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# Supreme Court of the United States

OCTOBER TERM, 1934

Nos. 854, 864

JOSEPH SCHECHTER, et al.

*v.*

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

*v.*

A. L. A. SCHECHTER POULTRY CORPORATION, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONERS IN No. 854 AND FOR RESPONDENTS IN No. 864

### THE OPINIONS OF THE COURT BELOW

The opinions of the Circuit Court of Appeals are not yet reported. Its opinion upon the hours and wages counts appears at R. 1660-1663. The opinion of that court upon the remaining counts is at R. 1648-1660. The opinion of the District Court upon demurrer is at R. 131-164.

### STATEMENT

**1. The business in which the defendants are engaged and its relation and that of the industry of which it is a part to interstate commerce.**

Defendants[1] Schechter Live Poultry Market, Inc. and A. L. A. Schechter Poultry Corporation are corporations

[1]Since this case is here on cross petitions for certiorari, the parties throughout this brief will be described as "the Government" and the "defendants".

engaged in the City of New York in the slaughter and sale of poultry for the local New York market (R. 1351, 1423). The major part of the poultry so slaughtered and sold comes from outside the state and is bought by the defendants for slaughter and resale from the persons to whom consigned after its arrival in New York and delivery to the latter (R. 1411, 1413, 1073). After such purchase such poultry is transported or caused to be transported by the defendants to their respective slaughter houses or places of business in Brooklyn and commingled with other poultry of the defendants for slaughter and resale (R. 1368, 1419, 1920). Such transportation from the place of delivery of the articles purchased in interstate commerce is conducted wholly within the State[2] and the slaughtering and resale of the poultry so purchased is conducted wholly within the state. Defendants do not sell poultry in interstate commerce, and are not charged with doing so (R. 50, 51, 63, 65, 66, 72, 75, 76-82). The business of the corporate defendants is, therefore, a local business conducted wholly within the State of New York, both in respect of their manufacturing operations and their sales, although the articles there manufactured (slaughtered) and sold have, for the most part, moved into the State in interstate commerce. The Schechter Live Poultry Market, Inc. was operated by the individual defendant Joseph

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[2]It appears that during the times covered by the indictment the defendants also caused to be brought into New York two truckloads of poultry most of which was bought as an accommodation purchase for another slaughterer (R. 1396) and carried direct to the defendants' places of business which after delivery thereat, were slaughtered and resold to the local trade. Otherwise, all of the poultry slaughtered by the defendants came into New York consigned to persons other than the defendants and was purchased by the defendants from them, and such is the normal course of the defendants' business (R. 1411).

Schechter (R. 1423) and the A. L. A. Schechter Poultry Corporation was operated by the individual defendants Alexander, Martin and Aaron Schechter (R. 1351). Joseph Schechter did not participate in the management of this concern but guaranteed its credits (R. 1423-1424).

As slaughterers of poultry for sale in the local New York market defendants are members of the live poultry industry. The Code, for the violation of whose provisions defendants were convicted, but to which they never assented, is a Code covering the "Live Poultry Industry of the Metropolitan Area in and about the City of New York." The term Metropolitan area (Code, Article II, Section 24, R. 19) includes the five boroughs of the City of New York, four adjoining counties in New York, two adjoining counties in New Jersey and one adjoining county in Connecticut. It covers all persons engaged in the business of trading in or slaughtering live poultry "from the time such poultry comes into the New York metropolitan area until the time it is first sold in the slaughtered form" (Code, Article I, Section 1, R. 16). Every sale of chickens charged to the defendants in the indictment, and alluded to in the record, was a sale to a retailer whose store is located in Brooklyn, New York (R. 50, 51, 63, 65, 66, 72, 75-82). There is no evidence that any of the slaughter houses conducting their business within the city of New York sell poultry in interstate commerce, although the evidence is that by far the greater part of the poultry purchased by them comes into New York from outside the State. It does not appear whether members of the industry in the adjoining counties in New Jersey and Connecticut slaughter for sale in their local market or in interstate commerce as well, but since the defendants' business is conducted wholly within the city it is immaterial whether those

members of the industry in the Metropolitan area outside of the State of New York slaughter for sale in interstate commerce or not. The Government makes much of the fact that the New York market is the largest poultry market in the United States. This is to be expected, since New York is the largest city in the United States. It is said that the prices paid in New York affect the prices paid elsewhere and at points of origin. This may be so, but, if so, it is a condition that exists in respect of every industry by reason of the interplay of prices in various consuming markets upon prices at other consuming markets and at points of origin.

As appears from the foregoing, all of the poultry slaughtered for resale by the defendants and others engaged in a similar line of business had ceased to be articles of interstate commerce and had come to rest and had become commingled in the general mass of goods in the State at the time of such slaughter and sale. There is entirely lacking that flow of interstate commerce through the city of New York whose movement is but temporarily arrested there, the supposed existence of which the argument of the Government assumes. Moreover, as appears from the foregoing, the form of the articles of interstate commerce which come into New York is transformed by the operations of the defendants and others similarly engaged from a raw product (live poultry) to a manufactured product (slaughtered poultry) for local consumption and use in its transformed state.

**2. The result of the trial in the District Court.**

The defendants were indicted on 59 counts (R. 62-119) charging various violations of the Livc Poultry Code

as set forth in the indictment (R. 3-43)[3] and on one count (R. 2-62) (within which count is included the code and executive action taken thereon by the President) charging the defendants with a criminal conspiracy to commit such violations.

A demurrer having been sustained to 27 of the 60 counts (R. 130), defendants were tried on the remaining 33 counts. On 14 of these counts they were acquitted and on 19 convicted (R. 1648).

**3. The counts (alleged violation of code provisions regulating wages and hours in slaughter houses) on which the Circuit Court of Appeals set aside the conviction and the basis of its decision thereon.**

The Circuit Court of Appeals set aside the conviction on two counts and affirmed the conviction on seventeen. The counts on which conviction was set aside were:

Two counts charging violation of the minimum wage and maximum hour privisions, one (Count 46, R. 101-102) charging defendants with paying wages amounting to less than 50c per hour "to a person employed by them in the wholesale slaughter house operated by them" and one (Count 55, R. 111-112), charging defendants with causing and permitting "a person employed at the wholsale slaughterhouse operated by them * * * to work at the said

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[3]The Code, set forth in full in the Appendix (p. 12) is entitled "CODE OF FAIR COMPETITION for the LIVE POULTRY INDUSTRY of the METROPOLITAN AREA IN AND ABOUT THE CITY OF NEW YORK." The Code thus, on its face, purports to regulate primarily a business conducted wholly within the City of New York and the area adjacent thereto.

slaughterhouse in excess of 60 hours per week" in violation of the Code.[4]

The employee to whom this charge relates was employed at the wholesale slaughterhouse of the defendants as a bookkeeper and general handyman performing various functions, none of which was charged in the indictment or shown by the proof to be performed in interstate commerce[5] (R. 1013, 1309, 1331-1335, 1340, 1341). The Circuit Court of Appeals set aside the conviction on these counts upon the ground that the wage and hour provisions of the Code governing slaughterhouse employees were void because not within the power conferred by the Commerce Clause (R. 1662-1663). Judge Manton dissented (R. 1660).

