Competitive struggle for gallonage.—The accumulation of this large excess supply intensified the competition for the market. Producers were driven to enter the refining and marketing branches of the industry and thousands of new filling stations were built in every section of the country. (Petroleum Development and Technology, 1931, American Institute of Mining and Metallurgical Engineers (Swensrud, Economics of Distribution in the Petroleum Industry) pp. 604, 605, 608, Appendix B, pp. 51–52; Bureau of Foreign and Domestic Commerce, Petroleum Industry of the Gulf Southwest (1931), p. 128). Because of the inelastic demand for gasoline, no larger aggregate amount of gasoline was distributed by reason of these additional facilities.[45] It was merely distributed through more retail outlets at an increased cost of distribution to the consumer. This struggle between retail marketers for gallonage has led to vicious competitive excesses throughout the country (R. 85, 86).

"Hot oil" and the interstate market.—The huge amounts of oil produced in violation of state law (R. 97, 102, 109, 120) have exerted a particularly depressing effect upon the interstate market of petroleum and its products (R. 85–86, 97, 102–103, 109–110, 120). Actual reported production in recent years shows a tremendous amount of illegal or

[45] The demand decreased after 1929 (Bureau of Mines, Minerals Yearbook, 1932–1933, Statistical Appendix, p. 300).

"hot" oil; the amount not reported can only be estimated.[46] By March 30, 1933, the output of the East Texas Field was estimated to be a million barrels a day, although the daily allowable was only 400,000 barrels [47] (Oil and Gas Journal, March 30, 1933 (Rowley, Immediate Strengthening of Crude and Refined Oil Markets Expected as Result of Meeting), p. 7). Considerable quantities of "hot" oil were also produced in the Oklahoma City pool.[48]

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[46] "How much more oil was produced in the field no one may ever be able to say, as it is believed millions of barrels were produced, of which there was no record made and most of which sold below market prices" (Oil and Gas Journal, Jan. 26, 1933 (Bredberg, Year of Turmoil in World's Largest Oil Field), p. 102).

[47] The Oil and Gas Journal carried weekly estimates of the illegal production in the East Texas field. On February 20, 1933, it was estimated to amount to 103,000 barrels daily (Oil and Gas Journal, March 2, 1933 (East Texas Crude Production and Shipments), p. 32); on February 27, 1933, the estimate was 90,695 to 150,000 barrels per day (*Id.*, March 9, 1933 (East Texas Crude Production and Shipments), p. 32); on March 25, 1933, the *reported* production was 231,381 barrels per day in excess of the daily allowable (400,000 barrels), and the *actual* daily production was estimated at 378,875 barrels above the allowable (*Id.*, March 30, 1933 (East Texas Crude Production and Shipments), p. 32); and by March 30, 1933, the output of the field was around 1,000,000 barrels a day as against a daily allowable of 400,000 barrels (*Id.*, March 30, 1933 (Rowley, Immediate Strengthening of Crude and Refined Oil Markets Expected as Result of Meeting), p. 7).

[48] At hearings held by a committee of the Oklahoma State Senate in January 1933 investigating the production situation in the Oklahoma City field, the vice president of one company admitted that his company had produced approximately 1,000,000 barrels in excess of its allowable between

Because of its illegal character, this oil was offered at large discounts below the posted price (R. 85, 97, 102–103, 120), and accelerated the decline in the price of crude oil. The refiners who purchased "hot" oil were able to market their petroleum products at a lower price than their competitors dealing in legal oil (R. 85, 97; Petroleum Development and Technology, 1933, American Institute of Mining and Metallurgical Engineers (Struth, Petroleum Economics in 1932), p. 51;[49] Oil and Gas

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October 1931 and November 1932 (Oil and Gas Journal, Feb. 2, 1933 (Evidence of Big Overproduction and of Sales of Overproduced Oil in Oklahoma City), p. 11). The official of another company testified that his company had purchased at least 525,000 barrels of "hot" oil at prices ranging from 24 to 40 percent below the posted price (*Ibid*). At a later date of this hearing, the official of another company admitted that his company had run 1,000,000 barrels of illegally produced oil in 1931 and 1932, and was running 8,000 barrels per day of such oil in January 1933 (Oil and Gas Journal, March 2, 1933 (Easy to Ship Illegal Oil Out of Oklahoma City, Witnesses Say, Who Admit Having Done It), p. 11). The situation was so bad in this field that the Governor of Oklahoma ordered a complete shutdown on March 4, 1933, in order to curb the overproduction (Oil and Gas Journal, March 9, 1933 (Spinney, Governor Shuts in Oklahoma City Field, Charging Some Companies Greatly Overproducing) p. 42).

[49] It is there stated (p. 51):

> East Texas continued to exert a far-reaching influence on the crude and gasoline market during 1932. Despite the fact that oil prices were advanced in most fields, large quantities of oil were produced in East Texas in violation of state proration orders, and sold in the market at prices considerably below official postings. This created competitive conditions in the gasoline market that were felt by all refining centers of the United States. The quantity of gasoline produced from cheap East Texas crude was not large, but

Journal, January 12, 1933 (Willson, Price Reductions in Oklahoma Market Include Kerosene, Distillate, Fuels, and Gasoline), p. 20 [50]); and those wholesalers and retailers who acquired "hot" gasoline were similarly able to cut prices below that of their competitors (R. 97), compelling the latter to meet the lower price in order to retain their business (R. 97, 103, 120). Waves of price-cutting of oil and its products extended across entire states and often across state boundaries (R. 85, 97). Legitimate refiners were frequently compelled to sell below cost in order to preserve their market (R. 85, 97). Bootlegging of "hot" oil and "hot" gasoline developed in amazing proportions in the East Texas field (R. 85, 97, 102–103, 120). "Hot" oil and "hot" gasoline lost their identity upon being commingled with legal oil and its products and moved into the channels of interstate commerce (R. 120). Even such "hot" oil or gasoline as might in an individual case move wholly within the State necessarily had a direct effect upon the interstate market because it compelled other producers

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the volume was sufficient to influence prices in practically all sections of the country. Thus, while the industry's economic situation showed visible improvement statistically, the unreported and unseen statistics originating in East Texas proved to be an insurmountable obstacle to the economic betterment that was otherwise apparently justified.

[50] Some underselling was also caused by offering of distress oil by producers who were unable to secure pipe-line connections (Oil and Gas Journal, Jan. 12, 1933 (Willson, Price Reductions in Oklahoma Market Include Kerosene, Distillate, Fuels and Gasoline), p. 20).

to produce "hot" oil and to place it upon the interstate market, in order to prevent drainage of the oil from under their premises (R. 81). In any case it absorbed part of the local market which had ordinarily been supplied by dealers in legitimate oil and its products, impelling them to seek markets in other states (R. 81, 120). Certain of the petitioners in the *Amazon* case were shown to have been producing "hot" oil (R. 128–129), and "hot" oil produced by the Amazon Petroleum Corporation was shown to have been commingled with other oil and moved to the terminal of a refining company from which it moved into interstate commerce (R. 129–130). Another of the petitioners was discovered moving oil from one of its leases to a refining company by a "bypass", a secret device employed to deliver "hot" oil, and part of this oil was refined into products which were shipped in interstate commerce (R. 130).

Importance of "stripper" well areas.—The collapse throughout the country of the price structure of crude oil resulting from the flush production of the new fields drastically affected producers in the "stripper" well areas. Out of the total of 321,000 producing wells in the country (R. 89, 90, 100–101; see Bureau of Mines, Minerals Yearbook, 1932–1933, Statistical Appendix, p. 335, Appendix B, p. 49), only about 15,000 are flush wells and of these 11,000 are located in the East Texas Field (R. 100). The rest of them are "stripper" wells having an average production of from one to five barrels per

day; 250,000 of these produce an average of only one barrel daily. (R. 89; Bureau of Mines, Minerals Yearbook, 1932–1933, Statistical Appendix, p. 335, Appendix B, p. 49.) In Illinois, New York, Ohio, Pennsylvania and West Virginia the daily average produced is less than one barrel per well and the wells of Indiana and Kentucky average less than 1½ barrels per day. (*Ibid.*) Many of the states in which the flush fields are located, including Texas and Oklahoma, also have large "stripper" well areas (R. 106, 107, 95–96, 104). The flush production of the new fields is, moreover, of temporary duration (R. 80), and prior to the approval of the Petroleum Code the excessive production from the East Texas field was diminishing the natural pressure and was bringing nearer the date when this field would also have to go on the pump and become a "stripper" field (Oil and Gas Journal, May 18, 1933 (Bignell, Recent Orgy of Production in East Texas Field Has Definitely Shortened the Flowing Life), p. 10; Oil Weekly, May 15, 1933 (Reservoir Pressure Drops as East Texas Production Spree Continues), p. 7), as have all flush fields in the past. See Report on Pipe Lines, *supra,* page ix, Appendix B, p. 21. The "stripper" fields are the backbone of the national supply, furnishing in normal times somewhat over 25 percent of the total domestic production [51] (R. 107).

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[51] See Hearings, S. 1712, H. R. 5755, Senate Finance Committee, 73rd Cong. 1st Sess. pp. 174, 179, 247, 250, Appendix B, pp. 139–140, 145, 146. See statement of Wirt Franklin at

Effect of price collapses on "stripper" well areas—loss of their national market.—The decline in crude oil prices drove prices in the "stripper" well areas far below the cost of production, causing many of these wells to be abandoned. (R. 81–82, 84, 89, 90–91, 105; *supra,* p. 84; and see Tariff Commission Report on Crude Petroleum, etc., *supra,* at pp. 158–163, Appendix B, pp. 59–65, and Petroleum Administrative Board, Preliminary Report on Crude Petroleum Costs, etc., *supra,* at pp. 10–33, Appen-

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Hearings on Petroleum Code before National Recovery Administration, as follows (p. 3032):

> The most important oil reserves in the nation are not found in the present flush fields or great pools. Our greatest oil reserves and the most important ones are in the approximately 300,000 stripper wells, with a total production of about 600,000 barrels per day. Several billion barrels of petroleum will ultimately be recovered from these wells. That recovery, however, is dependent upon the possibility of operating these wells at a profit. Since they are all on the pump, their production costs are necessarily higher than is the case with wells of flush production, such as are found in new fields only. Under present conditions, these wells are operated at a loss. Many of them have been shut down. Once closed, few of them ever can be reopened. Their premature abandonment would present a loss to the Nation of many millions of dollars of actual wealth. From some of those wells comes our most important supply of lubricants. They occupy a most important position in the structure of the petroleum industry. They are the very backbone of that industry. Flush fields are uncertain. Wells in such fields may suddenly cease flowing and require pumping. The flush wells of today are the stripper wells of tomorrow. The output of such wells is impossible to estimate. The wells of settled production are the most substantial part of the industry.

dix B, pp. 68–91.) During 1931, approximately 22,000 of such wells were abandoned, many more than in any other previous year. (Bureau of Mines, Mineral Resources of the United States, 1931, Part II, p. 610.) The record is replete with statements by producers from nearly every "stripper" well area in the country, showing the loss of their normal interstate and foreign market resulting from the excessive production in the flush fields and the decline of prices below their lifting costs, and the consequent abandonment of many of their wells. (R. 90–91, 105, 106, 107, 94, 95, 104; see Hearings, S. 1712, H. R. 5755, Senate Committee on Finance, 73rd Cong. 1st Sess. pp. 174, 177, 178, 215, 242, 243, 244–250, 271, Appendix B, pp. 139–148; Hearings, H. R. 5720, S. 1736, House Committee on Ways and Means, 73d Cong., 1st Sess., pp. 103–106, 109–111, 113, 117, 118, 119, Appendix B, pp. 155–161.) Production outside of the flush fields of Texas, Oklahoma, and Kansas decreased over 18 million barrels during the first six months of 1933, although the total production in the country increased 39 million barrels. (Oil and Gas Journal, July 27, 1933 (McIntyre, Flush Fields and Illegal Oil Runs Responsible for Increased Crude Production), p. 35, Appendix B, p. 108.) Production from the flush fields threatened to monopolize the market of most of the "stripper" well areas in the country. (R. 90, 96,

105–106, 107; see Federal Oil Conservation Board, Report V (1932), p. 3.)[52]

Permanent loss of resources in stripper-well areas.—The shutting down of many of the "stripper" wells caused the permanent loss of their reserves as a result of water intrusion (R. 89, 90, 101, 102, 105, 107), and in the case of other "stripper" wells, the majority of which are owned by persons of moderate means (R. 90, 106), so increased the cost of restoring them as producers as to make recovery of their reserves economically impracticable.[53] The loss of these reserves not only involved

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[52] In this report it is stated (p. 3):

> Because the potential production, established by competitive drilling, is in excess of the demand for oil, the adjustment among the various sources must either depend on their comparative costs of production, or on enforced restrictions of production to enable allocations of outlet among old and new areas. The new flush fields are the low-cost units, and, therefore, if costs alone were to control, such fields would monopolize the market. Yet unrestricted production from such sources means the temporary or even permanent abandonment of the older wells of settled production, with attendant dislocation of investments. It also means lessened ultimate recovery from the flush fields themselves because of loss of the irreplaceable lifting power of the gas blown into the air, accelerated water encroachment, and other causes.

[53] See Oil and Gas Journal, Feb. 5, 1931 (Hearing before Senate Committee), p. 21 at p. 98:

> These wells are now rapidly being flooded with salt water and the owners of these wells, independent operators, are facing utter ruin. You understand that every well makes a certain amount of salt water. This water is produced right along with the oil. If the wells are completely shut down the salt water accumulates and, being heavier than oil, forces its way

serious economic injury to the owners of the "stripper" wells and to the refineries and pipe-line companies which depend upon these wells for the supply of petroleum normally moved into interstate commerce by such refineries or pipe-line companies (R. 90, 92, 94, 95, 96, 89), not only involved loss of employment and drastic reduction of wages to the thousands of employees dependent for their jobs on the existence of these businesses (R. 89, 90, 92, 96, 103–104, 105, 106, 107), without materially increasing employment in the flush fields (R. 96, 106), but also threatened the vital public interests concerned in the conservation of this important natural resource (*infra,* pp. 138–141).

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back into the oil sand, driving the oil away from the pumps. Today the owners of these wells are pumping them just enough to keep the salt water off, in the hope that some relief may be obtained in the next few weeks that will give them a market again for their products.

