responsibility with respect to the regulation and control of the oil industry in any state."

Furthermore:

"From a profitless business as a whole when the oil administration took hold, you have been making fair profits. There has also been definite accomplishment as far as labor is concerned. All of you are familiar with the fact that the price of average Mid-Continent crude oil has been $1 a barrel for more than a year and that the steady market

in this area has resulted in corresponding stability in other districts."

(Longview Daily News, Nov. 14, 1934; Dallas Morning News and Fort Worth Star Telegram, November 15, 1934.)

With commendable frankness, the Secretary of the Interior, in all his public addresses about this subject, has always stated his purpose was to exercise that control over the oil industry in all its phases necessary to stabilize the industry and return it to prosperity.

Does the Secretary say that the federal government would like to be relieved of the duty of regulating interstate and foreign commerce? No, "of any responsibility with respect to the *regulation* and *control* of the oil industry in any state." Well, the National Constitution relieves the federal government of that responsibility, if the government will just obey its simple mandates. Since when was it the *grim purpose* of the people that the price of crude oil be maintained at $1 a barrel, so that they will have to pay correspondingly high prices for the products thereof?

Thus it appears that the administrative officials of the government in their zealous efforts to legislate and regulate the nation out of the depression find only the commerce clause in the constitution and brush aside the Tenth Amendment, as though it were not there.

4. These regulations are also arbitrary and unreasonable, being mere roving, fishing expeditions into the private affairs of private citizens.

In re Pacific Ry. Commission, 32 Fed. 263.

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336.

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 14 S. Ct. 1125.

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115.

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434, 35 S. Ct. 645.

And both regulations violate the rights guaranteed petitioners to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures under the Fourth Amendment, and from testifying against themselves, under the Fifth Amendment.

Boyd v. *U. S.*, 116 U. S. 619.

Hale v. *Henkel*, 201 U. S. 42.

Silverthorne Lumber Co. v. *U. S.*, 251 U. S. 385.

Carroll v. *U. S.*, 267 U. S. 132.

Gobart Importing Co. v. *U. S.*, 282 U. S. 344.

Weeks v. *U. S.*, 232 U. S. 383.

Point I.

The circuit court of appeals erred in holding that petitioners have an adequate remedy at law and are, therefore, not entitled to injunctive relief.

The circuit court of appeals said:

> "For by reference to Sect. 5 of the Act it appears that the sanctions for violating the Code are but three. Paragraph (b) declares a violation to be an unfair method of competition within the meaning of the Federal Trade Commission Act. If that sanc-

> tion be an unlawful one, and should be sought to be applied against complainants before the Federal Trade Commission, they have their remedy in that proceeding. Paragraph (c) provides for injunction proceedings by the district attorney to prevent violation, and a complete remedy against wrong is available there. Paragraph (f) provides a sanction by criminal prosecution, but only when the violation is 'in any transaction in or affecting interstate or foreign commerce.' An indictment or information could not stop at alleging the production of excess oil, but would have to allege with appropriate fulness that it was in a transaction in interstate commerce or affecting it. This sanction is thus tied to and seemingly not intended to exceed the commerce power of Congress. Each such criminal case would depend on its own facts. The provision of the Code thus enforced does not appear to be unconstitutional. Whether any complainant at any time has violated it is more appropriate to be tried in a prosecution of him than in this composite suit in equity. We may say of all three sanctions that an adequate remedy against abuse is afforded in the proceedings indicated by the statute for their respective enforcement, so that a remedy in equity by injunction may not be had." (R. 188.)

The circuit court of appeals also held petitioners are not entitled to injunctive relief against the repeated trespasses of respondents, because there was no showing of irreparable damage or insolvency of the trespassers. (R. 191-192.)

In these holdings the learned court fell into error. The respondents so admit. (Memorandum for Respond-

ents herein, page 3.) And the decisions of this court so hold.

Philadelphia Co. v. *Stimson,* 223 U. S. 605.

Champlin Refining Co. v. *Corporation Commission,* 286 U. S. 210.