**4. The counts on which convictions were sustained by the Circuit Court of Appeals—the record on which the verdict rests and the relation of the charges contained in such counts to interstate commerce.**

The counts on which convictions were sustained were:

(A) STRAIGHT KILLING—WHAT IT IS AND ITS RELATION TO INTERSTATE COMMERCE.

Ten counts (Counts 24-33, R. 71-82) charging that the defendants permitted their customers to make "selections

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[4]The Code fixed a maximum of 48 hours in any one week for slaughter house employees (Article III, R. 19) and a minimum wage of 50c per hour (Article IV, R. 20).

[5]Defendants were acquitted on four other counts charging violation of the minimum wage provisions of the Code (Counts 47-50, R. 102-106) and on eight other counts charging violations of the maximum hour provisions (Counts 51-54, R. 107-111 and Counts 56-59, R. 113-117).

of individual chickens taken from particular coops and half coops" for slaughter and sale to them (see Count 24, R. 72 as typical) and in violation of the code provision prohibiting any method of slaughter and sale except that referred to therein as "straight killing".[6]

In plain English, the straight killing provision of the Code forbids the slaughterer's customer from selecting either out of a particular coop of poultry, or from all of the poultry in the possession of the slaughterer, those chickens which he desires to buy; requires him to buy either in full coops or in half coops; if the former to take all of the chickens in the coop (excluding culls) and if a half coop to take that half of the chickens in the coop which are first taken out of it at random (excluding culls). "Coop run," so to speak.

This result is accomplished by prohibiting "the use in the wholesale slaughtering of poultry, of any method of slaughtering other than straight killing." This is in terms a regulation of the conduct of manufacture, the effect and purpose of which is to prevent the customer from selecting that which he chooses to buy and from paying for the same according to the quality of what he purchases. If this is not made plain from the language of the Code provision itself, it is made plain by the evidence relied on by the Government itself, to support the charge, and will not be denied.

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[6]The governing provision of the Code is as follows (R. 37):

"Sec. 14. *Straight killing.*—The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than 'straight killing' or killing on the basis of official grade. Purchasers may, however, make selection of a half coop, coop, or coops, but shall not have the right to make any selection of particular birds."

(B) Avoidance of inspection.

Two counts (Counts 4 and 5, R. 66-71) charged the defendants with "selling" poultry "without having the same inspected or approved in accordance with any rule, regulation or ordinance of the City of New York, in violation of Article VII, Section 22, of said Code" (Count 4, R. 66, Count 5, R. 68).[7]

The evidence on which this charge rests is that a portion of certain poultry trucked in by the defendants from outside the State was sold without inspection. The uncontradicted evidence shows that most of the poultry which was not inspected (including all of the poultry referred to in Count 4) represented poultry brought in as a matter of accommodation for another slaughterer and sold by him (R. 1396). The Code provision forbids sale without conforming to local inspection laws. It should also be observed that the poultry had come to rest within the State before sold and that the Code provision relied on as a regulation of *interstate commerce* is a provision forbidding the local "sale of poultry" unless inspected in accordance with *"local state regulations and ordinances"*, and not a provision requiring the observance of Federal inspection regulations expressly imposed by a Federal statute in the exercise of the commerce power.

(C) Sale of Unfit Poultry.

One count (Count 2, R. 62) charged the sale of one chicken alleged to be unfit for human consumption in violation of Article VII, Section 2 of the Code.[8]

[7]Article VII, Section 22, on which these counts rest, forbids the sale of live poultry which has not been inspected and approved in accordance with the rules, regulations, and/or ordinances of the particular area (R. 39).

[8]This section provides that members of the Industry shall not "Knowingly purchase or sell for human consumption culls or other produce that is unfit for that purpose" (R. 34).

The prohibition is against "knowingly" selling unfit poultry. The defendants were charged (Count 3, R. 65-66) with selling two other unfit chickens on which they were acquitted. The three chickens, which are the subject of these two counts, had been passed as fit by the Federal inspector (R. 955). Thereafter, an agent of the Code Authority, sent to the defendants' place of business to procure evidence upon which to base a criminal charge, surreptitiously marked these three chickens for identification and followed them into the hands of their purchaser. A Board of Health officer was called to look at them and found it necessary to perform an autopsy on them for the purpose of determining whether they were fit or not (R. 710). The autopsy disclosed that the two chickens, covered by the count on which defendants were acquitted, were altogether fit but that the third chicken, covered by the count on which they were convicted, was "egg-bound" (R. 710). There is no evidence that the defendants ever saw or that their attention was ever called to these three chickens after they had been passed as fit by the Federal inspector. The conviction rests upon the results of the autopsy, not on conclusions either to be drawn from the outward appearance of the chickens, or from any knowledge brought home to the defendants that these chickens previously passed by the Federal inspector as fit were even suspected of being unfit.[9] The one chicken covered by the count on which the conviction rests had ceased to be an article of interstate commerce at the time of its sale and the Code provision was one purporting to regulate the sale of slaughtered poultry within the State of New York after it had ceased to be such an article.[9]

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[9]It is also the contention of the defendants that there was a failure of proof on other counts on which they were convicted.

(D) The Making of False Reports, or Failure to Report.

One count (Count 38, R. 90), charged the making of reports containing "false and fictitious statements" relating to the range of daily prices and volumes of sales for the period between May 19 and June 11, 1934 (Count 38, R. 91) and another (Count 39, R. 92) charged failure to submit any reports "relating to the range of daily prices and volumes of sales between June 11, 1934, and the return of the indictment", in violation (Count 38) of Article VI, Sections 1 and 2, and Article VIII, Section of the Code, and (Count 39) in violation of Article VIII, Section 3 of the Code.[10]

This code provision, imposed by federal authority, is one requiring reports of sales and range of prices received in the sale of slaughtered poultry within the State of New York after such poultry has ceased to be an article of interstate commerce. This provision constitutes the attempted exercise of visitorial powers by Federal authority upon persons not engaged in interstate commerce.