Of course you understand the length of time that a producer can pump these wells is gauged by two things: First, his financial ability to continue his operation with no income; and second, the physical limitation. I mean by that that each well makes a varying amount of salt water. The wells making the most salt water would be the first hurt.

It is not necessary for me, I am sure, to point out to this committee that in addition to the owners of these wells there are the royalty owners, the farmers on whose lands these wells have been produced, and they have been depending upon them for a steady income, and the men who have been employed in the producing of these wells, the banks and the merchants of the community that have been built up on this business.

C. The fruitless efforts of the industry and of the States to control the competitive conditions attending the production of oil demonstrate the interstate unity of the oil industry and the need for federal control

The history of the oil industry since 1926 has been characterized by unsuccessful attempts on the part of the industry and the States to regulate the competitive conditions in the production of oil which have compelled production in excess of market demand. The failure of those attempts serves further to demonstrate the essential interstate character of this industry.

Failure of voluntary group action.—Voluntary group action by producers in a few of the fields followed the discovery of the large new pools in 1926 and 1927.[54] Umpires and informal committees were appointed to prorate an estimated market demand among the individual wells and properties within a field. In a few instances, particularly in California, these plans worked. (Petroleum Development and Technology, 1931, American Institute of Mining and Metallurgical Engineers (Allen, Control of California Oil Curtailment), p. 47). But in other cases it proved impossible to obtain compliance with the quotas thus

[54] In the Federal Trade Commission Report on the Petroleum Industry, etc., *supra*, at pp. 188–193, the attempts at voluntary proration in the Salt Creek, Panhandle and Seminole fields are discussed. The Yates and Kettleman Hills fields are examples of successful voluntary proration. See Oil and Gas Journal, Oct. 23, 1930 (Hardison, Yates Outstanding Proration Example), p. 64.

assigned.[55] Practical difficulties have rendered such voluntary proration impossible in most fields. By reason of the geologic and legal factors governing the production of oil, refusal to comply by any one operator within the field would compel all operators to abandon any voluntary plans unless they were willing to permit the oil to be drained from under their premises. See Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 17. Other fields, in the same or other states, which refused to prorate, merely absorbed a larger share of the national market upon which all fields were dependent (*Id.,* p. 161). Fear of the antitrust acts, both State and Federal, deterred the industry from making more aggressive attempts to secure stability by agreements within pools and between pools wherever located (*Id.,* p. 17).

Failure of attempts at State regulation.—The efforts of the States were equally futile. Oklahoma acting under an old conservation statute passed in 1915 (Oklahoma Sess. Laws 1915, c. 25) was the first State to supplement the efforts of the industry by force of law and by 1930 the Oklahoma Corporation Commission was prorating the production of the entire State. See Transcript of Record, p. 279–280, *Champlin Refining Co.* v. *Corporation Commis-*

[55] In the Seminole Field it was found necessary to use the statutory powers of the Corporation Commission. (Federal Trade Commission, Report on the Petroleum Industry, etc., *supra,* at pp. 189–193.)

sion, No. 485, *supra;* Marshall and Meyers, Legal Planning of Petroleum Production: Two Years of Proration, 42 Yale Law Journal, 702. Within a short time the Texas Railroad Commission, the official conservation agency of that State, was issuing proration orders on the basis of old waste statutes for many fields (Petroleum Development and Technology, 1931, American Institute of Mining and Metallurgical Engineers (Donoghue, Proration in Texas), p. 67). The Railroad Commission was soon embroiled in litigation. Its orders were twice invalidated by the courts on the ground that the conservation laws of Texas did not give the Commission authority to limit production to market demand. The conservation law of Texas was finally amended to give such authority to the Commission.[56]

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[56] The series of statutes, proration orders, and decisions in Texas are reviewed in *Amazon Petroleum Corporation* v. *Railroad Commission*, *supra*, p. 6, n. 8. The first of these decisions (*McMillan* v. *Texas Railroad Commission*, 51 F. (2d) 400) precipitated a crisis so acute as to call forth the use of military forces in East Texas and a special session of the Legislature in the summer of 1931, which, although it gave the Commission authority to issue proration orders, specifically withheld power to prorate to market demand. After a temporary interval, the Railroad Commission again took over proration but its orders were again held invalid by a federal three-judge court. (*People's Petroleum Producers* v. *Smith*, 1 F. Supp. 361; see Marshall and Meyers, Legal Planning of Petroleum Production: Two Years of Proration, 42 Yale Law Journal, pp. 715–720.) The court there held that the orders of the Commission, while ostensibly predicated upon mere physical waste, were actually in part based upon a market standard in the face of an ex-

In California a statute was passed seeking to control production by limiting the amount of gas which might be produced per barrel of oil, and the Court unanimously sustained this statute in *Bandini Co.* v. *Superior Court,* 284 U. S. 8. This gas-oil ratio law proved insufficient as a means of preventing excess production and a statute similar to that in Oklahoma was passed by the California Legislature but was defeated by a referendum.[57] (See Hearings, S. 1712, H. R. 5755, Senate Committee on Finance, 73d Cong., 1st Sess., p. 48, Appendix B, p. 169.)

In *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, this Court sustained proration of production to market demand by a State as against the claim by producers of deprivation of their property in violation of the due process clause of the Fourteenth Amendment, but this decision did not, as many hoped, spell success for proration by the States. The oil-producing States acting individually and driven by self-interest, proved un-

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press statutory prohibition against limiting the production of oil to the market demand. Before the decree could be entered in this case, the Texas Legislature amended the conservation law to authorize proration predicated upon reasonable market demand. (Tex. Stat., Vern. Supp. 1934, Articles 6014, 6014a, 6029, 6049a, c, d.)

[57] See 2 Cal. Gen. Laws (Deering 1931) Sec. 5636, rejected on referendum May 3, 1931. In California the industry attempted state-wide voluntary curtailment under a so-called "Central Proration Committee," upon which all fields in the State were represented.

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able to prorate among themselves a national market (*infra,* p. 104). Many of the States had no proration law at all,[58] and even in States which had such laws it proved impossible to obtain compliance when enforcement in other States collapsed and demoralized the market structure (R. 82, 84). Just as within a field, curtailment for some and not for others resulted inevitably in the loss of the fair share of the market for those who did curtail, so as between the oil-producing states curtailment by some and no curtailment or ineffective curtailment by others, resulted inevitably in a loss of the fair share of the national market for those states that did curtail. (See Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 13.[59]) And when to an amount of oil

[58] Only Texas, Oklahoma, and Kansas had proration laws. See Ely, Oil and Gas Conservation Statutes (Federal Oil Conservation Board).

[59] "If it be assumed that production from all the wells in a single pool has been curtailed to equal the demand from that pool, and that all the pools of the State have been likewise regulated, nevertheless these pools are generally tributary to a market supplied also by other pools in nearby States; and all the pools in the curtailing State are at the mercy of any major pool in another. This is true because flush production is cheap and interstate pipe lines are readily interconnected. An uncurtailed flush pool can as readily displace any competing settled pool in the next State as it can its neighbor in the same county, if the old pool does not drop its prices to a level of flush-production costs, and hence to a level below the average costs of the field's life.

"In other words, waste depresses prices; but lower prices, insulated by the capture doctrine, only partially restrain production, for production is controlled by the pace of off-

produced without reference to the demands of the national market there was added still more oil produced illegally, and sold, because of its taint of illegality, at only a fraction of the price of legally produced oil, the competitive forces which were generated between and among the states was more than proration could stand.[60]

If the market for oil were a local market, or if the industry were not so physically and economically interrelated on a national scale as to make transfers from different sources of supply such an inevitable occurrence, proration might be able to operate successfully as a local matter. But no more striking proof of the interrelationship of the entire industry can be found than in the statistical records of the past few years which show how markets for both crude and products were almost everywhere governed by the volume of production coming out of East Texas. (*Supra,* pp. 78–85.)

Failure of efforts to coordinate State action.—Although both the industry and the states soon recognized that cooperation between all of the states was necessary if control of the competitive condi-

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set drilling set by the greediest producer; and the destructive process cannot be stopped by any individual operator. The State can relieve this pressure internally, but not that from outside its borders." (Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 13.)

See recommendation to the Federal Oil Conservation Board of the Oil States' Advisory Committee, Ely, *supra*, at p. 20, Appendix B, pp. 161–164.

[60] The disregard for Texas and Oklahoma proration laws has been described, *supra*, p. 87.

tions attending the production of oil was to be achieved, it became readily apparent that efforts to obtain such cooperation would prove futile. On April 2, 1929, the American Petroleum Institute [61] submitted to the Federal Oil Conservation Board a world-wide plan for limitation of production to demand and sought the approval of the Board in order to obtain immunity from the federal anti-trust laws.[62] See Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 17. On the advice of the Attorney General, the Board held that it had no authority to grant such immunity (*ibid*), but suggested that the industry attempt to secure the cooperation of the states in an interstate compact to be approved by Congress [63] (*id.*, p. 18). The suggestions of the Oil

[61] In 1926 this association had opposed a plan for Federal control suggested in that year to the Federal Oil Conservation Board. See Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 15; Hearings, Federal Oil Conservation Board, May 27, 1926, pp. 2–23.

[62] "It was proposed, by voluntary agreement of the units within the American industry, in cooperation with foreign companies, to restrict the production of the world to the 1928 level, and to allocate that figure among producing nations in the ratio established by their 1928 production; and to carry the purpose further by allocating the American quota among domestic producing regions on the same basis." (Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 17.)

[63] A meeting of governors' representatives was held at Colorado Springs in June 1929, at which Secretary of the Interior Wilbur, Chairman of the Federal Oil Conservation

Conservation Board were disregarded until the spring of 1931, when production from the East Texas field had demoralized the national market. In April of that year the governors of the states in the Mid-Continent area appointed the "Oil States' Advisory Committee" in an effort to carry out a common program (*Id.*, pp. 19–20). The Committee recommended allocations to the various states based upon recommendations of committees of economists and engineers appointed by the Federal Oil Conservation Board and by the American Petroleum Institute [64] (*Id.*, pp. 21, 165).

Board, presented a program calling for enactment of uniform conservation legislation for the major oil producing states and the coordination of the efforts of the states by means of a joint commission to be created by an interstate compact ratified by Congress. (Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), pp. 18–19.)

[64] These Committees had for some time been engaged in an effort to develop a statistical technique for forecasting the national market demand for crude petroleum (Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), pp. 164–165, 261). After careful study, such a technique had been devised and, with certain modifications and improvements which have been made from time to time, it has proved to be sufficiently precise to forecast the consumptive requirements of the market within a small margin of error (*supra*, p. 72; Federal Oil Conservation Board, Surveys of National Petroleum Requirements). The work carried on under the auspices of the Federal Oil Conservation Board has been continued by the Petroleum Economics Division of the United States Bureau of Mines. See Appendix B, pp. 185–186. The facts as developed by this Bureau form the basis upon which the national consumptive demand and the allocation of each state's proportionate

The Oil States' Advisory Committee found it impossible to secure the voluntary cooperation of the states. See Oil and Gas Journal, July 16, 1931 (Score Sheet on Oil Production), p. 28.[65] The suggestion which had been repeatedly made for the coordination of the activities of the states through the medium of an interstate compact was never acted upon by the state legislatures (Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), pp. 18, 19, 20, 22–24), even though a bill to authorize such a compact was introduced in Congress[66] (*Id.*, p. 23). Some of the

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part of that demand have been made under those sections of the Petroleum Code here in question. See Appendix B, pp. 186–199.

[65] This article reads (p. 28):

> " Below is shown the allotted average daily production in the United States from April 1 to October 1, 1931, suggested by the Oil States Advisory Committee and the actual daily average production in the week ending July 11:
>
> *Score sheet on oil production for the week ending July 11, 1931*
>
> | | Allotted | Actual | Over | Under |
> |---|---|---|---|---|
> | Texas | 714,000 | 987,047 | 273,040 | -------- |
> | California | 500,000 | 519,650 | 19,650 | -------- |
> | New Mexico | 40,000 | 42,113 | 2,113 | -------- |
> | Oklahoma | 550,000 | 631,915 | 81,915 | -------- |
> | Louisiana | 65,000 | 56,115 | -------- | 8,885 |
> | Kansas | 110,000 | 101,250 | -------- | 8,750 |
> | Arkansas | 50,000 | 43,475 | -------- | 6,525 |
> | Eastern | 110,000 | 107,000 | -------- | 3,000 |
> | Rocky Mountain fields | 60,000 | 50,415 | -------- | 9,585 |
> | Total | 2,199,000 | 2,538,980 | 376,725 | 36,745 |
>
> Total net daily average overproduction, 339,980 bbls."

[66] In advocating such a compact, Ely admitted that the states would not adhere if it had any sanction other than

states, driven by the pressure of local interests, had no desire to regard any suggested quota as their reasonable market demand. (See National Petroleum News, March 30, 1932 (Another "Compact" on Oil Talked, But Texas Merely Listens), p. 25.) Following the crash of crude oil prices in the summer of 1931, the Governors of Oklahoma, Texas, and Kansas, and the regulatory commissions of those states entered into an informal agreement in an effort to limit the production of their respective states to certain fixed amounts. (Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 21.) Although this agreement, aided by the use of troops in Texas and Oklahoma, succeeded for a time during the latter part of 1931 and 1932 in stabilizing the price structure of petroleum, by the end of that year the production of oil had again gotten completely out of hand, culminating in the second collapse of prices in the spring of 1933.[67]

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comity. See Ely, Oil Conservation through Interstate Agreement (Federal Oil Conservation Board), p. 215.

[67] One of the factors contributing to the inability of the states to enforce compliance was their lack of power to prevent the movement of oil produced in excess of quota when consigned to an interstate destination. Whether oil has been produced in excess of allowable cannot, of course, be determined until after the oil is produced, at which time the oil may already be in the course of movement to consignees. Numerous injunctions were obtained against state regulatory officials by producers and refiners on the ground that the consignments in question of crude or its products were to destinations in another state. The railroads felt themselves

Demand for Federal action.—Faced with this long history of unsuccessful attempts to protect the national market for oil, the industry and the producing States were compelled to conclude that if stabilization of the interstate market was to be achieved, the Federal Government must coordinate the activities of the oil producing States and the industry by providing sanctions to enforce a scientific determination of reasonable market demand between and among the States.[68] From all the pro-

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bound to accept for interstate shipment all oil regardless of the legality of its production, and obtained an injunction against interference by the state authorities (Oil and Gas Journal, February 23, 1933 (Bredberg, Many Injunctions Granted in East Texas District; New Locations and Completions Decline), p. 57). It was a simple matter for oil producers and refiners, in order to evade the authority of the state regulatory bodies, to make initial consignments to consignees in another state and to divert such consignments while in transit to local consignees.