Ex parte Young, 209 U. S. 123.

For the convenience of the court, we have included in the appendix, first, applicable parts of the National Industrial Recovery Act; second, applicable parts of the Petroleum Code; third, Regulations IV and VII of the Secretary of the Interior; fourth, reference to articles bearing on the National Industrial Recovery Act.

Conclusion.

In conclusion, we respectfully submit to the court that the record clearly shows that the National Industrial Recovery Act is unconstitutional, and especially Sections 3 and 9 (c) thereof, in the particulars herein set forth, and that the order of the President, dated July 11, 1933, prohibiting the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order, prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a state (R. 37-38); that the order of the President appointing the Secretary of the Interior administrator and the Department of the Interior the federal agency under the Code of Fair Competition for the Petroleum Industry (R. 54); that Sec-

tion 4 of Article III of said Code; and that Regulations IV and VII of the Secretary of Interior are null and void.

Therefore, the decree of the circuit court of appeals should be reversed, and the decree of the district court should be affirmed.

Respectfully submitted,

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APPENDIX A.

The National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195 (U.S.C. Sup. VII, Title 15, Secs. 701, 702 (b), 702 (c), 703 (a), 703 (b), 703 (c), 703 (f), 709 (c), 710 (a)) provides in part:

> SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.
>
> SEC. 2. (b) The President may delegate any of his functions and powers under this title to such

officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

(c) This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by Section 1 has ended.

SEC. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided,* That such code or codes shall not permit monopolies or monopolistic practices: *Provided further,* That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including re-

quirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

(f) When a code of fair competition has been approved or prescribed by the President under this *title, any violation of any provision thereof in any* transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

SEC. 9. (c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.

SEC. 10. (a) The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500, or imprisonment for not to exceed six months, or both.

APPENDIX B.

Petroleum Code.

Article III.

Production.

Section 1. The President is hereby requested, after such investigation and hearing as is prescribed by, and subject to the limitations contained in, Title 1 of the National Industrial Recovery Act, to limit imports of crude petroleum and petroleum products for domestic consumption to volumes bearing such ratio to the estimated volume of domestic production as will effectuate the purposes of this Code and the National Industrial Recovery Act.

Section 2. Withdrawals of crude oil from storage shall be subject to approval by the Planning and Coordination Committee but for the remainder of 1933 shall be limited in the aggregate to an average not in excess of 100,000 barrels daily. Additions to storage beyond the necessary limits of fluctuations in working stocks shall be made only with the approval of the Planning and Coordinating Committee.

Section 3. Required production of crude oil to balance consumer demand for petroleum products shall be estimated at intervals by a Federal Agency designated by the President. In estimating such required production, due account shall be taken of probable withdrawals from storage and of anticipated imports. The required

production shall be equitably allocated among the several States by the Federal Agency. The estimates of required production and the allocations among the States shall be submitted to the President for approval, and, when approved by him, shall be deemed to be the net reasonable market demand, and may be so certified by the Federal Agency. The allocations when approved by the President shall be recommended as the operating schedule for the producing States and for the industry and thereupon Section 4 of this Article shall apply. In any States where oil is produced on account of back allowables, total current allowables shall be reduced accordingly.

Section 4. The subdivision into pool and/or lease and/or well quotas of the production allocated to each State is to be made within the State. Should quotas allocated in conformity with the provisions of this Section and/or Section 3 of Article III of this Code not be made within the State or if the production of petroleum within any State exceeds the quota allocated to said State, the President may regulate the shipment of petroleum or petroleum products in or affecting interstate commerce out of said State to the extent necessary to effectuate the purposes of the National Industrial Recovery Act and/or he may compile such quotas and recommend them to the State Regulatory Body in such State, in which event it is hereby agreed that such quotas shall become operating schedules for that State.

If any subdivision into quotas of production allocated to any State shall be made within a State any production by any person, as person is defined in Article

I, Section 2 of this Code in excess of any such quota assigned to him shall be deemed an unfair trade practice and in violation of this Code.