The evidence relied upon for conviction under the count charging false reports, fails to take into account accommo-

[10]Article VI, Sections 1 and 2, provide for the appointment of a Code Supervisor (Section 1, R. 25) and an Industry Advisory Committee (Section 2, R. 27-29); delegate to the Supervisor the duty to administer the Code, to prescribe rules and regulations for its administration and to submit reports to the Secretary or Administrator upon request with reference to the operation and effect of the Code (R. 26-27), make it the duty of the Advisory Committee to cooperate with the Code Supervisor in the administration of the Code and to act as a planning and research agency for the industry for the purpose of making recommendations (R. 32). Article VIII, Section 3, reads as follows (R. 42):

> *"Listing sales prices.*—Every member of the industry shall submit a weekly report to the code supervisor. Such report shall show the range of daily prices and volume of sales for each kind, grade, or quality of produce sold by the member of the industry during the reported week."

dation sales (R. 1061) (sales made by the defendants for the account of others and reported by such others) and is apparently based upon the theory that the Act required the defendants to report sales other than their own. Within the period covered by the other count defendants did not make reports. It is the contention of the defendants (1) that, since this provision of the Code may not be supported as an exercise of Federal authority under the commerce clause, they were not required to make such reports (this applies as well to the charge of making false reports) and (2) that since they had been advised at this time of the purpose of the Code authority, or the Government, to bring a criminal prosecution against them they could not be compelled to furnish evidence against themselves (see Part II, Point IX).

(E) Selling to Unlicensed Slaughterers or Dealers.

One count (Count 60, R. 117-118) charged defendant A. L. A. Schechter Poultry Corporation and defendants Martin, Alex and Aaron Schechter with selling to Joseph Schechter, or to the Schechter Live Poultry Market, Inc. in violation of the ordinances of the City of New York requiring the licensing of slaughterers of poultry and of the regulations of the Board of Health of said City. This was made a violation of the Code by Article VII, Section 15[11] thereof, which prohibited the sale of poultry within the City of New York to an unlicensed slaughterer or dealer in violation of local ordinances and regulations. It appears that the place of business conducted by the defendants

[11]This section prohibits "The sale or resale of produce to any person not legally entitled to conduct a business of handling the produce of the industry (where a license or permit is required)" (R. 37).

Joseph Schechter or Schechter Live Poultry Market was licensed (R. 596, 1432).

**5. The Conspiracy Count.**

The Circuit Court of Appeals also affirmed the conviction on Count 1 (R. 2-62) charging defendants with a criminal conspiracy to commit, among others, the offenses charged in the counts hereinbefore reviewed. The Recovery Act (Sec. 3 (*f*)) makes any violation of any provision of a code "in any transaction in or affecting interstate or foreign commerce" a misdemeanor, subjecting the offender to a fine of not more than $500 for each offense and providing that each day such violation continues shall be deemed a separate offense. It imposes no jail sentence. The object of the conspiracy charge was, of course, to lay a foundation upon conviction for a jail sentence, which upon conviction was imposed upon the individual defendants. It is the contention of the defendants; (1) that for each and all of the reasons to be hereinafter set forth the code provisions on which the substantive counts rest were beyond the authority of the United States to make, or to impose upon these defendants and that hence there could be no criminal conspiracy to commit acts in themselves not unlawful; (2) that there was a complete failure of proof on the conspiracy charge (Part II, Point X); and (3) that if a single one of the code provisions, of whose violation defendants were convicted, was void because beyond the constitutional power of Congress to make or enforce (the Circuit Court of Appeals so held in respect of the wage and hour provisions), as a result of which conviction on the count predicated on such provision must be set aside, or if conviction on any other of the substantive counts is set aside for any other reason, the conspiracy charge falls with the setting aside of the conviction on such count (Part II, Point X).

## THE STATUTES INVOLVED

The statutes involved are the National Industrial Recovery Act, reproduced in an Appendix printed under separate cover (pp. 1-11) and the act defining criminal conspiracy and imposing penalties and punishment therefor, reproduced in the Appendix (p. 45).

The National Industrial Recovery Act purports to give all the force and effect of statutes to the Codes promulgated thereunder, making a violation thereof a misdemeanor. The CODE OF FAIR COMPETITION for the LIVE POULTRY INDUSTRY of the METROPOLITAN AREA IN AND ABOUT THE CITY OF NEW YORK, for the violations of whose provisions (R. 3-43) defendants were convicted, is set forth in full in the Appendix (pp. 12-34).

## SPECIFICATION OF ERRORS

1. The courts below erred in failing to hold that the National Industrial Recovery Act, and all parts thereof, including Sections 3 and 7, is void because constituting an unconstitutional delegation of legislative power, in so far as it purports to confer upon the President the authority to adopt and make effective codes of fair competition and to prescribe maximum hours of labor and minimum rates of pay.

2. The courts below erred in failing to hold that the Code of Fair Competition for the Live Poultry Industry, and the several provisions thereof upon which conviction was had in this case, are, jointly and severally, void as constituting the result of an exercise of legislative power unconstitutionally delegated.

3. The District Court erred in failing to hold that the minimum wage and maximum hour provisions of the Code of Fair Competition for the Live Poultry Industry, as applied to these defendants and their employees, are void because beyond the scope of the constitutional authority of the Federal Government and violative of the Tenth Amendment to the Constitution of the United States, and because they deprive these defendants of their liberty and property in violation of the Fifth Amendment thereto.

4. The courts below erred in failing to hold that the "straight killing" provision of the Code of Fair Competition for the Live Poultry Industry is void because not constituting either a regulation of interstate commerce or a regulation sustainable under any definition of fair competition, and because it deprives these defendants of their liberty and property in violation of the Fifth Amendment.

5. The courts below erred in failing to hold that the provisions of the Code of Fair Competition for the Live Poultry Industry relating to the sale of unfit poultry, requiring the inspection of poultry, restricting the sale thereof to those licensed in accordance with local laws, and requiring the filing of reports with the Code Supervisor, are void, as here applied, because not constituting regulations of interstate commerce, and because they deprive the defendants of their liberty and property in violation of the Fifth Amendment.

6. The courts below erred in failing to hold that the several provisions of the Code of Fair Competition for the Live Poultry Industry are void because not constituting regulations of interstate commerce.

7. The courts below erred in failing to hold that the penal provision of the National Industrial Recovery Act is void and unconstitutional for indefiniteness and vagueness.

8. The Circuit Court of Appeals erred in failing to hold that the reversal of conviction upon the wage and hours

counts also required a reversal of the judgment upon the conspiracy count.