[68] "We have tried every alternative. When the industry in 1930 attempted after long conferences to make effective an agreement for a limitation upon production, the Attorney General of the United States at that time declared such an agreement unlawful. The Governors of the Oil States proposed compacts or other interstate agreements, but none of these has been completed. Statutes were drafted, amended and re-amended in the hope of finding some way to prevent the petroleum industry from being demoralized. Armies of men held oil fields under martial law in order to make effective an attempted control of production. Operators both as individuals and as companies voluntarily sacrificed large portions of their production in order that the industry might balance supply with demand. The courts have been flooded with cases involving these efforts. The legislatures of oil States have been forced to devote a disproportionate amount

ducing areas had come a demand for Federal control. (Hearings, S. 1712, H. R. 5755, Senate Committee on Finance, 73rd Cong., 1st Sess., pp. 140–160, 173–182, 214–222, 241, 261, 269–273; Hearings, H. R. 5720, S. 1736, House Committee on Ways and Means, 73d Cong., 1st Sess., pp. 73–81, 96–120; Appendix B, pp. 139–161.) The governors of all the principal oil-producing States had urged the President and Congress to act, proclaiming the futility of further efforts at State control. (Hearings, S. 1712, H. R. 5755, Senate Committee on

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of their time to the attempted solution of this production problem. Each effort has failed, since neither individual effort nor the effort of any single State or any group of States, could meet an issue which was of an interstate character and required both the approval and the cooperation of the Federal government to make it succeed. Through the National Industrial Recovery Act and this code, authorized under the Act, we believe we can achieve this control of production. * * *

"This code being an overall picture over the United States will bring about coordination, so that one State or one area will not be able by reducing prices below the cost of production to seize the demand from other States from other areas. On this point, Mr. Administrator, depends the success of this code, or the success of any movement which will restore the oil industry. This is the meat in the cocoanut." (Statement of Wirt Franklin, President of the Independent Petroleum Association of America, Hearings before the National Recovery Administration on the Petroleum Code, pp. 3021–3024).

The vain efforts in the spring of 1933 to rescue the industry through means other than the binding sanctions of federal law are described in the Hearings, H. R. 5720, S. 1736, House Committee on Ways and Means, 73d Cong., 1st Sess., pp. 97–98, Appendix B, pp. 152–155.

Finance, 73d Cong., 1st Sess., pp. 43, 46–50, Appendix B, pp. 165–175.)

D. Under the decisions of this Court the production-control provisions of the Petroleum Code are a valid exercise of the commerce power of Congress

The general proposition that Congress under the commerce power may regulate intrastate activity which burdens or obstructs interstate commerce is fully established (*supra,* p. 45). In every such case the only constitutional question is whether the effect of the local activity upon interstate commerce is sufficiently direct and substantial to justify regulation.

Respondents have already attempted to demonstrate the direct, immediate, and substantial relationship between the production of crude oil and interstate commerce. Commerce in oil and oil products is primarily interstate (*supra,* pp. 48–61). Because of the standardized nature of these products, the relative inelasticity of demand, the fluidity of movement from sources of production to points of distribution and consumption, and the integrated and widespread business of many concerns in this industry, variations in volume of production have immediate and sharp repercussions upon interstate commerce in crude oil and gasoline, and particularly upon prices in interstate transactions (*supra,* pp. 68–85). Not only is the prosperity and very existence of a large part of this vast interstate trade threatened by the price fluctuations which flow from changes in volume of production, but uncon-

trolled production in "flush", low-cost producing areas causes a diversion in the interstate movement of oil from areas of higher-cost "stripper" wells (*supra,* pp. 92–95). It also leads to the abandonment of these wells and the elimination of interstate commerce in their products (*supra,* p. 92–95). Finally, the States alone, due to their conflicting interests, cannot or will not exercise any effective, coordinated control (*supra,* pp. 97–105). It is submitted that the real and serious effect upon interstate commerce thus shown justifies Congress in protecting that commerce by controlling production in the manner set forth in the code for the petroleum industry.

A striking illustration of the exercise of Federal power to control local activity affecting the price of commodities in interstate commerce is *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. This case involved the Grain Futures Act, which regulated contracts for sales of grain for future delivery, most of which, this Court said (p. 36), "do not result in actual delivery, but are settled by offsetting them with other contracts of the same kind." The sales were between buyers and sellers in the city of Chicago; but it was contended that these sales of futures affected the price at which cash grain was sold throughout the country. Thus the question was not one of regulating the movement of a commodity in interstate commerce, or of directly regulating the price of a commodity moving in inter-

state commerce, but of regulating purely local activity which Congress had found (see pp. 4–5) affected the price of commodities moving in interstate commerce and caused price fluctuations which burdened and obstructed interstate commerce. In the words of the Court (p. 36), the questions presented were whether such speculative sales were subject to "abuses which are a burden and obstruction to interstate commerce in grain", and whether such burden and obstruction "can be said to be direct." In giving an affirmative answer to these questions the Court said (pp. 39, 40):

> Manipulations of grain futures for speculative profit * * * exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only * * * justifiable hedging but disturb the normal flow of actual consignments.
>
> * * * * *
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> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced,[69] it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in

[69] The reference is to *United States* v. *Patten*, 226 U. S. 525, sustaining the validity of an indictment under the Sherman Act charging a corner in contracts for the future delivery of cotton on the New York Cotton Exchange.

> that commerce are equally direct. The question of price dominates trade between the States. *Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.* (Italics ours.)

If Congress can regulate sales (not made in the course of interstate commerce) which affect the country-wide price and thereby the country-wide commerce in grain, it would seem to follow that Congress can regulate the production of oil, which affects the country-wide price of that commodity and, more directly than in the case of dealings in grain futures, interstate commerce therein.

The charges made by commission men, dealers, and traders for their services in buying, selling, and handling cattle, sheep, and hogs on a stockyards, which Congress can regulate (*Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420) can hardly be said to burden or affect interstate commerce as vitally as the volume of oil production affects prices of oil products in interstate sales and the character and direction of the movement of these products in interstate commerce.

Certain cases arising under the Interstate Commerce Act also show that the commerce power warrants Federal regulation of local acts although these acts affect interstate commerce only remotely. *Colorado* v. *United States,* 271 U. S. 153, sustained an order of the Interstate Commerce Commission au-

thorizing an interstate railroad to abandon operation of an unprofitable branch line lying wholly within a State. The order was sustained upon the theory that losses incurred in operating the branch line might prejudice the carrier's ability to serve interstate commerce efficiently, but the Court did not find it necessary to set forth the extent of the local operating losses or their relation to the carrier's gross or net income. *Florida* v. *United States,* 292 U. S. 1, sustained an order of the Commission which set aside certain intrastate log rates upon the ground that they were unremunerative and therefore discriminated against interstate commerce, although over a two-year period the Commission's order increased the carrier's revenue by less than 3/10 of 1% of its total freight revenue during approximately the same period.[70]

In *United States* v. *Ferger,* 250 U. S. 199, where the defendant was indicted for forging interstate bills of lading, this Court rejected the defense that the statute could not be constitutionally applied to a forgery which did not represent or relate to any actual or contemplated interstate commerce, saying (p. 203) that the commerce power—

[70] The carrier's total freight revenue for the years 1929 and 1930 was $99,616,669. (*Georgia Public Service Comm.* v. *Atlantic Coast Line R. R. Co.*, 186 I. C. C. 157, 166.) During the period February 8, 1929, to January 31, 1931, the carrier's revenue from the rates prescribed by the Commission exceeded that which would have been collected under the lower rates which the Commission set aside by $290,283. (*Ibid*, p. 167.)

> must include the authority to deal with obstructions to interstate commerce * * * and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

It can hardly be questioned that the production of oil under the circumstances shown here has a more direct and substantial "relation to and influence upon interstate commerce" than the circulation of forged bills of lading.

Cases under the Sherman Act are of particular significance to questions at issue here. Restraints of trade and monopolistic combinations are held to be within that Act and within the commerce power of Congress if they substantially affect interstate commerce, although the means by which the restraint is carried out operate before interstate commerce has begun (*Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310; *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163, 169) or after it has ended (*Bedford Cut Stone Company* v. *Journeymen's Stone Cutters' Association,* 274 U. S. 37, 46–47; *United States* v. *Brims,* 272 U. S. 549; *Loewe* v. *Lawlor,* 208 U. S. 274, 301). In *Local 167* v. *United States,* 291 U. S. 293, involving a conspiracy in violation of the Sherman Act to restrain sales and movement of live poultry within the metropolitan area of New York City, the Court said (p. 297):

> It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce [citing cases]. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce.

The Sherman Act is based upon the assumption that interstate commerce is best protected from the evils of monopoly and price control by the maintenance of competition. One of the evils which Congress sought to prevent was the creation of combinations clothed with power to affect the consuming public injuriously through the exaction of monopoly prices. In few of the cases did the culmination of this evil appear to be imminent. The Federal power was exerted to prevent acts which tended to create monopolies, which in turn *might result in* exaction of monopoly prices. And it has been held that Congress had the power, in carrying out the policies embodied in that statute, to prohibit local acts (including interruption of or restraint upon production) which affected interstate commerce directly or substantially. In the Recovery Act, Congress adopted the view that, under the conditions then prevailing, interstate commerce

might require protection against the demoralization resulting from overproduction or nonremunerative prices. It should equally have the power, in carrying out this policy, to regulate local acts (including production) when they affect interstate commerce directly or substantially.

The Sherman Act and the Recovery Act are thus based upon different conceptions of sound economic policy or upon the view that differing industrial and economic conditions call for the application of different remedies. But both have the same objectives, protection and promotion of interstate commerce. And there can be no difference in constitutional power where the purpose is to protect interstate commerce against high prices and where the purpose is to protect it against low prices. It is the function of Congress to choose between economic theories and to determine the particular policy deemed necessary for the protection of interstate commerce. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337.

United Mine Workers v. *Coronado Coal Co.,* 259 U. S. 344, and *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, show that even comparatively minor dislocations of interstate commerce resulting from local acts may be sufficiently direct and substantial to warrant regulation under the commerce power. The plaintiffs in these cases brought suit for triple damages under the Sherman Act against officers of a labor union and against

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the union, charging that they had conspired to restrain the plaintiffs' interstate trade in coal and had effected such restraint by destroying valuable mining properties. In the first case this Court held that restraint of interstate commerce had not been established and the verdict for the plaintiffs was therefore reversed. After citing certain cases, the Court said (259 U. S. 344, 408):

> It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.

At the second trial, evidence was presented that one of defendants' purposes had been to destroy the power of the plaintiffs to send their nonunion output (about 5,000 tons a day) into interstate commerce to compete with the product of union mines. This Court thereupon reversed a directed verdict for the defendants, stating (268 U. S. 295, 310):

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control *the supply* entering and moving in interstate commerce, or *the price* of it in interstate

> markets, their action is a direct violation of the Anti-Trust Act.[71] (Italics ours.)

There is a close parallel between the second *Coronado* case and the case at bar. In the one, the justification for Federal control is the effect upon commerce of a stoppage of production; in the other, it is the effect upon commerce of overproduction. In the one, the exercise of Federal power was occasioned by conditions which concerned production of an insignificant portion of the country's coal resources, coupled with a possible slight effect upon price. In the other, Federal power has been exercised by reason of the fact that conditions governing oil production present a constant threat to the entire fabric of interstate commerce in that commodity.

In *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163, certain oil companies had pooled their patents for the processing of gasoline by "cracking", and had agreed upon uniform licenses for refineries. The Government alleged in a suit brought

[71] A Congressional mandate will serve the same purpose in positive regulation as the intent required to be shown in cases under the Sherman Act. See *Stafford* v. *Wallace,* 258 U. S. 495, where the Court said (p. 520):

> The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint.

under the Sherman Act (p. 165) that the defendants were restraining interstate commerce by controlling that part of the supply of gasoline which was produced by the cracking process. While this Court held that the agreement did not constitute an unreasonable restraint of trade, it pointed out that if the defendants' acts had tended to limit the supply of gasoline, they would have been within Federal power. The Court said (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix *the price* of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. *Swift & Co.* v. *United States,* 196 U. S. 375, 397; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392. (Italics ours.)

The analogy between the kind of situation dealt with under the Sherman Act and the present case may be demonstrated by a hypothetical illustration. If the producers in the East Texas field were to enter into an agreement which provided for assigning a quota to each producer and for limiting his output to such quota, in order that petroleum prices might be raised throughout the country, there would be little question that such an agreement would constitute a restraint of interstate commerce within the Sherman Act, provided the re-

straint was an unreasonable one.[72] If Congress has the power to forbid production control under a statute which treats high prices as detrimental to interstate commerce, it must have the power to curb excessive production under a statute which treats low prices as detrimental to interstate commerce.

It has previously been shown (*supra,* pp. 92–95) that overproduction of oil diverts the flow of commerce from the output of high cost "stripper" wells to the output of low cost "flush" wells. This diversion of commerce from one area to another is analogous in its effect upon interstate commerce to the diversion in time of shipment which results when local acts cause a commodity like grain either to be then consigned in interstate commerce or to be withheld from such commerce. See *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 38–40.

It has also been shown (*supra,* pp. 92–95) that the diversion of commerce caused by the low prices resulting from "flush" production force the abandonment and permanent loss of "stripper" wells.

[72] *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, involved the legality under the Sherman Act of an agreement of certain producers of bituminous coal to sell all of their coal through a common selling agency, which agency, if it could not sell the entire output of the companies represented, was to apportion available orders among them upon a stated basis. In substance, though not in form, this was an agreement to limit production since no producer would mine more coal than he had opportunity to sell. While this Court held that the agreement did not unreasonably restrain trade and therefore did not violate the Sherman Act, it assumed that an agreement of this character was within the commerce power of Congress.

These conditions are directly destructive of commerce. What this Court said in *Appalachian Coals, Inc.* v. *United States* (*supra,* p. 372) is directly applicable here:

> The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.