Section 5. In any State in which no regulatory body or officer charged with the duty of allocating quotas within said State exists, and under the laws of which any person in any trade or industry within said State is required to comply with the terms of any Code of Fair Competition for such trade or industry approved under Title I of the National Industrial Recovery Act, the President may designate an agency within such State to compile quotas within said State. Such compilations, upon approval by the President, shall become operating schedules for the petroleum industry within said State. If any subdivision into quotas of production allocated to any such State shall be made within the State, any production by any person, as person is defined in Article I, Section 3 of this Code in excess of any such quota assigned to him shall be deemed as unfair trade practice and in violation of this Code; and, further, persons engaged in the petroleum industry or any branch thereof in any State may adopt a supplemental Code for that State, to be effective when approved by the President, covering any matter relating to the petroleum industry not in conflict with the provisions of this Code.

APPENDIX C.

The two regulations by the Secretary of the Interior involved in the present litigation read as follows:

IV.

Every producer of petroleum shall file a statement under oath, sworn to before any duly authorized State or Federal officer, not later than the fifteenth day of each and every calendar month, beginning with August 15, 1933, with the Division of Investigations of the Department of the Interior, unless otherwise ordered to report at more frequent intervals by the Division, which statement shall contain the following information for the given field involved covering the preceding calendar month:

(1) The residence and post-office address of the producer.

(2) The location of his producing properties and wells, the allowable production for each property and well as prescribed by the proper State agency for both property and wells.

(3) The daily production in barrels produced from each property and well.

(4) A report of all deliveries of petroleum showing the names and places of business of all persons to whom such petroleum was delivered whether purchasers, consignees or transporting agencies, and the quantity involved in each delivery, transportation or other disposition thereof, together with a report of all petroleum in storage, wherever located, at the beginning and at the end of said calendar month, the place of storage and the amount in storage at each place.

(5) A declaration that no part of the petroleum or the products thereof produced and shipped has been produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder by any Board, Commission, Officer, or other duly authorized agency of the State in which the petroleum was produced. [As amended by Order of July 25, 1933.]

VII.

All persons, natural or artificial, embraced within the terms of Section 9 (c) of the National Industrial Recovery Act (Public No. 67, 73d Congress) and the Executive orders and regulations issued thereunder, shall keep and maintain available for inspection by the Division of Investigations of the Department of the Interior adequate books and records of all transactions involving the production and transportation of petroleum and the products thereof.

APPENDIX D.

Articles Bearing on N. I. R. A.

Harvard Law Review, November, 1933, pages 93-95; also, 109-114;

Address of Honorable John J. Parker, United States Circuit Judge, "Is the Constitution Passing?" before the American Bar Association at Grand Rapids, reported in American Bar Association Journal, October, 1933;

John Corbin, The Forum, August, 1933;

Mitchell Dawson, "The Supreme Court and the New Deal," Harper's Magazine, November, 1933;

Paul Hutchinson, The Forum, September, 1933;

Maurice Finkelstein, "The Dilemma of the Supreme Court," The Nation, October, 1933;

James M. Beck, "The NRA Is Unconstitutional," Fortune Magazine, November, 1933;

Howard E. Wahrenbrock, "Federal Anti-Trust Law and the National Industrial Recovery Act," Michigan Law Review, June, 1933;

Honorable Clarence E. Martin, "Shall We Abolish Our Republican Form of Government?" American Bar Association Journal, August, 1933;

Senator Patrick A. McCarran, address to the American Bar Association in Grand Rapids, American Bar Association Journal, October, 1933;

Professor Milton Handler, "The National Industrial Recovery Act," American Bar Association Journal, August, 1933;

Professor Charles E. Clark, "Legal Aspects of Legislation Underlying National Recovery Program," American Bar Association Journal, May, 1934;

Hal H. Smith, "The National Recovery Act: Is It Constitutional?" American Bar Association Journal, May, 1934;

David L. Podell, "Essential Factors in Determining Constitutionality of Recovery Act," American Bar Association Journal, May, 1934; and,

Frederick H. Wood, "Constitutional Aspects of National Recovery Program."