9. The courts below erred in failing to hold that counts 4, 5, 38 and 60 of the indictment were fatally defective and demurrable for failure to plead the substance of the applicable ordinances, municipal regulations and rules.

10. The Circuit Court of Appeals erred in failing to hold that the reversal of the judgment of conviction upon the wage and hour counts required the reversal of the judgment upon all the counts on the ground that the whole Code must fall if any provision thereof is unconstitutional or unauthorized.

11. The District Court erred in refusing to direct a verdict for the defendants on counts 1, 2, 4, 5, 24 to 33 inclusive, 38, 39 and 60.

12. The Circuit Court of Appeals erred in affirming that part of the judgment of the District Court relating to counts 1, 2, 4, 5, 24 to 33 inclusive, 38, 39 and 60 of the indictment.

13. The Circuit Court of Appeals erred in failing to hold that the charge of the District Court with respect to the effect of the acts of defendants upon interstate commerce, was reversible error.

14. The Circuit Court of Appeals erred in failing to hold that the acceptance by the District Court of the jury's verdict of guilty upon the conspiracy count, and the actions of said District Court with respect to said verdict, constituted reversible error.

15. The Circuit Court of Appeals erred in failing to hold that the District Court in refusing to accept evidence from the defendants as to the arbitrary, unreasonable and capricious nature of the "straight killing" regulation in the Code, was reversible error.

## ARGUMENT

# PART I

# THE CONSTITUTIONAL QUESTIONS INVOLVED

## SUBDIVISION I OF PART I—DELEGATION OF LEGISLATIVE POWER

### I

### THE NATIONAL INDUSTRIAL RECOVERY ACT, IN SO FAR AS IT PURPORTS TO CONFER UPON THE PRESIDENT THE AUTHORITY TO ADOPT AND MAKE EFFECTIVE CODES OF FAIR COMPETITION AND IMPOSE THE SAME UPON MEMBERS OF EACH INDUSTRY FOR WHICH SUCH A CODE IS APPROVED, IS VOID BECAUSE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

#### 1. Synopsis of the Provisions of the Act.

The National Industrial Recovery Act is entitled "An Act to Encourage National Industrial Recovery, to Foster Fair Competition, and to Provide for the Construction of Certain Useful Public Works, and for Other Purposes." Title I of the Act is entitled "Industrial Recovery". It is this title with which we are solely concerned.

Section 1 is entitled "Declaration of Policy". It is set down in the Act all in one paragraph, but for the sake of clarity and to emphasize its multifariousness we are indenting the various clauses. Section 1 reads as follows:

"It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;

"and to provide for the general welfare

"by promoting the organization of industry for the purpose of cooperative action among trade groups,

"to induce and maintain united action of labor and management under adequate governmental sanctions and supervision,

"to eliminate unfair competitive practices,

"to promote the fullest possible utilization of the present productive capacity of industries,

"to avoid undue restriction of production (except as may be temporarily required),

"to increase the consumption of industrial and agricultural products by increasing purchasing power,

"to reduce and relieve unemployment,

"to improve standards of labor,

"and otherwise to rehabilitate industry

"and to conserve natural resources."

In Section 2 of the Act the President of the United States is authorized to effectuate the policy of Title I by establishing such agencies and appointing such officers and employees as he sees fit. He is further authorized to delegate any or all of his functions and powers under Title I to such officers, agents, employees and agencies.

Section 3 of the Act provides for the enactment of so-called "codes of fair competition". It was pursuant to this section that the President approved the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York (Appendix, p. 12). Trade or industrial associations or groups "representative" of trades or industries or branches thereof may formulate "codes of fair competition" and present them to the President for approval. Sec. 3 (a). When approved by the President the provisions of each "code of fair competition" are to be the standards of fair competition for the entire trade or industry or branch thereof in question and compulsory upon all non-assenters as well as proponents. Sec. 3 (b).

The President may "as a condition of his approval of any such code" impose in his absolute discretion any conditions he deems to be "in furtherance of the public interest" for the protection of consumers, competitors, employees and others. He may also provide such exceptions to and exemptions from the provisions of the code as in his absolute discretion he deems necessary to effect the policy "herein declared." Sec. 3 (a). Any violation of any provision of a code in any transaction "in or affecting interstate or foreign commerce" is declared an "unfair method of competition" in commerce within the meaning of the Federal Trade Commission Act. Sec. 3 (b). The several District Courts of the United States are invested with jurisdiction to prevent and restrain code violations, and the United States attorneys in their respective districts are authorized to institute such injunctive proceedings. Sec. 3 (c).

In the event no code is presented to the President by the members of a trade or industry he may prescribe a code which shall bind the entire industry. Sec. 3 (d).

When a "code of fair competition" has been approved or prescribed by the President, any violation of any provision thereof in any transaction "in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of $500, each day the violation continues to be deemed a separate offense. Sec. 3 (f). It was under this subsection that defendants were convicted.

The Act provides for certain limitations with respect to what the nature and character of the codes *must not be.* Sec. 3 (a). It also provides for certain general labor provisions that they must contain. Sec. 7 (a). Otherwise the President's uncontrolled conception of what is "fair competition" prevails.

Section 3 (a) provides that the President may approve a "code of fair competition" provided he finds (1) that the trade or industrial association applying for the code imposes no inequitable restrictions on admission to membership and is "truly representative" of the industry; (2) that the code is not designed to and will not promote monopoly or monopolistic practices; (3) that the code is not designed to eliminate, oppress or discriminate against small enterprises; (4) that it will tend to effectuate the policy of Title I. The first requirement is merely a matter of procedure having to do solely with the "representative" character of the trade or industrial association presenting the code. The second and third requirements do not concern themselves at all with what provisions a "code of fair competition" shall or may contain. They merely outlaw and forbid "codes of fair competition" promotive of monopoly or oppressive to small business.

The second type of limitations upon code provisions is set out in Section 7 (a). There are certain labor provisions which every code must contain: first, the collective

bargaining and so-called anti "yellow-dog" contract provisions of Section 7 (a) (1) and (2), and second, the provisions of Section 7 (a) (3) 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. Presidential action with respect to these latter matters is purely permissive, even if he has approved or prescribed a "code of fair competition."

The scheme for the fixing of "maximum hours of labor", "minimum rates of pay" and "other conditions of employment" is outlined in Section 7 (b) and (c). The President is required so far as practicable to afford every opportunity to employers and employees in any trade or industry, wherein collective bargaining obtains, to establish by mutual agreement the standards as to "maximum hours of labor" and "minimum rates of pay", and other "necessary" conditions of employment. When and if such agreements are made, the President *may* approve them. These agreements will then be the standards which all employers in the industry must comply with in accordance with Section 7 (a) (3).