This Court has said that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift and Co.* v. *United States,* 196 U. S. 375, 398. With the extraordinary increase in the facilities for and the rapidity of communicaton and transportation, the interaction of forces governing production and forces determining the movement of goods in commerce has been greatly increased. By reason of these changes, matters such as the production of oil which formerly may have been beyond the commerce power may now be within it, because their effect upon interstate commerce has become more direct, immediate, and powerful. In *Stafford* v. *Wallace,* 258 U. S. 495, it was recognized that the practical course of interstate business had expanded with the growth of the country. The words of this Court (pp. 518–519) are directly applicable here:

> The application of the commerce clause of the Constitution in the *Swift Case* was the

> result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This Court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.
>
> The principles of the *Swift Case* have become a fixed rule of this court in the construction and application of the commerce clause.

Intrastate transactions can be regulated by the Federal Government where these transactions are so interwoven with interstate commerce that the latter cannot be effectively regulated without control of the former. *Minnesota Rate Cases,* 230 U. S. 352; *Houston E. & W. Texas Ry. Co.* v. *United States,* 234 U. S. 342. Crude oil which is sold within the State of production and crude oil shipped to another State or sold without the State of production are of precisely the same character and

are used for the same purpose.[73] The producer whose oil is sold within the State of production draws his oil from the same pool as one whose oil is sold without the State and, if the former producer increases his production, he compels the latter likewise to increase in order to avoid losing his share of the oil within the pool. The oil of the former producer contributes to the total supply and affects the interstate price regardless of where it is sold or consumed. It either competes directly with oil moving in interstate commerce or, if it fills a merely local demand, it forces other oil into the channels of interstate commerce. No effective regulation of interstate movement or price is therefore possible without control of the sources of supply, which inevitably condition every interstate aspect of the industry. And since it has been shown that the volume of production affects every aspect of the industry and that difficulties engendered at this central point spread out and adversely influence the entire field of interstate and intrastate commerce in oil and oil products, under these circumstances, it is submitted that the Federal Government is not required by the Constitution to

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[73] See *Standard Oil Co.* (*Indiana*) v. *United States*, 283 U. S. 163, 176–177, where the Court pointed out that ordinary or straight-run gasoline is indistinguishable from gasoline made by the cracking process and that the two are either mixed or sold interchangeably, so that the defendants could not effectively control the supply or fix the price of cracked gasoline unless they could control total gasoline production from all sources.

confine itself to the symptoms manifesting themselves in interstate commerce, but it may undertake the only kind of protection of commerce which is adequate, and deal with the difficulty at its source, through control of production.

This Court has held in cases under the Interstate Commerce Act that the Federal power may be extended over local activities which must be regulated in order to insure the economic well-being of the interstate railroads. In dealing with the rate-making power of the Interstate Commerce Commission this Court has repeatedly sustained the power of the Commission to regulate intrastate rates, not only for the purpose of removing discriminations against persons or localities, but also to insure an adequate *interstate* transportation system. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Co.,* 257 U. S. 563; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456; *United States* v. *Louisiana,* 290 U. S. 70; *Florida* v. *United States,* 292 U. S. 1.

The power to promote commerce is not limited to the fostering of agencies of transporation; ever since *Gibbons* v. *Ogden,* 9 Wheat. 1, it has been recognized that commerce is much broader than transportation. It follows that if the Federal Government can regulate intrastate rates in order to insure an adequate interstate transportation system, it should equally have the power to regulate intrastate activity in order to insure the economic well-being of interstate industries other than railroads.

It is true that the railroad cases involve an application of Federal power to persons who are themselves engaged in interstate commerce. It is submitted, however, that the principle therein embodied is applicable to all those elements in an interstate industry the regulation of which is essential to the well-being of the industry.[74]

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[74] Mr. Justice Johnson in his concurring opinion (9 Wheat. 1, 229–230) defined commerce as follows:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation.

That the commerce clause was intended by the framers of the Constitution to apply to those subjects requiring national legislation with which the States were separately incompetent to deal is indicated by the history of the clause in and at the time of the Constitutional Convention. See Stern, That Commerce Which Concerns More States Than One, 47 Harvard Law Review, p. 1335 (June 1934). In the *Minnesota Rate Cases*, 230 U. S. 352, 398, the Court said:

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole government," said Chief Justice Marshall [quoting from *Gibbons* v. *Ogden*, 9 Wheat. at 195] "seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

See also *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 195; *Second Employers' Liability Cases*, 223 U. S. 1, 46.

Finally, the emergency conditions existing at the time of the enactment of the Recovery Act, and still existing, may have the effect of rendering certain types of transactions which in normal times have only an indirect or incidental effect on interstate commerce, matters of great moment and powerful effect. In the national emergency, the situation had to be viewed as a whole. When overcapacity, overproduction, cut-throat competition, and various unfair trade practices existed side by side with unemployment and reduced purchasing power, and as a consequence the commerce of the country was crippled (*infra,* pp. 130–133), Congress might reasonably conclude that drastic action commensurate with the needs of the situation was required. In *Stafford* v. *Wallace,* 258 U. S. 495, 521, this court, speaking of ordinary times, said that it "will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent." The doctrine that while emergency does not create power, emergency may furnish the occasion for the exercise of power, has been applied to the interpretation of, not only the due process clause (*Block* v. *Hirsh,* 256 U. S. 135; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242), but the constitutional provision that no State shall pass a law impairing the obligation of contracts (*Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 426), and the commerce clause (*Wilson* v. *New,*

243 U. S. 332, 348).[75] An emergency, while not creating powers, may nevertheless bring to the attention of Congress and the courts conditions and relationships not previously recognized which call for the application of powers admittedly in existence.

The particular provisions with which the Court is concerned in the case at bar are but a small part of a wide-spread effort to rehabilitate commerce and industry inaugurated under the Recovery Act. In Section 1 of that Act Congress found that:

> 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.

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[75] In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426, after referring to the commerce case of *Wilson* v. *New*, 243 U. S. 332, the Court said:

> The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. * * * When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. * * * But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details.

Ex parte Milligan, 4 Wall. 2, relied upon by petitioners, involved a provision " of the Constitution [the habeas corpus clause] * * * so particularized as not to permit of construction.

It was 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. * * *

In this statement Congress manifested its appreciation of the fact that the general industrial depression had severely burdened interstate commerce and that interstate commerce could not be substantially benefited without an effort to strike at the causes of the depression.

The evident purpose of the Recovery Act and the declaration of Congress are sufficient to distinguish the case of *Hammer* v. *Dagenhart,* 247 U. S. 251, which denied the power of Congress to prohibit the interstate shipment of products of child labor. As that case was interpreted by this Court in *Brooks* v. *United States,* 267 U. S. 432, 438, the child labor law was held unconstitutional because in that legislation Congress was not really attempting to regulate interstate commerce, but was attempting "to regulate labor in the State of origin by an embargo on its external trade." Since this Court concluded that Congress was not there concerned with protection of interstate commerce, but that its purpose was to control the social policy of the various States with respect to mining and manufacture, the statute could not escape invalidity because it was cast in the form of a

regulation of interstate commerce. See *Hill* v. *Wallace,* 259 U. S. 44; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20. In Title I of the Recovery Act, on the contrary, Congress not only declared its purpose to be to free interstate commerce from the burdens which shackled it, but the provisions of the title and the circumstances under which it was enacted plainly evidence this purpose.

Hammer v. *Dagenhart* may also be distinguished upon the ground that no attempt was made to show that the employment of child labor had any substantial effect upon interstate commerce in the articles of manufacture. It was contended that factories in States which prohibited child labor were placed in an unequal competitive position with factories in other States because of interstate commerce in the goods manufactured, but there was no suggestion that the practice aimed at burdened, obstructed, or diminished the flow of interstate commerce.

II

THE PRODUCTION-CONTROL PROVISIONS OF THE PETROLEUM CODE ARE REASONABLE REGULATIONS DESIGNED TO ACHIEVE PROPER OBJECTIVES OF THE FEDERAL GOVERNMENT, OF VITAL CONCERN TO THE NATION; THEY DO NOT, THEREFORE, INVOLVE ANY INFRINGEMENT OF THE RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

In the recent case of *Nebbia* v. *New York,* 291 U. S. 502, this Court has defined the scope of the Fifth Amendment as a limitation upon the power

of the Federal Government in the following language (p. 524–525):

> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.
>
> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means

> selected shall have a real and substantial relation to the object sought to be attained.

"The object sought to be attained" by the provisions of the Petroleum Code here in question, though such provisions are to be dealt with largely on the basis of the special conditions obtaining in the oil industry, must, nevertheless, be considered in the light of all of the purposes of the Recovery Act under the authority of which the Petroleum Code was promulgated. That Act was expressly designed to remove obstructions to interstate and foreign commerce brought on by a long-continued depression of unparalleled severity. The existence of a national emergency and its effect upon interstate and foreign commerce and upon the welfare of the American people was expressly declared by Congress in the Act (Sections 1 and 2 (c), *supra,* pp. 7–9).

This Court has already had occasion to take notice of the crisis which confronted the nation in the spring of 1933. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344; *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398. Years of declining business activity [76] and mounting insol-

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[76] From an average of 119 for the year 1929 (1923 to 1925=100) industrial production had dropped to 63 in February 1933. (Department of Commerce, Bureau of Foreign and Domestic Commerce, World Economic Review, 1933, p. 84 (from Federal Reserve Board indices).) Construction activity had dropped from 117 in 1929 to 19 in February 1933, and to even lower levels in the succeeding months. (*Id.* p. 112 (from Federal Reserve Board indices).)

vencies and bank closures had culminated in March of that year, with the closing by Presidential proclamation of the banks throughout the country. Prices had fallen drastically.[77] Millions had been thrown out of employment, and the wages of many of those still employed had fallen below the subsistence level.[78] These persons and their families were dependent for their very existence upon public and private charity. In an effort to survive during this period of low business activity, businesses everywhere resorted to drastic wage cuts and other methods of reducing labor costs in the attempt to maintain or increase their output at a lowered cost of production, and engaged in almost every conceivable type of unfair competitive practice.

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[77] Commodity prices fell from 95.3 in 1929 (1926=100) to 59.8 in February, 1933. (World Economic Review, *supra*, at p. 92 (from Bureau of Labor Statistics).)

[78] The number of unemployed in March 1933 has been estimated by the American Federation of Labor at 13,689,-000, by the Cleveland Trust Company at 13,833,000, and by the Alexander Hamilton Institute at 17,169,000. (Proceedings of 53d Ann. Convention of Am. Fed. of Labor, p. 312; Business Conditions Weekly, Mar. 10, 1934; Clev. Trust Co. Business Bulletins, Jan. 15, 1934.) The estimates of the American Federation of Labor show an increase in unemployment from January 1930 to March 1933 of over 10,000,-000; the estimates of the Cleveland Trust Company show an increase in unemployment during this same period of over 10,800,000; the estimates of the Alexander Hamilton Institute show a rise in unemployment of over 13,000,000 from 1929 to March 1933.

The number of persons employed in factories fell from 101 in 1929 (1923 to 1925=100) to 59.4 in February 1933.

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Prices, wages, and employment were driven to lower and lower levels. The extent of the decline of purchasing power is indicated to some extent by the drop in the national income. The income received by individuals in the United States declined from 81 to 49 billion dollars, or 40%, from 1929 to 1932. (Sen. Doc. No. 124, 73d Cong. 2d Sess., National Income, 1929–1932, p. 10.[79]) In those industries in which it was possible to segregate wages from other payments (mining, manufacturing, construction, and transportation) the decline from 1929 to 1932 in wage payments was from 17 billion to $6,840,000,000, or 60%. (*Id.,* at p. 14.)

The full extent of the effect of all of these factors upon interstate commerce is roughly indicated by the decline in railway freight traffic. The aggregate of whole carloads of freight declined from 52,827,925 carloads in 1929 to 28,200,000 in 1932, a decline of 46%. (Information Bulletin No. 639 of Car Service Div. of Am. Ry. Ass'n.) Revenue

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(World Economic Review, *supra,* at p. 101 (from Federal Reserve Board indices).) The total pay rolls dropped even further than the total number of persons employed—from 107 in 1929 (1923 to 1925=100) to 40 in February 1933. (*Id.*, at p. 102 (from Federal Reserve Board indices).) The average weekly earnings of factory employees in 25 selected industries fell from $28.54 in 1929 to $16.13 in February 1933. (*Id.*, at p. 107 (from National Industrial Conference Board).)

[79] This report shows (p. 10) that the greatest previous decline since income data have been tabulated (1909) was in the post-war depression of 1921, when there was a contraction of only 14.4%.

freight originating on Class 1 roads declined from 1,339,091,000 tons in 1929 to 646,223,000 tons in 1932, a decline of 51%. (Department of Commerce, Bureau of Foreign and Domestic Commerce, Statistical Abstract of the United States, 1933, p. 357.[80])

In Title I of the Recovery Act Congress sought to remedy the conditions which had thus grievously affected interstate commerce. It declared its objectives in the following language (Section 1):

> 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 ade-

[80]Although available records do not distinguish between intrastate and interstate traffic, it is well known that railway traffic is predominantly interstate and only to a minor extent intrastate. While part of the decline in railway traffic is doubtless attributable to the increase in motor-truck traffic, the competition of motor transportation is mainly with the intrastate traffic of railroads. Intercity truck traffic is only about 20% interstate (Coordination of Motor Transportation, 182 I. C. C. 263, 377). Moreover, the competition of truck traffic affects primarily the *less-than-carload* traffic of the railroads and total carloading figures do not reflect to any considerable extent the increase in the competition of truck traffic. It may fairly be said, therefore, that the decline in total carloadings represents more or less accurately the effect of the depression itself upon railroad traffic.

> quate 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.

These objectives were to be achieved wherever possible by cooperation from industrial groups. Sections 3 (a) and (b) of the Act, therefore, provide that any trade or industrial association or group truly representative of the trade or industry concerned may submit a code of fair competition the provisions of which, when approved by the President, shall become the standards of fair competition for that trade or industry. Express provision is made to assure that such codes would not be employed to eliminate or oppress small enterprises or to permit monopolies or monopolistic practices. (Section 3 (a).) It was manifestly impossible for Congress to provide detailed legislation for each trade or industry. Moreover, any attempt at such legislation would have delayed other national measures which the public welfare demanded (*infra,* pp. 151–152). It was not unreasonable, arbitrary, or capricious for Congress to conclude that the protection of interstate and foreign commerce required

prompt and simultaneous action with respect to the hundreds of trades and industries whose activities had so injuriously affected the free flow of such commerce, and that the ends sought to be attained could be achieved by means of the formulation of codes at the instance of the industries or trades themselves.