Where no mutual agreement has been reached by collective bargaining in an industry, the President *may* conduct an investigation as to labor practices, policies, wages, hours of labor and other conditions of employment in the trade or industry, and he is authorized to prescribe on the basis thereof "maximum hours of labor" and "minimum rates of pay" and other conditions of employment in the trade or industry such as "will effectuate the policy of Title I." The President *may* (but does not have to) differentiate according to skill or experience of employees affected and according to the locality of employment.

Sec. 7 (c). As we have said before, he need not act at all with respect to wages and hours.

Under Section 10 the President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of Title I, and any violation of any such rule and regulation is to be punishable by fine or imprisonment. The President may cancel or modify any order, approval, rule or regulation issued under Title I.

**2. The Live Poultry Code.**

The Recovery Act does not itself set forth any acts which are punishable under Section 3 (f) thereof. It is left entirely to the "code of fair competition," which may or may not be approved or prescribed for an industry, to declare those acts which are to be criminal. Although the Act became effective June 16, 1933, the Live Poultry Code was not approved by the President until nearly a year later, April 13, 1934, and became effective April 23, 1934.

The Live Poultry Code contained the provisions required by Section 7 (a) of the statute and it prohibited, among other things: (1) the working of employees more than 40 hours a week, with certain exceptions (Article III); (2) the paying of wages less than 50 cents an hour (Article IV); (3) the employment of fewer persons than the number prescribed for various volumes of business (Article V, Section 9); (4) the following "unfair methods of competition"—(a) false advertising, (b) knowingly purchasing or selling produce unfit for human consumption, (c) discrimination between customers by rebates, etc., (d) commercial bribery, (e) interference with contractual relations, (f) defamation of creditors or customers, (g)

"destructive" price cutting, all selling below market price being deemed *prima facie* such, (h) price discrimination between purchasers, (i) giving of prizes and premiums, (j) misrepresentation respecting produce, (k) excessive feeding to increase sale weight, (l) false weighing, (m) delay of unloading to cause shrinkage of weight, (n) "selective" killing, (o) sales to unlicensed persons, (p) misrepresentations as to expected shipments to create false market, (q) misrepresentation of facts affecting price, (r) combinations to monopolize or restrain trade, (s) unreasonable service charges, (t) misrepresentation as to function or business, (u) "racketeering" (Article VII).

**3. The Formulation and Promulgation of the Live Poultry Code of Fair Competition was Essentially a Legislative Act.**

That Congress has delegated to the President the power to make laws in approving or prescribing codes of fair competition is rather plainly demonstrated from the foregoing recitals of what is contained in the Live Poultry Code.

A "code" has been defined as a "system of laws; any systematic body of law, especially one giving statutory force; a compilation of laws of public authority" (Webster's New International Dictionary). See also *Johnson* v. *Harrison,* 47 Minn. 575, 578, in which Judge Mitchell says that the word "code" as now generally used means a "system of law." Such "codes" are well known on the Continent of Europe, in Latin America and also in the United States, *i.e.,* Code of Napoleon, etc.

The idea of a "code" involves the exercise of the legislative power in its promulgation (Bouvier's Law Dictionary,

Vol. 2).[1] It may be described as a collection of pre-existing laws arranged and classified into a logical system or one intended to be such. By way of illustration, we have the Codes of Civil Procedure, Code of Criminal Procedure and the United States Code.

A "rule" on the other hand, has been defined as a principle or regulation set up by authority prescribing or directing action or forebearance as for instance a regulation made by a Court of Justice, or public office with reference to the conduct of business therein (Black's Law Dictionary, 3d ed.).

The word "code" must have been advisedly used with knowledge of its usual sense as above defined. That there was no intention on the part of Congress to use the word "code" in lieu of the words "rules or regulations", witness Section 10 (a) of the National Industrial Recovery Act, which says that the President may prescribe "rules" and "regulations" to carry out the purposes of Title I.

In *Gibson Auto Co. Inc.* v. *Finnegan, Attorney General, et al.,* (March 5, 1935) 259 N. W. 420, the Supreme Court of Wisconsin held the Wisconsin Industrial Recovery Act unconstitutional as a delegation of legislative authority. This important case is hereinafter discussed more fully. Chief Justice Rosenberry, at page 423, said of such a code of fair competition:

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[1]In the draft of its brief the Government has admitted this, saying: "The approval of codes of fair competition establishing general rules applicable to an entire industry would *clearly appear to be legislative in character.*" Both parties to this case are petitioners in this Court. Since the text of this brief was written, preliminary drafts of the briefs of the Government and defendants have been exchanged for the purpose of acquainting each with the general scope of the other's arguments and contentions.

> "* * * If the regulation of any trade or industry so minutely as is provided for by the code of fair competition of the motor vehicle retailing trade is in the public interest, the act nowhere so declares nor can it be said to be implied. What is in the public interest is to be found by the preponderant majority of the trade. The code as adopted and approved deals with matters of the highest public concern; co-operation between employees and employers, the elimination of unfair competitive practices; the reduction and relief of unemployment; the improvement of standards of labor, removal of obstacles to business recovery, the rehabilitation and conservation of the natural resources of the state. These matters of the very highest importance to the general welfare are by chapter 110 to be dealt with not by the legislature in whom the power to make laws is vested by the Constitution but by an indefinite unascertained self-perpetuating group which may be in existence or may thereafter come into existence."

Our situation does not differ except that the rubber stamp of the President must be placed upon the code of fair competition.[2] The President, however, has no more power to make laws than administrative bodies have. It is, therefore, plain from the essential nature of the Code itself and the manner of its enactment that the formulation and promulgation of the Code of Fair Competition for the Live Poultry Industry involved a complete abdication of the legislative power by Congress.

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[2]See discussion *infra* on "The Scope of the Recovery Act as Evidenced by the Codes Enacted Thereunder."

**4. The Doctrine of the Non-delegability of Legislative Power.**

Article I, Section 1, of the Constitution of the United States provides that

> "All legislative powers shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives."

It is well settled that this impliedly forbids the delegation of legislative powers by Congress to the executive or administrative bodies. In the recent case of *O'Donoghue* v. *United States,* 289 U. S. 516, 530, this Court said:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Government of Philippine Islands,* 277 U. S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan."

By the Recovery Act Congress has delegated to the President of the United States the power to approve so-called codes of fair competition which may be presented to

him by "representative" trade or industrial associations. When and if such codes of fair competition are approved by the President each and every provision thereof has the full force and effect of law and violations thereof are constituted crimes. It is our contention that such a delegation of power is purely and simply a delegation of legislative power to the President of the United States on account of the fact that Congress has set up no intelligible policies to govern the President, no standards to guide and restrict the President in his action, and no procedure for making determinations in conformity with due process of law.