In the case of the oil industry the need for prompt measures was particularly acute. The peculiar conditions governing the production of oil had caused the complete demoralization throughout the country of the price structure of this industry. The States had proved themselves incapable of regulating these conditions and their conservation laws were being flagrantly disregarded. Destructive competition prevailed throughout all branches of the industry. In this competitive struggle the ability of the large integrated companies, because of their large financial resources, to balance losses in one section of the country with profits obtained elsewhere threatened the extinction of the small producers, refiners or marketers. See Petroleum Development and Technology, 1931, American Institute of Mining and Metallurgical Engineers (Logan, Stabilization of Petroleum Industry) p. 617. Production from the "flush" fields had absorbed a large part of the national market of the "stripper" well areas, throwing many men out of employment, and was bidding fair at the time of the adoption of the Petroleum Code to monopolize

the entire national market of most of the wells in the "stripper" areas. (*Supra,* p. 93.) The consuming public had received small benefit from the severe decline in prices. During the period when crude oil dropped to a few cents a barrel the average retail price of gasoline had dropped only a few cents a gallon.[81]

Tremendous wastes of this important natural resource had resulted from the severe break in the price structure. The decline in prices below the lifting cost in the "stripper" well areas had caused the irretrievable loss of valuable reserves of oil and threatened still further losses. (*Supra,* p. 94.) Lower prices, themselves caused by excessive production from the flush fields, had compelled even greater production in these fields (*supra,* p. 170) resulting in the premature exhaustion of the reservoir energy so essential to the maximum recovery of oil and greatly diminishing the amount of oil recoverable from these fields. (Report on Pipe Lines, *supra,* at pp. ix–xii, Appendix B, pp. 22–27; Federal Oil Conservation Board, Report III

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[81] When the price of crude oil fell to extremely low levels between January and August 1931, the average retail price of gasoline to the consumer dropped only 2.35 cents; the drop in retail prices during the collapse of crude prices in 1933 was only 1.72 cents. See Oil and Gas Journal, January 25, 1934 (Smiley, All Records Smashed in 1933 When Motorist Paid Only 12.76 Cents for His Motor Fuel) p. 42. In this article is a table showing average service-station prices of gasoline, excluding taxes, for 50 representative cities by months for the years 1931, 1932, and 1933.

(1929), p. 21 *et seq.,* Appendix B, pp. 92–95; Petroleum Development and Technology, 1934, American Institute of Mining and Metallurgical Engineers (Umpleby, Efficient Utilization of Reservoir Energy) p. 168.) Such excessive forcing of the flush fields had led to the blowing and burning of billions of cubic feet of natural gas, rich in energy and gasoline content. See Report on Pipe Lines, *supra,* at p. x, Appendix B, pp. 22–23. Excessive production had resulted in the accumulation of large stocks of oil which faced losses through fire and evaporation (Petroleum Development and Technology, 1932, American Institute of Mining and Metallurgical Engineers (Umpleby, Changing Concepts in the Petroleum Industry) pp. 38, 41). Excessively low prices had stimulated inefficient refining processes (R. 82). With crude at extremely low prices refiners found it more profitable to extract by skimming only 20% to 30% of gasoline, than to employ the improved refinery technology which has made it possible to secure by cracking upwards of 50% of gasoline. (Federal Oil Conservation Board, Report V (1932), pp. 27–29; Pogue, Economics of Petroleum, pp. 77, 145.)[82] Since gasoline is the

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[82] "Where the crude is used in the raw state, practically the whole output is fuel oil. With topping or skimming refining in its various stages, from 50 to over 90 percent of the raw material is turned out as fuel oil. With transition to complete refining, the proportion of fuel oil becomes decreasingly less and partly of a superior quality (distillate gas oil); and when cracking refining is introduced, fuel oil (or

major product of petroleum, it is apparent that any reduction in the amount of gasoline recovered constituted as serious a waste as the abandonment of the oil in the ground or its waste by evaporation or burning on the surface. After a small yield of gasoline had been skimmed from the crude, the remainder must be sold as fuel oil or other products. This inferior use of petroleum products was largely responsible for the supplanting of coal as an industrial fuel and had seriously affected interstate commerce in coal. See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 351, 361.

These wastes, which followed in the wake of a demoralized price structure brought on by the competitive conditions inherent in the production of oil, were of particular concern to the nation because of the limited supply of this important natural resource. It cannot be said with certainty when the supply of petroleum in the United States will be exhausted, but all available estimates agree that the known fields will not supply the national consump-

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rather its preferred variety, gas oil) becomes in turn the raw material for further refining, and the yield of fuel oil is cut down in still further degree.

"Topping and skimming plants go along with flush conditions in oil-field development. They spring up quickly wherever the supply of crude petroleum is abundant and cheap; they require a relatively small outlay of capital and for a period are profitable, in many instances exceedingly so. With high cost crude, however, they become uneconomic, and either cease to operate or change to plants making a fuller extraction of values." (Pogue, Economics of Petroleum, p. 145.)

tive demands for more than 15 years, the largest estimate of known resources being 12 billion barrels against a national demand of 835,000,000 barrels in 1932. See Geological Survey, Review of Petroleum Industry in the United States,[83] April 1934 (Circular No. 11), p. 2; Bureau of Mines, Minerals Yearbook, 1932–1933, Statistical Appendix, p. 300. The discovery of new fields is necessarily problematical and "the day of exhaustion is merely postponed a few months or a few years by each new discovery". (Federal Oil Conservation Board, Report V (1932), p. 7.)[84] Although substitutes for

[83] This publication states that the estimates since 1922 of known resources are as follows (p. 3):

	Billion Bbls.
1922 United States Geological Survey and American Association of Petroleum Geologists (The oil supply of the United States: Dept. Interior Press Notice, 1922)	5.0
1925 American Petroleum Institute (American Petroleum Supply and Demand, p. 3, American Petroleum Institute, 1925)	5.3
1926 Federal Oil Conservation Board (Federal Oil Conservation Board, Report I, p. 8, 1926)	4.5
1932 Federal Oil Conservation Board (Federal Oil Conservation Board, Report V, p. 7, 1932)	10.0
1933 Valentin R. Garfias (Am. Inst. Min. Met. Eng. Trans., Vol. 103, p. 253, 1933)	12.0

[84] "In 1926 the extent of known domestic reserves was about 4½ billion barrels. Reserves made known by later discoveries have raised the current classification of known reserves to 10 billion barrels; future discoveries may raise it further; but the day of exhaustion is merely postponed a few months or a few years by each new discovery. Each year this country consumes or exports some 800,000,000 barrels more than it imports. In other words, as has been said by one authority, the equivalent of from 8 to 10 new pools, each containing 100,000,000 barrels of recoverable oil, must be discovered each year to maintain our present margin of domestic reserves. The wheels of 80 percent of all our

natural oil may be obtained through the manufacture of petroleum from coal, the distillation of oil from shale and the use of alcohol in place of gasoline, no process is known which can compare in cheapness with that of merely tapping reserves already created by nature.[85] See Geological Survey, Review of the Petroleum Industry in the United States, April 1934 (Circular No. 11), pp. 37–50; Federal Oil Conservation Board, Report II (1928),

horsepower, fixed and automotive, are turned by the consumption of a resource whose known reserves have never been many years ahead of exhaustion. Although we possess large quantities of substitutes in oil shale and coal, capable of distillation, new processes must be discovered before their refining costs become competitive with costs of producing motor fuel from crude oil." (Federal Oil Conservation Board, Report V (1932), p. 7).

[85] The problem of preventing waste is not simply to prepare for a day decades hence when all oil shall have been exhausted " but to minimize the readjustment to a stage of increasing cost which in some of the older lands has already arrived and in the United States is only a matter of time. The prospect is clear enough to make the prevention of needless waste a major social responsibility. As far as the mineral and power resources are concerned, the long time problem of conservation merges with the immediate social problem of overdevelopment and overproduction. Both are concerned with controlling the wastes of destructive competition. * * * The task of the present day conservationist is to see that any change in economic organization for the control of production which is undertaken to insure steadier profits and wages should also operate to prevent needless waste of the underlying resources." Report of the President's Research Committee on Social Trends, Recent Social Trends in the United States, 1933, Vol. I, pp. 89–90.

pp. 3–9; Report on Pipe Lines, *supra,* at p. viii, Appendix B, p. 19.

Wastes of oil, an exhaustible natural resource, threatened not only the premature extinction of interstate and foreign commerce in petroleum and its products, but also the continued functioning at low cost of those of the nation's transportation agencies which depend for their operation upon an adequate and economic supply of petroleum and its products. Wastes of oil are of particularly vital concern to the nation because of the importance of this natural resource for the national defense in times of war. It is common knowledge that the naval and air forces of the United States require petroleum products for fuel, as do many of the agencies of army transportation. Indeed, so important to the nation is the existence of an adequate supply of oil in time of war that the competitive conditions attending the production of oil might well have been regulated as a peace-time measure to provide for the national defense.

It thus appears that at the time of the passage of the Recovery Act the competitive conditions inherent in the production of oil had demoralized the price structure of the industry throughout the country and that the severe decline in price had in turn contributed to economic wastes of an important irreplaceable natural resource. To carry out with respect to this industry and the competitive conditions therein, the purposes of Congress

expressly declared in the Act, the Petroleum Code was adopted by the industry and approved by the President. The purposes of this Code as stated in its preamble were:

> To meet the emergency in the petroleum industry; to increase employment, establish fair and adequate wages, enlarge the purchasing power of persons related to this industry and improve standards of labor; to conserve the Nation's petroleum resources and to prevent physical and economic wastes which demoralize the national market to the detriment of consumers and producers and to restrain and avoid recurring abuses in the production, transportation and marketing of petroleum and its products which directly obstruct the free flow of interstate and foreign commerce by causing abnormal and disturbing temporary fluctuations in the supply of petroleum or its products that are not responsive to actual demand and prices and disrupt the normal flow of interstate commerce in petroleum and its products; and to prevent the growth of monopoly resulting from unfair competitive practices; and to protect the Nation from an unnecessarily wasteful depletion of this natural resource essential for the national defense and the safety and the continued functioning of the Nation's transportation facilities that are dependent for operation on an adequate and economic supply of petroleum and its products and to accomplish and effectuate the pol-

> icies set forth in the National Industrial Recovery Act. * * *

The production-control provisions of the Code, which are here under consideration, were an important, if not the major, means by which these objectives were to be achieved. The conditions in this industry which have previously been described had made it plain that effective control of the competitive forces governing the production of oil as a means of restoring stability to the interstate market structure of the industry, and of eliminating wastes and other abuses resulting from a demoralized market, was essential, if the principal abuses in the industry were to be eliminated or mitigated. It was through the production-control provisions of the Code that control of these competitive forces was sought.

The long series of unsuccessful attempts by the industry and the States to regulate these competitive forces afforded ample basis for the view that effective regulation could be accomplished only by means of national limitation of production to the amount necessary to meet the national consumptive demand for petroleum products. Prior experience of the Federal Oil Conservation Board (*supra,* p. 72) had proved it possible to compute the national demand accurately. The Petroleum Code seeks, moreover, to make use so far as possible of the experience of the States in prorating an estimated demand among the individual fields and wells within

a State. As has been pointed out, the quotas of production directly involved in this case have been fixed not by the Federal Government but by the Railroad Commission of Texas. (*Supra,* p. 15.)

This Court has sustained the power of the States to prorate production to market demand against the claim, analogous to that now made by the petitioners, that such restriction of their production involved a violation of the due process clause of the Fourteenth Amendment. *Champlin Refining Co.* v. *Corporation Commission, supra.*

Based upon the experience of a prior Federal agency in estimating the national demand, making use so far as possible of the power of the States, sustained by this Court, to prorate an estimated market demand among the producers within a State, and designed to achieve objectives which can be accomplished only through the exercise of Federal power, the production-control provisions of the Code are, it is submitted, fully shown to be reasonable regulations aimed at the attainment of purposes within the sphere of Federal power.

III

THE AUTHORIZATION BY CONGRESS OF THE PRESIDENT TO APPROVE CODES OF FAIR COMPETITION IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWERS

The doctrine of delegation of powers, based upon the fundamental tripartite division of our Government, prevents Congress from abandoning its constitutional power to the other two branches

of the Government. Accordingly, when the necessities of practical administration require Congress to avail itself of executive or administrative agencies, it must intelligently determine the policies which such agencies are to apply to particular factual situations. The precise degree of detail with which the policies are required to be described by Congress must, of course, vary with the character of the subject of regulation. To require the same minuteness of statement in a statute seeking to control in a short space of time a large number of widely different and ever-changing activities, as in a statute dealing with only one kind of transaction, would be to cripple the legislative branch of the Government in those situations in which legislative action is most needed. The doctrine of delegation of powers was intended to protect and not destroy the power of the legislative representatives of the people.

The emphasis upon practical considerations in determining whether a Congressional delegation of authority is constitutional is found in each of the leading decisions of this Court upon the subject. In no case has the determination by Congress as to the standard to guide the administrators of its laws been overthrown.

Beginning with *Wayman* v. *Southard,* 10 Wheat. 1, this Court, speaking through Chief Justice Marshall, adverted (pp. 34–35, 46–47) to the need for flexibility to conform the Federal practice to the judicial systems of the States in a statute delegat-

ing to the Federal judiciary power to alter the rules as to process as the courts "in their discretion deem expedient" (p. 39). The statute upheld in *Field* v. *Clark,* 143 U. S. 649, permitted the President to impose reciprocal duties on goods imported from countries which discriminated against American products, a function which could best be exercised by a governmental agency capable of swift action after forming a judgment based upon changing conditions. The law sustained in *Buttfield* v. *Stranahan,* 192 U. S. 470, authorized the Secretary of the Treasury to fix standards of purity, quality, and fitness for consumption with which imported tea must comply. The Court declared (p. 496):

> Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

In upholding the statute authorizing the Secretary of War to determine whether a bridge was an "unreasonable obstruction" to navigation, the Court in *Union Bridge Co.* v. *United States,* 204 U. S. 364, emphasized the fact that "investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to

free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time" (p. 386). A denial of the right of delegation "would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business" (p. 387).

Similarly, in *United States* v. *Grimaud,* 220 U. S. 506, the impracticability of having Congress provide general regulations for each of the many different forest reservations was held to justify authorizing the Secretary of Agriculture "to make such rules and regulations * * * as will insure the objects" of such reservations.

The Court said (p. 516):

> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features * * *.

Again, in upholding the section of the Interstate Commerce Act which authorizes the Interstate Commerce Commission to make rules in case of car shortage, the Court declared in *Avent* v. *United States,* 266 U. S. 127 (p. 130):

> * * * the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed.

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See also *Mutual Film Corp.* v. *Ohio Industrial Commission,* 236 U. S. 230, 245; *Mahler* v. *Eby,* 264 U. S. 32, 40; *United States* v. *Chemical Foundation,* 272 U. S. 1, 12.

The emphasis upon the practical need for the delegation is clear in *Hampton & Co.* v. *United States,* 276 U. S. 394. In upholding the Flexible Tariff Act, which authorized the President to adjust tariff rates so that they would correspond to the differences in costs of production here and abroad, the Court took into account the inability of Congress to make the necessary adjustments (p. 404), the need for readjustment because of ever-changing conditions (p. 405) and the uncertainty as to the time when the adjustments should be made (p. 407). By way of analogy, it referred to the fixing of just and reasonable rates by the Interstate Commerce Commission, stating that (p. 407):

> If Congress were to be required to fix every rate, it would be impossible to exercise the power at all.

In view of these considerations, it was held sufficient for Congress to establish a general rule declaring an "intelligible principle" (p. 406):

> In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

Let us examine briefly the situation confronting Congress in order to determine whether the broad delegation in the Recovery Act was justified by "common sense and the inherent necessities of the governmental co-ordination." The delegation will be found justified (1) by the magnitude of the subject regulated and the need for great flexibility in dealing with different conditions in the various industries, and (2) by the unprecedented economic chaos existing in the spring of 1933, requiring prompt legislative action in many fields.

(1) Congress desired to regulate industry in order to eliminate or mitigate certain evils threatening our whole industrial structure. But these evils took different forms in different industries, and no rigid rule of general application would have been feasible. For Congress to have legislated separately for each industry would have required prolonged study and investigation. Also, flexibility was essential since conditions in all industries are constantly changing. Much more than in the case of bridges and forest reservations (compare *Union Bridge Company* v. *United States,* and *United States* v. *Grimaud, supra*), the attempt at detailed legislation by Congress would have taken so much of its attention and time as to have stopped "the wheels of Government." The only alternative was to establish a flexible procedure applicable generally, which would permit both easy differentiation between industries and rapid amendment to keep up with changing conditions and to correct the mis-

takes which would inevitably be made in commencing a novel program.

The executive branch of the Government alone possessed the needed flexibility. But the executive branch itself would not have sufficient knowledge of conditions to carry the legislative policy into effect by means of such administrative devices as have heretofore been used in filling in the details of legislation. And it would have been impossible to enforce and make effective the program of Congress under the Act without the support and cooperation of the business interests affected. The code device in the Recovery Act was adopted to meet these difficulties. Each industry was to prepare its own code.[86] The President after a hearing to determine

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[86] Petitioners presumably contend that the Act contains an invalid delegation of legislative power because it provides for approval by the President of codes submitted by the industries. It is submitted that this contention is sufficiently answered by the opinion of the court below which stated (No. 260, R. 189–190):

> The groups could really do nothing but advise the President just as Congress itself often is 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.

The court below in referring to certain decisions of this Court stated (N. 260, R. 189):

> Congress by the Act of March 2, 1893, enacted that the American Railway Association, a mere trade body, should fix the height of draw-bars for railway cars which was to be established as standard by the Interstate Commerce Commission, but there was thereby no unconstitutional delegation of legislative power. *St. Louis & Iron Mountain R. R. Co.* v. *Taylor*, 210 U. S. 281. By R. S. Sec. 2324, Congress in providing

whether or not the code would carry out the policy of the Act, could approve or disapprove the code, or approve it subject to such conditions as he might deem "necessary to effectuate the policy" declared in the Act. Congress recognized that it could not itself accomplish the task of either formulating or passing upon the many provisions in numerous codes.

(2) Even in a period of normal legislative activity, a broad delegation would have been required. The reasonableness and necessity of the delegation are especially apparent in the light of the emergency situation confronting the first session of the 73d Congress in the spring of 1933 (*supra,* pp. 130–133). During the ten weeks following the banking crisis of March, 1933, Congress was engaged in preparing and passing measures to cope with the depression on many fronts. The banking laws were changed, and a deposit insurance plan established (Banking Act of 1933 (48 Stat. 162)). The sale of securities was regulated (Securities Act of 1933 (48 Stat. 74)). Credit was pumped into the financial and industrial structure through the Farm Credit Act (48 Stat. 257), changes in the Reconstruction Finance Corporation Act (48 Stat. 119,

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for mining on the public lands enacted that the miners in each district might make regulations not in conflict with law. These regulations come close to being a miners' code of fair competition in staking out claims, but there was no improper delegation of legislative powers to the miners. *Erhart* v. *Boaro*, 113 U. S. 527; *Butte City Water Co.* v. *Baker*, 196 U. S. 119.

141), and the Public Works program (Title II of the Recovery Act). A Federal Emergency Relief Administration (48 Stat. 55) and a national employment system (48 Stat. 113) were established to cooperate with State relief efforts. An attempt was made to help home owners burdened with heavy mortgages (48 Stat. 128). Development of the industrial resources of the Tennessee Valley was authorized (Tennessee Valley Authority Act (48 Stat. 58)). An Act was passed for the relief of the railroads (Emergency Railroad Transportation Act of 1933 (48 Stat. 211)). And finally efforts were made to rehabilitate the economic life of the nation through a direct attack on the evils believed to be afflicting agriculture and industry. In the Agricultural Adjustment Act (48 Stat. 31) and the National Industrial Recovery Act, general principles were laid down for the executive branch of the Government to apply to different commodities and industries.

It is apparent that this broad program would not have been adopted in time to have been of any value if Congress had had to legislate for each industry. Time was of the essence in any attempt to put the 14,000,000 unemployed to work. To have required Congress to legislate for each industry would have prevented any legislation at all. To have adopted a single rule applicable to all industries regardless of their diversities would have been unadvisable, inequitable, and impracticable.

Without such a delegation as is embodied in the Recovery Act no effective legislation would have been possible.

Section 3 (a) of the Recovery Act authorizes the President to approve codes of fair competition upon application of representative industrial associations if he finds that the codes are not designed to promote monopoly, will not oppress small business enterprises, and will tend to effectuate the policy of the Act. The policy of Congress set forth in Section 1 (*supra,* p. 8) is to remove obstructions to commerce through cooperative action of industry and labor, to increase purchasing power, relieve unemployment, improve standards of labor, eliminate unfair competitive practices, utilize the productive capacity of industry as far as possible, "to avoid undue restriction of production (except as may be temporarily required)" and to conserve natural resources. These factors are not separate and unrelated. All fit into the general pattern of the plan to improve business through eliminating practices believed responsible for existing conditions and through increasing the capacity to buy what business sells. The codes were to conform to this policy.

That Congress may employ such general terms as "fair competition" in defining legislative policy is clear from the decisions of this Court upholding statutes authorizing the Executive to act "in the public interest" (*New York Central Securities*

Corporation v. *United States,* 287 U. S. 12, 24; *Avent* v. *United States,* 266 U. S. 127); to fix "just and reasonable" rates or charges (Interstate Commerce Act, Sec. 1, par. 5 (49 U. S. C., Sec. 1, par. 5)); to grant certificates based upon public necessity and convenience (*Colorado* v. *United States,* 271 U. S. 153, 168; *Chesapeake & Ohio Ry.* v. *United States,* 283 U. S. 35, 42; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U. S. 266, 285); or to forbid "unfair methods of competition" (Federal Trade Commission Act, Sec. 5 (38 Stat. 719, 15 U. S. C., Sec. 45)).

Such general expressions are not, of course, employed *in vacuo.* This Court has indicated in the most recent cases involving the question of delegation that such terms as "public interest" take on definite substance from their context, the purposes of the statute in which they are found, and the nature of the subject regulated. *New York Central Securities Corporation* v. *United States,* 287 U. S. 12, 24, 25; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U. S. 266, 285. In the *Radio* case, the requirement that the Commission act "as public convenience, interest, or necessity requires" was deemed a sufficient criterion because it was (p. 285):

> to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between

> States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities.

Similarly, the words "fair competition" in the Recovery Act must be construed in the light of the policies set forth in Section 1 and given expression in other sections of the Act. In this context the words "fair competition" have just as definite although not the same meaning as the phrase "unfair methods of competition" in the Federal Trade Commission Act, in which Act there are no other provisions calculated to fix more precisely the meaning of the phrase.

If the powers granted the Executive by the Recovery Act seem extensive it must be borne in mind that the subject matter with which the Act deals is extensive and complex. It is precisely the magnitude of the problem which makes a broad delegation necessary. It is submitted that no constitutional provision, no decision of this Court, and no accepted political theory or social policy stands in the way of the validity of the present delegation.

IV

THE PRODUCTION-CONTROL PROVISIONS OF THE PETROLEUM CODE ARE AUTHORIZED BY THE RECOVERY ACT

The only provisions of the petroleum code before this Court are those which declare that production in excess of State quotas, fixed in conformity with

the code provisions,[87] shall be deemed an unfair trade practice and a violation of the code. It is submitted that the language of the Recovery Act, its contemporaneous and consistent administrative construction, and the subsequent implied approval of such construction by Congress, show that these code provisions are authorized by the Act.

Section 3 (a) of the Act authorizes the President to approve codes of "fair competition." Certainly prohibition of production which is in violation of State law tends to promote the fairness of competition. The words, "unfair methods of competition", in Section 5 of the Federal Trade Commission Act have been held by this Court to cover a practice which, although not within the reach of the criminal law, is "of the sort which the common law and criminal statutes have long deemed contrary to public policy." *Federal Trade Commission* v. *Keppel & Bro., Inc.,* 291 U. S. 304, 313. *A fortiori,* under the broader scope to be attributed to the words "codes of fair competition" in the Recovery Act, and where the practice prohibited is not merely contrary to public policy but is illegal, prohibition of the practice is within the provisions of

[87]As previously stated, the code in article III, sections 3 and 4, prohibits production in excess of State quotas where a Federal agency has estimated the production of crude oil required to balance consumer demand and has allocated such required production equitably among the States, and a State has subdivided the production so allocated to it into pool, lease, or well quotas.

the Recovery Act permitting promulgation of codes of "fair" competition.

If the matter were otherwise doubtful, the fact that the President, his administrative agents, and a representative part of the petroleum industry have concurred in determining that production of oil in excess of State quota is an "unfair" practice, is entitled to great weight. This Court has said that it would hesitate to reject the administrative determination of the Federal Trade Commission that a particular method of competition is unfair. *Federal Trade Commission* v. *Keppel & Bro., Inc., supra,* p. 314.

It is submitted that the provisions of the petroleum code here in question concern not only practices which are "unfair" but also "competition" as that word is used in Section 3 (a). The competition of industrial concerns is not confined to the field of marketing, distribution, and sales, but extends or may extend to every step in the industrial process, including the purchase or other acquisition of raw materials. Due to the peculiar geological and legal factors governing the production of oil (*supra,* pp. 61–66), there is the most intense competition between producers of oil; each producer is in competition with every other near-by producer to obtain for himself the largest possible share of the limited supply of this fugitive product. In this competition the "hot" oil producer has a great advantage over his law-abiding competitor (*supra,* pp. 88–90).

Not only is there, in fact, competition in production, at least in the oil industry, but the provisions of the Recovery Act show that codes of fair competition were intended to permit regulation of production. Section 7 (a) provides that every such code shall contain the condition that "employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President." Section 4 (b)[88] provides that whenever the President shall find that destructive wage cutting is being practiced in an industry, he may, as to such industry, require a license of every person carrying on any business in or affecting interstate or foreign commerce. These wage and hour provisions are stated in general terms and necessarily apply to all employees, whether engaged in production, distribution, or marketing. This shows that codes may embrace competitive practices within the field of production.

It should also be noted that Section 3 (a) permits the President to approve a code of fair competition only if he finds that it "will tend to effectuate the policy" of Title I of the Act. In Section 1 of Title I Congress declares it to be its policy, *inter alia,* "to conserve natural resources." Since codes are the medium through which the policies declared in Section 1 are to be carried into effect, and since unregulated or illegal production of oil

[88] This section by its terms expired one year after the date of the enactment of the Act, i. e., June 16, 1934.

unquestionably wastes and dissipates the nation's oil resources (*supra*, pp. 136–138), prohibition of "hot oil" production in a code regulating fair competition in the oil industry is clearly designed to carry out the purposes of Congress, as expressed in the Act.

Section 1 also declares it to be the policy of Congress "to avoid undue restriction of production (except as may be temporarily required)". This indicates that Congress viewed restriction of production as within the ambit of codes of fair competition, provided such restriction either was not "undue" or was "temporarily required".[89] The code provision here in question cannot be said to be unduly restrictive and the conditions brought about by the potential flush production in the East Texas field temporarily require some measure of production control.

The consistent administrative construction of the Act also leads to the conclusion that code provisions regulating production are authorized by the statute. The first code approved under the Act, that for the cotton textile industry, provides that employers in that industry shall not operate "productive ma-

[89] The President in his message to Congress of May 17, 1933, recommending the passage of the Recovery Act, said (H. Rept. No. 159, 73d Cong., 1st Sess., p. 1):

> My first request is that the Congress provide for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and *disastrous overproduction.* (Italics ours.)

chinery'' for more than two shifts of 40 hours each per week. Since then more than 50 codes have been approved which authorize some measure of control of production.[90] This Court has said that when the meaning of a statute is indefinite or doubtful, ''administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons'', and that such practice ''has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion.'' *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315.