**5. The Rules laid down by the Cases for determining whether Legislative Power has been Delegated.**

Prior to the recent decision of this Court in the so-called *Oil* cases, *Panama Refining Co.* v. *Ryan et al., Amazon Petroleum Corporation* v. *Ryan et al.,* 293 U. S. 388, this Court has not infrequently had occasion to pass on alleged delegations of legislative power by Congress to the Chief Executive or administrative bodies. The Government cites many of these cases as supporting its contention that the Recovery Act does not constitute an invalid delegation of legislative power. We believe, however, that there is no great difficulty in distinguishing all of these cases, and that they can be readily classified into definite categories, into none of which can that Act possibly be fitted. When Congress has prescribed (1) a reasonably intelligible policy; (2) a reasonably definite standard for administrative action in carrying out that policy, and (3) an administrative procedure complying with the requirements of due process of law, administrative action in accordance therewith does not involve any unconstitutional exercise of legislative power.

Such permissible administrative action is of two kinds: (a) when the policy which has been laid down by Congress is not to be effective at once or under all conditions and circumstances, a determination in accordance with the standard laid down by Congress as to when the conditions or circumstances have come into existence which Congress has said shall make the law operative, and (b) the carrying out of the policy of Congress by filling in details or making subordinate rules and regulations in accordance with the standard laid down by Congress.

Examples of the first class of cases are to be seen in *Field* v. *Clark,* 143 U. S. 649 (power to suspend operation of free list of imports in the event the President finds discrimination against American products by foreign nations); *Hampton & Co.* v. *United States,* 276 U. S. 394 (power in the President to adjust tariffs as relations between costs of production here and abroad change).

Examples of the second class are *Buttfield* v. *Stranahan,* 192 U. S. 470 (classification of foreign teas as to whether or not inferior); *Union Bridge Co.* v. *United States,* 204 U. S. 364 (classification of bridges as to whether obstructive of navigation by reason of height or width of span or other specified conditions); *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77 (quantity of food or drug contained in a package required to be marked thereon, and reasonable variations to be permitted); *United States* v. *Grimaud,* 220 U. S. 506 (rules and regulations for use of Government-owned forest reserves).

In its recent decision in the *Oil* cases this Court very clearly stated that in order for a delegation of power by Congress to the Chief Executive or an administrative body to be valid, certain essentials must be complied with. These are (1) the statute must define a policy; (2) a standard for

administrative action must be laid down in the statute; (3) the statute must provide for administrative procedure in accordance with due process of law, which procedure must include administrative findings of fact to demonstrate that the action taken has been in compliance with the prescribed standard.

It is important to note that Congress is required both to lay down a policy and to set up a standard. The word "policy" has been defined as a "settled or definite course or method adopted and followed by a government institution, body or individual". A "standard" has been defined as "a criterion, model or example, or an established rule". Webster's New International Dictionary, Second Edition, Unabridged (1935).

Let us examine some of the cases prior to the decision in the *Oil* cases in order to make clear the distinction between policy and standard and to determine whether or not both these requirements have uniformly been complied with in those cases in which this Court has held that there was no illegal delegation of legislative power.

In *Field* v. *Clark, supra,* the Congressional policy was to maintain American export markets and reciprocity of trade. The standard for Presidential action was a requirement that the President determine whether the Government of any country producing sugar, molasses, tea, coffee or hides had imposed duties or other exactions upon our agricultural or other products which, in view of the free list established by the Act, the President might deem to be reciprocally unequal and unreasonable, in which case he should not only have the power, but it should be his duty, to suspend the free introduction of those articles by proclamation to that effect, during which suspension the duties specified by the section should be levied.

In *Buttfield* v. *Stranahan, supra,* the Congressional policy was to exclude the importation of inferior teas. Congress itself forbade the importation of inferior teas and as a standard for administrative action provided for the establishment of uniform standards of purity, quality and fitness for consumption for all kinds of imported teas, on expert recommendation.

In *Hampton & Company* v. *United States, supra,* this Court dealt with the so-called Flexible Tariff Act. The Congressional policy declared was to foster home industries by placing them on an equal competitive basis with foreign industries. The standard for Presidential action declared was the adjustment of tariffs to correlate them with changes in the relations between costs of production abroad and those in the United States. The President was definitely limited with respect to the extent of the changes he could make in the tariffs.

In *Union Bridge Co.* v. *United States, supra,* the policy declared was to remove obstructions from navigable waters. The standard for administrative action was the effect in obstructing navigable rivers of bridges of insufficient height and too great width of span.

In *United States* v. *Shreveport Grain & Elevator Co., supra,* the policy was to prevent the deception of consumers of foods and drugs. The standard for action was the requirement that the statement of quantity upon package or container labels be clear, the administrative delegate being permitted to make reasonable variations and exceptions.

In *United States* v. *Grimaud, supra,* the policy declared was the preservation and conservation of Government-owned forest reserves consistent with their reasonable use

by the public. The standard for administrative action was that depredations upon these reserves should be prevented and destruction by fires guarded against; hence, that there should be a limitation of user by regulation thereof, without, however, limiting ingress and egress to settlers and unreasonably preventing prospecting and developing operations.

The more recent cases on which the Government relies can be analyzed in the same manner. In the draft of the Government's brief important omissions have been made in discussing these more recent cases. For instance, it has been stated that the only policy or standard laid down in such statutes as the Interstate Commerce Act and the Federal Radio Act is contained in the expressions "when it shall appear in the public interest" and "as public convenience, interest or necessity requires". This is very far from the fact.

In *Chesapeake & Ohio Railway Company* v. *United States,* 283 U. S. 35, the Interstate Commerce Act as amended by the Transportation Act of 1920 was involved. This declared that no railroad should extend its line or construct a new line without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. On page 42 of the opinion the Court referred to Section 5 (4) of the Interstate Commerce Act, which authorized the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems. This Section, as this Court said, clearly discloses a policy on the part of Congress to preserve competition among carriers. It provided that "in the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing groups and channels of trade and commerce shall

be maintained." It therefore appears that a much more definite criterion than the public interest was supplied.

In *Avent* v. *United States,* 266 U. S. 127, which arose under Section 1, paragraph 15, of the Interstate Commerce Act as amended by the Transportation Act of 1920, this Court said, at page 129, that the Act itself

> "* * * authorizes the Interstate Commerce Commission, whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people; and also, among other things, to give direction for preference or priority in transportation or movement of traffic."