Finally, it would appear that Congress has, in effect, ratified the restriction of production contained in the oil code. Sections 604 and 605 of the Revenue Act of 1934 (c. 277, 48 Stat. 766–767) levy an excise tax upon the sale of crude oil by the producer and upon the refining or processing of crude oil. Section 604 requires producers to keep such records and make such reports covering production and sale of crude oil as shall be prescribed by regulations promulgated by the Commissioner of Internal Revenue. The section makes these records

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[90] This number does not include codes which authorize limitation upon increases in plant capacity. The commonest form of control of production authorized by approved codes is a limitation upon hours of operation of machines or plants, but a few codes, like the petroleum code, authorize limitation of production upon a quota basis. Codes authorizing limitation of production are listed in Appendix B, pp. 182–184.

and reports open to inspection by any agency of the United States or of any State having regulatory power over the production of oil. While the primary purpose of Congress in enacting these sections was to provide revenue, a secondary purpose was to assist Federal and State officers in enforcing laws (including the code) regulating the production of oil.[91] When, therefore, it appears that these revenue provisions were intentionally framed so as to aid in enforcing the provisions of the oil code which restrict production, Congress may be regarded as having impliedly declared that it believed that these provisions were authorized by the Recovery Act. The situation is analogous to the reenactment of a statute with knowledge by Congress of its prior administrative interpretation. Such reenactment is held to indicate legislative approval of the statute as administered. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492–493; *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273.

V

SECTION 9 (C) OF THE RECOVERY ACT IS CONSTITUTIONAL

A. Section 9 (c) is within the commerce power of Congress

Section 9 (c) authorizes the President to prohibit the transportation in interstate and foreign

[91] H. Rep. No. 704, 73d Cong., 2nd Sess., pp. 41–42; Hearings, H. R. 7835, Senate Committee on Finance, 73d Cong., 2nd Sess. (Confidential), pp. 121–126; Cong. Rec., vol. 78, pt. 3, p. 3057.

commerce of petroleum and its products produced or withdrawn from storage in excess of the amount permitted by any State law or valid regulation or order thereunder. This section is within the commerce power of Congress. It regulates commerce itself—the movement of oil across State lines or to foreign countries. Since it prohibits only the transportation of oil produced or withdrawn from storage in violation of State law, it does not constitute an attempt to exert the commerce power so as to thwart or control the internal policy of the several States. The court below, in its opinion in the *Amazon* case, said (R. 185):

> Such cooperation between state and central government is not Constitutionally wrong, but right and desirable. The central government was not created to be an opponent and a rival of the state governments, but to be a supplement and a protection to them. Its enumerated powers, although supreme and sometimes exercised to the dissatisfaction of some state, are not misused when by a happy concord of duty these governments can cooperate. The grant to the central government of the power to regulate interstate and foreign commerce is without qualification and in general exclusive of the states, and that government may rightly take up the regulation of a matter at the point where the state government because of this grant must itself cease to regulate.

Prohibition of the use of interstate commerce as an instrumentality for the promotion of violation of State laws, or for the furtherance of injurious or harmful results, has been consistently upheld. When certain States, exercising their general police power, sought to control the transportation and sale of intoxicating liquors within their borders, Congress first made such liquors subject to State laws on arrival, and later made it illegal to transport them into such a State. *In re Rahrer,* 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311.[92] This Court has sustained laws prohibiting the interstate transportation of diseased cattle (*Thornton* v. *United States,* 271 U. S. 414); lottery tickets (*Champion* v. *Ames,* 188 U. S. 321); adulterated articles likely to deceive or injure purchasers (*Hipolite Egg Co.* v. *United States,* 220 U. S. 45); women for immoral ends, whether for commercial purposes or otherwise (*Hoke* v. *United States,* 227 U. S. 308; *Caminetti* v. *United States,* 242 U. S. 470); prize-fight films (*Weber* v. *Freed,* 239 U. S. 325); goods with misleading labels (*Seven Cases* v. *United States,* 239

[92] These cases clearly indicate, contrary to petitioner's contention in the *Panama* case, that the commerce clause does not require uniformity in its application throughout the country. See also *Cooley* v. *Board of Port Wardens,* 12 How. 299, 319. These cases also dispose of a similar contention that the regulations are invalid because not uniform in that they do not apply to producers and refiners throughout all producing areas in the country.

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U. S. 510); and stolen automobiles (*Brooks* v. *United States,* 267 U. S. 432). See also *Rupert* v. *United States,* 181 Fed. 87 (C. C. A. 8th), holding valid an Act of Congress prohibiting transportation *out of* the State of wild game killed in violation of State law.

Petitioners rely upon *Hammer* v. *Dagenhart,* 247 U. S. 251, *supra,* which held invalid an Act of Congress prohibiting interstate transportation of any products of a mine or factory in which, during the preceding 30 days, children of less than certain ages had been permitted to work. The decision appears to be based upon two grounds, (1) that the transportation which was barred was not necessary to the accomplishment of "harmful results" to people of other States and (2) that the necessary effect of the statute was to take from the States the power to control child labor in mines and factories.

It is submitted that Section 9 (c) is distinguishable upon both grounds. As to the latter, it has already been pointed out that Section 9 (c) does not operate to usurp State control over production; on the contrary, it strengthens and aids such control. As to the former, the prohibited transportation directly contributes to harmful results in the States of destination, because oil produced in excess of State quotas is offered for sale below the price of legal oil (No. 260, R. 85, 97, 102–103, 109–110, 120; oN. 135, R. 57–58; pp. 88–90, *supra*), and either

causes the "legal" producer or refiner to lower his price in interstate sales or diverts his interstate business to his "illegal" competitor.

Moreover, *Brooks* v. *United States,* 267 U. S. 432, indicates that interstate transportation may be prohibited under the commerce clause if the prohibited commerce contributes to harmful results in the State of origin. That case upheld the validity of the provisions of the National Motor Vehicle Theft Act making it a crime to transport in interstate commerce a motor vehicle, knowing that it had been stolen. The fact that interstate transportation facilitated escape from detection and punishment, and thereby promoted the local crime of larceny and the individual property losses incident thereto, appears to have been one of the grounds which this Court viewed as justifying the exertion of Federal power in the statute there under consideration. The Court said (pp. 438–439):

> The quick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.

The transportation prohibited by Section 9 (c) directly contributes to harmful results in the State of origin, by providing an interstate market for oil illegally produced or withdrawn from storage. The prohibitions of that section are therefore designed, similarly to the National Motor Vehicle Theft Act, to prevent a "gross misuse" of interstate commerce; to prohibit the use of the channels of commerce as a means of profiting by illegal activity and of extending its effect into other States; and to preserve property rights threatened by illegal or criminal action.

B. Section 9 (c) is not an unconstitutional delegation of legislative authority

The question of delegation arising under Section 9 (c) is much narrower than that previously discussed (*supra,* pp. 144–155) involved in the approval of codes under Section 3 (a). The kind of transportation which Section 9 (c) authorizes the President to prohibit is explicitly set forth and he is given no discretionary power as to the scope of the prohibition. His discretion is limited to determining when the prohibition shall take effect.

Delegations of this character have been uniformly held to be valid. In *Hampton & Co.* v. *United States,* 276 U. S. 394, *supra,* this Court, in sustaining such a delegation, said (p. 407):

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future condi-

> tions, and it may leave the determination of such time to the decision of an Executive * * *.

The law upheld in *Field* v. *Clark,* 143 U. S. 649, and the numerous statutes reviewed in the Court's opinion (pp. 682–692) were of this character. The Tariff Act there sustained authorized the President to remove certain goods from the free list "for such time as he shall deem just", in order to protect American goods against unreasonable or discriminatory duties by foreign countries. In *Interstate Commerce Commission* v. *Goodrich Transit Company,* 224 U. S. 194, the delegation sustained was considerably broader in scope. The Interstate Commerce Commission was authorized to determine both the time when the carriers should be required to maintain a uniform system of accounts and the form in which such accounts should be kept.

The general policies and purposes of the Recovery Act, of which Section 9 (c) is an integral part, govern the President's determination of the time or times during which the prohibition against transportation of hot oil shall be applied. Among those policies and purposes declared in Section 1 of the Act are the conservation of "natural resources", elimination of "unfair competitive practices" and the removal of "obstructions to the free flow of interstate and foreign commerce." The only matter committed to the President is the application of these policies and purposes to the particular

conditions pertinent to the question of Federal prohibition of interstate transportation of "hot" oil. While Congress might have considered an outright prohibition desirable, it was undoubtedly justified in concluding that the situation called for some degree of flexibility and that the Executive was in a better position than Congress to determine when the prohibition should go into effect or should terminate. For example, if a code for the oil industry adopted under Section 3 (a) should provide for and effectuate a balanced and workable control of overproduction of oil and its interstate transportation, or if there should be an unexpected decrease in the production of the more important flush fields, it might well be desirable to allow the particular type of prohibition authorized by Section 9 (c) to remain dormant or to be discontinued after having once been put into operation.

It is submitted that the policies set forth in Section 1 of the Act apply to Section 9 (c) and provide ample guidance for the administration of the narrowly limited powers there granted.

Petitioners in the *Panama* case contend that Section 9 (c) is an invalid delegation of legislative power in that criminal liability thereunder does not arise until the issuance of an order by the President. A similar contention is made with respect to Section 10 (a) of the Act which authorizes the promulgation of rules and regulations and makes violation thereof a crime. That Congress may

make it a crime to violate an administrative order or regulation is clear from the authorities. *Avent* v. *United States,* 266 U. S. 127; *United States* v. *Grimaud,* 220 U. S. 506; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *In re Kollock,* 165 U. S. 526; *Caha* v. *United States,* 152 U. S. 211.

Petitioners in the *Panama* case further contend that Section 9 (c) is invalid as a delegation to the states since it is operative only as to oil produced in violation of state law. The decisions of this Court establish that it does not constitute an invalid delegation of power to predicate a Federal offense upon a violation of state law. *In re Rahrer, supra; Clark Distilling Company* v. *Western Maryland Ry. Co., supra; Ex Parte Siebold,* 100 U. S. 371; *Cooley* v. *Board of Port Wardens,* 12 How. 299.

VI

THE REGULATIONS HERE IN QUESTION ARE IN ALL RESPECTS VALID AND CONSTITUTIONAL

A. The requirement of periodic reports from producers and refiners and the maintenance of books open to inspection is authorized by Section 10 (a) of the Recovery Act as necessary for the enforcement of Section 9 (c) of the Act

The regulations have been described in the statement, *supra,* pp. 16–18. They were issued pursuant to Section 10 (a)[93] of the Recovery Act, which

[93] Petitioners in the *Panama* case base their argument that the Regulations are not authorized by the Act on the mistaken assumption that the regulations were issued under Section 9 (c) alone. Their basis was, in fact, Section 10 (a), which expressly authorizes the promulgation of regulations.

authorizes the promulgation of such rules and regulations as may be necessary to carry out the purposes of Title I of the Act. They were designed to make effective the prohibition contained in Section 9 (c) of the transportation in interstate and foreign commerce of oil or its products produced in violation of state laws. The specific regulatioss involved in these cases require the filing of monthly reports by all producers (Reg. IV) and refiners (Reg. V)[94] and the maintenance by them of books and records open to inspection covering all transactions involvisg the production and transportation of petroleum and the products thereof (Reg. VII). All three regulations are at issue in the *Panama* case, and Regulations IV and VII in the *Amazon* case.

The principal issue raised with respect to the validity of these regulations is as to whether they are necessary to the enforcement of Section 9 (c). The Secretary of the Interior, in promulgating them, made the following finding as to their necessity:

> Because of the interrelation of interstate and intrastate commerce in petroleum and the products thereof and the direct effect upon interstate and foreign commerce of petroleum and the products thereof moving

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[94] As previously stated (*supra*, p. 16), Regulation V was suspended except in the East Texas and Oklahoma City areas, and Regulation IV was suspended excepting in states which require monthly producers' reports. Texas is one of the states requiring monthly producers' reports.

> in intrastate commerce, it is essential and hereby required for the proper enforcement of the provisions of Section 9 (c) of the National Industrial Recovery Act (Public, No. 67, 73d Congress) and the orders and regulations issued thereunder, that there shall be furnished the Division of Investigations of the Department of the Interior such information as respects production, purchases and shipments as is hereinafter required, regardless of whether such production, purchases, and shipments are in interstate and foreign commerce or in intrastate commerce (Reg. III, Appendix A, *infra*, p. 221).

Such a finding by the administrative official charged with the enforcement of the statute is entitled to great weight, and his construction of the statute as permitting such regulations "will not be overruled except for weighty reasons." *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. See also *Brewster* v. *Gage,* 280 U. S. 327, 336; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315; *Boske* v. *Comingore,* 177 U. S. 459, 470.

The necessity of the regulations here in question, as applied to these petitioners, will clearly appear from a consideration of the difficulties of enforcement confronting the Government in the East Texas field.

(1) *It is essential to enforcement of Section 9 (c) that a system of reports be imposed.*

The very size and complexity of the East Texas field defies any attempt on the part of the Government to detect and prevent interstate shipment of illegal petroleum and of illegal petroleum products through ordinary policing methods.

The developed area of the East Texas oil field is of enormous extent, comprising approximately 116,000 acres (Oil Weekly, Feb. 26, 1934, (Reistle, East Texas Production), p. 14) underlying a tract which is 35 miles long and from 3 to 7½ miles in breadth (Federal Oil Conservation Board, Report V (1932), p. 42). Present average well spacing is approximately one well to 9.5 acres (Reistle, *supra*), and there are approximately 15,000 wells in the field (Production and Storage Report for the East Texas Field, Railroad Commission of Texas, Sept. 1934, p. 4, Appendix B, p. 179). The field is divided into more than 3,000 separate lease tracts operated by approximately 1,900 different producers. (Production and Storage Report for the East Texas Field, Railroad Commission of Texas, Feb. 1934, p. 7.) Each well in the field has a separate daily allowable production computed on the basis of a uniform percentage of each well's hourly potential producing capacity as fixed by orders of the Railroad Commission of Texas.

The individual wells are connected directly to storage tanks upon the leases where they are located, several wells usually flowing into a single

tank or battery of tanks.[95] In the same lease tanks there is usually a certain quantity of storage oil in addition to the current production. For example, on the first day of October 1934 there was in storage on leases in the East Texas field 1,394,856 barrels of crude petroleum. (Production and Storage Report for the East Texas Field, Railroad Commission of Texas, Sept. 1934, p. 3, Appendix B, p. 178.)