Needless to say, this presents a clear statement of Congressional policy and provides standards for administrative action.

In *New York Central Securities Corporation* v. *United States, et al.,* 287 U. S. 12, which involved an order of the Interstate Commerce Commission under Sections 5 and 20 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, permitting a carrier to acquire control by lease of the railway of another company, this Court, answering the contention that there had been an illegal delegation of legislative authority because the only stated criterion was the public interest, held that the purpose of the Act, the requirements it imposes and the context of the provision in question show the contrary. It spoke of the fact that the Transportation Act of 1920 went forward from a policy mainly directed to the prevention of abuses,

particularly those arising from excessive and discriminatory rates. It was designed to assure more adequate transportation service. The criteria established by the statute referred to the "transportation needs of the public", "the necessity of enlarging transportation facilities" and measures which would "best promote the service in the interest of the public and commerce and the people". It was thus held that the term "public interest" was not without ascertainable criteria but had a direct relation to the adequacy of transportation services, to its essential conditions of economy and efficiency, and to the appropriate provision for and best use of transportation facilities.

Similar observations can be made concerning the case of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U. S. 266. "Public convenience, interest or necessity" is not the only policy or standard set out in the Act involved in that case. As was noted by the Court, Congress by § 9, declared that the licensing authority should "as nearly as possible make and maintain an equal allocation" of licenses, wave lengths, time, station power, etc., to all zones; and the Commission was further directed to make a fair and equitable allocation of these factors "to each of the States, * * * within each zone, according to population." Indeed, in the *Oil* cases, at page 152, Mr. Justice Hughes comments on this case and refers to the fact that the statute itself had declared a policy as to "equality of radio broadcasting service, both of transmission and of reception" and that therefore the standard set up was not so indefinite as to confer an unlimited power.

In *United States* v. *Chemical Foundation, Inc.,* 272 U. S 1, the Alien Property Custodian was given the powers of a common law trustee and was authorized to dispose of alien property under rules to be prescribed by the

dent. The statute contained a proviso requiring sales to be made in the manner therein specified, unless the President, stating the reasons therefor, in the public interest should otherwise determine. The statute had previously restricted the power to sell alien property to cases where it would be necessary for the prevention of waste, but that restriction was removed because experience showed that such restriction defeated the purpose of the Act by bringing advantage to the enemy. The Court stated at page 9 of its opinion that the purpose of the Trading with the Enemy Act was not only to weaken enemy countries by depriving their supporters of their properties but also to promote production in the United States of things useful for the effective prosecution of the war. As shown above, the Act did set up certain standards which, although they could be departed from by the President in the public interest, nevertheless indicated a certain course of conduct. It cannot be doubted in any event that the standards laid down by Congress were far more definite than mere public interest.

It is further to be noted that in each and all of the cases we have considered above the statute had reference to a particular subject matter fully described, defined and limited by such description. For instance, in *Buttfield* v. *Stranahan* the subject matter was imported teas; in *Hampton & Company* v. *United States,* tariff duties; in *Union Bridge Company* v. *United States,* bridges over navigable waters; in *United States* v. *Shreveport,* foods and drugs; in *United States* v. *Grimaud,* Government-owned forest reservations; in *Chesapeake & Ohio Railway Company* v. *United States, Avent* v. *United States* and *New York Central Securities Corporation* v. *United States,* railroads; in *United States* v. *Chemical Foundation, Inc.,* enemy

erty; in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* radio broadcasting. In our case, however, there is absolutely no limitation in respect of the subject matter.

Furthermore in nearly if not all of the cases in which this Court has passed upon alleged illegal delegations of legislative power, the legislation was operative either in a field where Congress is not required to accord judicial review (*Crowell* v. *Benson,* 285 U. S. 22, 50) or in a field of actual or natural monopoly (railroads and radio broadcasting). In a field of the former character the rights of private property may be seriously affected by Governmental action, but no person has the constitutional right to protest against such Government acts as are involved in tariff-making, the conduct of foreign relations generally, the operation of Government-owned property, or those acts necessary to the carrying on of war, such as the seizure of enemy property, etc. The case of monopoly, actual or natural, is somewhat different. The right of Government regulation is necessarily primary, private rights being subordinated.

It is not surprising, therefore, that Congress has been permitted a freer hand in such fields, with respect to the delegation of such extraordinary powers, than could possibly be sanctioned in situations like ours where the attempt is drastically to regulate not only all private businesses engaged in interstate commerce, but all matters claimed in any way to "affect" interstate commerce.

If, in truth, the vast domain of all private business is open to regulation by Congress in the drastic manner contemplated in the Recovery Act, then it is surely true that private citizens directly affected are entitled to have

gress itself lay down the legislative policies with definiteness, declare definite standards which are capable of guiding administrative action and properly restricting it, and to have provision made for quasi-judicial administrative procedure properly conforming to due process of law. Otherwise dictatorship is surely here, for the fact is that the Recovery Act attempts to override and ignore not only the limitations of the Commerce Clause, but the prohibition against illegal delegation of legislative power and the constitutional guarantees of substantive due process under the Fifth Amendment as well. It is a bold and unparalleled piece of legislation of the most sweeping and drastic character.

It cannot be denied that, if the past decisions of this Court still mean what they say, not even Congress (much less its delegates) has constitutional authority to fix minimum wages for purely private businesses, even when the declared purpose is protection of health and morals and even when the regulation is restricted to women and children and to a field in which Congress has the unquestioned power of control. *Adkins* v. *Children's Hospital,* 261 U. S. 525. It cannot be denied that the decisions of this Court with respect to maximum hours of labor go no further than to say that a legislature may restrict the hours of labor in limited situations to 8, 9 or 10 hours, and that the constitutionality of this restriction is definitely predicated solely upon a health relationship.

The Recovery Act throws overboard all these "old-fashioned" limitations; it does not even restrict minimum wages to women or children; it does not restrict them to particular industrial applications; it takes no account of the health or morals factors. In its administration it is

common knowledge that this bold attempt to dictate has spread out into every conceivable trade, industry, business or occupation, whether interstate or intrastate, even to barber shops and clothes pressing establishments. In the case of maximum hours of labor not the slightest attempt has been made in the statute or in its administration to relate the fixing of maximum hours to individual health. No consideration has been paid to the question whether or not the public has any real interest in the businesses, trades, occupations or industries regulated. The regimentation has been all pervasive and all inclusive, and liberty of contract has been utterly ignored.