From the individual leases the oil is customarily gathered through what are known as "gathering systems." (See Sen. Doc. No. 61, 70th Cong., 1st Sess. (Federal Trade Commission, Report on Petroleum Industry, Prices, Profits and Competition), pp. 99–100, Appendix B, p. 10.) In the East Texas field there are some 40 independently operated gathering systems (Production and Storage Report for the East Texas Oil Field, Texas Railroad Commission, Feb. 1934, p. 6) in addition to some gathering lines operated purely as plant facilities by the local refiners, and in addition to the gathering systems operated as adjuncts to the major pipe lines which transport petroleum from the field (*id.* p. 2). Immediately upon its entrance into a gathering system, the crude petroleum produced from any lease becomes intermingled with other petroleum gathered by the system from other

[95] See Lilley, The Oil Industry (1925), pp. 197–198; United States Bureau of Mines, Applied Methods and Equipment for Reducing Evaporation Losses of Petroleum and Gasoline (Bulletin 379, 1934) p. 44.

leases; and it is further intermingled with oil from other sources upon delivery into trunk pipe lines for transportation out of the field, or delivery to the storage tanks of local refineries, or of some loading rack operator adjacent to a railroad right-of-way for rail shipment, or upon delivery to some other gathering system. Thus, in the gathering systems there is a continuous concealed movement of oil from place to place and from gathering system to gathering system within the field, which thoroughly confuses the source from which the petroleum was produced and the destination to which it is to be shipped. Storage oil is necessarily intermingled with current production, allowable production with excess production, and oil from each well with oil from hundreds of other wells.

The petroleum leaves the field through three major outlets. Approximately 90% of the crude produced in the field is transported by the trunk pipe lines which carry it to Louisiana, to the Gulf Coast for refining or coastwise movement, and to the Mid-Continent Area (No. 260, R. 116–117). Approximately 10% is refined in the refineries located in the field, and leaves the field in the form of refined products (No. 260, R. 116–117). An almost negligible quantity of crude oil leaves the field through the medium of tank-car shipments over the railroads. See Production and Storage Report for the East Texas Field, Railroad Commission of Texas, for September 1934, Appendix B, p. 181.

An attempt to obtain the information necessary to prevent the interstate movement of illegal petroleum and its products through the medium of inspectors and investigators would be fore-doomed to failure. A body of law-enforcing officers watching the movement of oil and products from Texas through investigation of the three outlets described above could accomplish nothing in view of the fact that petroleum from various sources is commingled and bears no marks showing the source from which it comes or the legality or illegality of its production (No. 135, R. 58, 66–67; No. 260, R. 113). If this force of law officers were expanded so that all gathering systems leading to these three outlets could be constantly watched and their deliveries checked, information might be obtained as to the leases of origin, but no information would be available as to the day or days on which the oil was produced or the particular well or wells from which it came, which information is essential to the determination of the legality or illegality of the production. Therefore, this force of investigators would have to be expanded further in order to place men upon each lease to watch the daily production from the individual wells and to make constant gauges of the lease storage.

Such a system of enforcement would necessitate a force of approximately 25,000 men (No. 135, R. 66; No. 260, R. 119), but even such a body of men would, as a practical matter, find it almost impossi-

ble to check accurately the legality or illegality of the production throughout the field and to trace the oil produced through its ramifications of transportation and refining until it reached the stage of interstate shipment (No. 135, R. 58, 67; No. 260, R. 120). Not only does the complicated nature of the legitimate movement of oil prevent this being done accurately, but also additional difficulties are being constantly interposed by operators of wells, pipe lines, and refineries who seek to conceal their operations. A common practice adopted by producers who are engaged in withdrawing more than their legal allowable is to install secret pipe connections which conduct the oil from the lease in a manner to defeat detection. Devices of this type are known as "by-passes" and have found extensive use in the East Texas field (No. 135, R. 98–101, 125, 126, 128). Lease tanks are frequently allowed to flow into gathering systems at the same time that wells are flowing into the lease tanks, thus defeating any attempt to gauge the petroleum being produced (No. 135, R. 61, 126–127; No. 260, R. 121, 124). Other devices such as reverse valves, which appear to be locked closed when in reality they are open; running crude oil into pits usually used for waste oil whence it is recovered as crude oil (Oil and Gas Journal, Feb. 1, 1934 (Bredberg, Doom of East Texas Hot Oil Producers Sounded by Latest Federal Activity), p. 32) and concealing in inaccessible locations the valves on the main line running

from the wells (National Petroleum News, Mar. 21, 1934 (Smith, The Panorama of Petroleum in the Mid-Continent), p. 31, 32) are utilized. It cannot be expected that inspections of the physical properties can uncover all of these practices.

It is apparent, therefore, that it is impossible to identify and prevent the shipment of illegal petroleum and the products obtained therefrom through a policing system, however thorough. The information necessary to identify and prevent such shipment can, as a practical matter, only be obtained from those actually engaged in producing, shipping, refining or transporting petroleum and its products, and the only known reasonable and effective method of obtaining such information from them is by a system of periodic reports. No evidence was submitted by the complainants in either of these cases that such a reporting system was not reasonable and necessary for the enforcement of Section 9 (c). On the other hand, a large number of experienced oil producers and refiners testified that such a reporting system was both reasonable and necessary (No. 135, R. 58, 61, 62, 63, 65, 66, 67; No. 260, R. 86–88, 103, 119, 120, 122, 123, 124).

(2) *Periodic reports from all producers are necessary for the enforcement of Section 9 (c).*

In order to detect interstate movements of illegally produced petroleum and its products it is necessary first to identify the petroleum as legal or

illegal and then to trace its movement into interstate commerce. The only persons who can report as of their own knowledge as to the legality of their production are the producers themselves, since certain of the facts essential in determining legality of production are known to them alone. Gathering systems, pipe lines and refineries may know the total amounts of oil which they receive from particular leases, but no one except the producers who turn the valves on the lines connecting their wells with the lease tanks on their leases can possibly have knowledge of the day by day production and of the particular wells which actually supply the contents of the lease tanks from which deliveries are made. These facts must be known, since the proration orders of the Railroad Commission of Texas prescribe *daily* allowables and impose the restrictions upon *individual wells.* Moreover, only the producers are able to report whether or not oil from the same lease is being delivered at the same time through more than one connection (No. 135, R. 103). It is apparent, therefore, that an adequate system of reports must include reports from the producers themselves.

Any contention that reports are necessary only from those producers whose oil or its products moves eventually into interstate commerce is manifestly untenable. Producers cannot ordinarily know either the immediate or ultimate destination of the oil which they themselves produce. There is

an intricate, interconnected network of gathering systems and pipe lines in the field into which the oil flows and from which it may be delivered to a large number of different points within and without the field. (No. 135, R. 58, 61, 66–67, 98–101; No. 260, R. 120, 124.) Moreover, the producers ordinarily have no control over the movement of oil after it has been removed from their lease tanks, since in the usual course of business they sell and surrender possession of their oil immediately upon delivery from these tanks. (No. 260, R. 72, 74; See Federal Trade Commission, Report on Petroleum Industry, etc., *supra,* pp. 99–101, Appendix B, p. 10.)

As a matter of fact, 85% of the oil produced in the field moves ultimately into interstate commerce in the form of crude or its products (No. 260, R. 117). Furthermore, every well in the field contributes to this stream of interstate commerce to some degree, because of the fact that all oil gathered by the gathering systems and moving to refineries or trunk pipe lines is, during the process of gathering, refining and transportation, inextricably intermixed (No. 260, R. 79–80, 84; No. 135, R. 103). Approximately 90% of the crude from the field leaves the field in the trunk pipe lines in which it is either being transported into interstate commerce or is commingled with other oil which is being so transported (No. 260, R. 114, 117). Practically all of the balance of crude produced in the field moves to local refineries which transport approximately

60% of the products manufactured by them into interstate commerce (No. 260, R. 117, 110).

(3) *Periodic reports from all refiners are also necessary for the enforcement of Section 9 (c).*

Although a system of periodic reports from all producers supplemented by inspections and investigations will disclose the essential facts concerning production, it is not a sufficient source of information to enable the Government to enforce the prohibition against the interstate shipment of illegal petroleum and the products thereof. As was pointed out above, the producers are not in a position to report the destination to which their oil will move, since its movement is not ordinarily under their control from the moment that it is transferred from the lease tanks to the gathering lines. It is therefore necessary that the producers' reports be supplemented by information concerning the course of transit of oil from the time it leaves the wells until it reaches an interstate carrier.

In the cases now before this Court only reports from producers and refiners are directly involved, but the system of reports in effect at the time these cases were instituted (see No. 135, R. 9–20; No. 260, R. 39–53), as well as at the present time, constitutes a comprehensive method of tracing movements of oil throughout the entire course of its transportation within and from the field. As a part of this system it is essential that all refiners make periodic reports since they alone are in a po-

sition to inform the Government from whom they obtained their petroleum and to whom they delivered the petroleum in its crude form or as products. The need for this information is clear as to those refiners, such as the complainants in the *Panama* case, which ship a portion of their products in interstate commerce (No. 135, R. 2, 67–97, 105–119), for as to them knowledge of their interstate shipments and of the source of their petroleum is absolutely essential in order to determine whether Section 9 (c) has been or is likely to be violated. It is not believed that there are any refineries in the East Texas field which ship all of their products solely within the State. Petitioners offered no evidence of the existence of any such refineries. Even if there were such refineries in the field, it would, nevertheless, be essential to discover from them whether or not they have transferred any of their crude petroleum or petroleum products to other refineries for refining or re-refining, since the refineries in the field are interconnected by an intricate system of pipe lines through which they may exchange both crude petroleum and petroleum products (No. 135, R. 61, 127, 100; No. 260, R. 121, 124). It is essential to know the intrastate destination of crude or products shipped by refineries located in the field, so that in case of subsequent interstate shipments of such crude or products a record of the source of origin of such shipments will exist. In order to trace the line of movement from the well to the interstate carrier, it is thus essential

to have reports on receipts and deliveries from every refinery in the field.

Reports from the refineries in the East Texas field are particularly necessary since they constitute the principal outlet for illegal petroleum from the field (No. 135, R. 67, 104, 129). Many of them exist merely for the purpose of disposing of crude oil (No. 135, R. 104). Nearly all own pipe line and gathering systems (No. 135, R. 61, 126; No. 260, R. 121, 124), and many also own wells (No. 135, R. 61; No. 260, R. 124, 127). Oil flows from leases in the field to these refineries through an intricate network of pipe lines (No. 135, R. 61, 98–101, 127; No. 260, R. 121, 124). The small pipe lines which run to the refineries are so interconnected that oil can be delivered from practically any point in the field to these refineries and from one refinery to another (No. 135, R. 61, 127; No. 260, R. 121, 124). The evidence established the existence of a large number of "by-passes" or illegal connections from wells to refineries, including the Panama Refining Company, petitioner in No. 135, and several of the complainant refiners in the causes which were consolidated with the *Panama* case (No. 135, R. 98–101, 124–125). Many of the refineries do not use seals on the lock-stops on the tank batteries located on the leases from which they receive oil, with the result that the lock-stops can be opened at will so as to permit oil to flow from the lease to the refineries

at the same time that it is flowing into the lease tanks, thus defeating any attempt to ascertain the amount of oil flowing from wells on these leases (No. 135, R. 61, 126–127; No. 260, R. 121, 124).

Periodic reports from producers and refiners and also from pipe lines and gathering systems not only disclose the source and course of transit followed by petroleum within and from the field but also serve to provide a cross-check of the truth and accuracy of all of the reports. Whereas any single person might be able to deceive inspectors and to falsify his records and reports, if his operations were examined separately, it is more difficult for him to avoid detection when all of the persons from whom he is receiving and to whom he is delivering petroleum or petroleum products are also required to report. A thorough system of sworn reports properly audited requires collusion between all persons handling the oil from the time of production until it eventually leaves the field, in order successfully to conceal illegal operations.

(4) *Inspection of books and records to supplement the reporting system is essential to the enforcement of Section 9 (c).*

In order to check the accuracy of the reports of producers, refiners and others it is essential that they be required to keep records of their transactions available for inspection as provided in Regulation VII. While the books and records may also be kept inaccurately, it is much more difficult, as a

practical matter, to eliminate from books and records all evidence disclosing the actual operations of a business. Thus inspection of books and records will often disclose the amount of payments made or received by individuals selling or purchasing crude oil or its products and will thereby furnish some check as to the accuracy of the quantity of crude or its products shown in the reports to have been delivered or received. Books and records will often disclose the real parties in interest from whom crude or its products has been purchased or to whom it has been sold. Such facts may easily be concealed in the reports by the use of fictitious names.

What has previously been stated as to the utility of a complete reporting system in furnishing a cross-check as to the accuracy of all reports is equally applicable to the requirement of the maintenance of books available for inspection. Such a requirement furnishes a check not only of the reports made by any particular person reporting, but also of the reports made of other persons with whom he has dealt.

In view of the ingenuity with which producers, refiners and others in the East Texas Field have sought to conceal illegal operations, a cross-check provided by a thorough reporting system supplemented by inspection of books and records cannot be said to be a needless precaution. Such a system not only serves to detect actual violations of Section 9 (c), but also to deter future violations. See

Bartlett Frazier Co. v. *Hyde,* 65 F. (2d) 350, 352 (C. C. A. 7th), certiorari denied, 290 U. S. 654. A person will be loath to violate the law when he is faced with the alternative either of disclosing his violation or of making a false statement under oath, the falsity of which may be detected.

As previously stated (*supra,* p. 177) no evidence was presented by the complainants in either case showing that the regulations were not necessary to the enforcement of Section 9 (c). The evidence offered by complainants bearing on the regulations consisted of testimony that agents of the Division of Investigations of the Department of the Interior had gauged the storage tanks on their leases (No. 135, R. 40–41, 42–43, 46, 48, 49, 51, 53; No. 260, R. 69, 72–73). There was also testimony by one of the complainants in the *Panama* case that on one occasion agents of the Division of Investigations had dug up and disconnected the flow line leading from one of his wells on the claim that it constituted a "by-pass" (No. 135, R. 40). Although the regulations did not authorize these acts,[96] we think it clear, as the court below stated, that even if such conduct constituted a trespass "there is no showing of irreparable damage or insolvency of the trespassers, and no occasion for an injunction on that account" (No. 135, R. 190; No. 260, R. 192).

[96] The regulations recently promulgated provide for the inspection and examination of wells, pipes, flow lines, etc., and the gauging of tanks. See Appendix A, p. 224.