We have discussed elsewhere the relationship of minimum wages and maximum hours of labor to the Fifth Amendment. Our preceding remarks have been made for the purpose of demonstrating the drastic nature of the regulations permitted by the Recovery Act and their vital effect upon all the activities of the most private and localized businesses, trades, occupations and industries. It must be admitted that even in the case of public utilities having monopolistic privileges such as the railroads, the electric and gas companies, etc., the power to fix minimum wages has been recognized only once by this Court and then only as a purely temporary measure to tide over a special and limited situation. *Wilson* v. *New,* 243 U. S. 332. It is now proposed to discard all limitations under the theory of a general emergency, to ignore the relationship of maximum hours of labor to public health or public safety and the possible relationship of minimum wages to public health, public safety, comfort and morals, and to relate the fixing of the same merely to the entirely vague concept of public welfare. It would seem to be obvious that no such plan should be permitted to prevail over time-honored constitutional guarantees.

**6. The Decision in the Oil Cases clearly demonstrates an Illegal Delegation of Legislative Power in Section 3 of the Recovery Act.**

In its recent important decision in the so-called *Oil* cases, (*Panama Refining Co.* v. *Ryan, et al., Amazon Petroleum Corp.* v. *Ryan, et al.,* 293 U. S. 388, 418) this Court said of Section 1 of the National Industrial Recovery Act:

> "It is manifest that this broad outline is simply an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined if at all by the subsequent sections." (See also similar expressions on pp. 431, 432.)

The Court was there dealing solely with the regulation of oil production, and despite the fact that a separate section of the Recovery Act, to-wit, section 9 (c), attempts to lay down a legislative policy with specific respect to the prohibition of the shipment of "hot oil" (oil produced in excess of state quotas) in interstate commerce, this Court held that there had been an illegal delegation of legislative power by Congress to the President, since Congress had not decreed that "hot oil" should be forbidden to move in interstate commerce *but had merely authorized the President to determine whether or not it should be permitted so to move, without specifying the circumstances or conditions which should govern the President in his determination.*

With respect to the purely intrastate slaughtering and selling operations of the Schechters, the delegation of legislative power by Congress to the President is much more flagrant, for nowhere in the Recovery Act has Congress declared any policy whatsoever, no matter how indefinite or

vague, to govern these operations. The so-called Live Poultry Code is in force, if at all, only by virtue of the scheme provided for in Section 3 of the Recovery Act. This section does not provide that live poultry slaughterhouse markets or any other trade, business or industry shall be regulated by codes of fair competition. *It merely provides that trade or industrial associations or groups may, if they so choose, formulate codes of fair competition and submit them to the President for approval.* If approved, the provisions thereof are to be the standards of fair competition for such trades or industries, and violations thereof, *in or affecting interstate commerce,* shall be misdemeanors. This manner of legislating seems to us to be precisely what is condemned by the Court in the *Oil* cases. It represents an abdication by Congress of its legislative power to the President.[1]

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[1]To sustain the proposition that the use of the word "may", rather than "shall", in Section 3 (a) of the Recovery Act "does not render the delegation invalid", the Government cites certain cases in which delegations of power in permissive language have been upheld. In not one of the cited cases, however, does it appear that any question was raised as to the meaning to be assigned to the permissive language, and in most of such cases the particular provision in which the permissive language was used was a relatively unimportant part of the entire statute in question. Whether or not the absence of a mandatory duty affects the validity of a delegation of power in cases where the particular duty is subordinate or incidental, such cases fall far short of sustaining the Government's contention. The entire context of the Act and the contrasting employment of both mandatory and permissive phrasing throughout, as the subject may require, is conclusive against the Government. A duty to approve all codes not tending to monopoly or to restrain trade would in any event be devoid of practical obligation in view of the practical impossibility of determining these very controversial facts, at least without judicial procedure.

In a footnote to its discussion, the Government cites certain other cases to the effect that "may" imposes a mandatory duty "when used to define the powers of a public official." In none of these cases, however, was there involved any question of delegation, much less of the meaning of permissive language in connection with a delegation. The cited cases simply raised the question whether

Congress has never determined that the live poultry slaughterhouse markets in New York City require for their regulation a code of fair competition. It has adopted no policy with respect to the industry nor prescribed any guides for the President to follow in determining whether or not the industry requires a code of fair competition.

To make matters worse, Congress has nowhere stated in the Recovery Act what shall and what shall not be considered "fair competition" within that industry or within any industry. It has not even announced any standard or criterion of fair competition, no matter how indefinite. The statute baldly attempts to empower the President, with or without the assistance of trade associations, to write the law of fair competition which shall govern all those engaged in an industry, with their consent or without it. It is left within the absolute discretion of the President whether or not to approve a code of fair competition for a particular industry, which may or may not be submitted by a trade association. That legislation of this character is palpably unconstitutional is in our opinion clearly shown by the decision of this Court in the *Oil* cases.

What the Court said therein with respect to the unconstitutionality of Section 9(c) of the Recovery Act in that it unlawfully delegated legislative power to the President applies, it seems to us, *a fortiori* to Section 3 thereof authorizing the promulgation of codes of fair competition

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statutes in permissive language created positive rights (e. g., that trial "may be by court or on demand by jury", *Michaelson* v. *United States,* 266 U. S. 42. Not only do these cases fail to establish that in cases such as those at bar there exists a rule of construction requiring permissive language to be construed as mandatory, but they do not even establish any such proposition for cases of their type. See, for example, *Ritchie* v. *Franklin County,* 22 Wall, 67, cited by the Government.

for trades and industries. At page 414 of its opinion this Court first states that *the subject* to which the Presidential authority relates is defined as transportation in interstate and foreign commerce of oil produced in excess of the amount permitted by State authority. The live poultry slaughterhouse market industry, on the contrary, as we have before remarked, is nowhere mentioned in the Recovery Act, and no Congressional policy to regulate it, even a policy optional with the President, is set down with respect to it. Our case, therefore, for unconstitutionality seems ever so much stronger than the situation which this Court passed upon in the *Oil* cases.

Next the Court says that the question whether the transportation of "hot oil" shall be prohibited by law is obviously one of legislative policy. Likewise the question whether New York City live poultry slaughterhouse markets shall be regulated by a code is obviously one of legislative policy. Next the Court looks to the statute to see whether Congress has declared a policy with respect to the subject in hand, that is, whether Congress has set up a standard for the President's action, and whether it has required any finding by the President in the exercise of his authority to enact the prohibition against the interstate transportation of "hot oil". The Court concludes that Section 9(c) does not qualify the President's authority by reference to the basis or extent of the State's limitation of production, that it does not state whether or in what circumstances or under what conditions the President is to prohibit the interstate shipment of "hot oil", that it establishes *no criterion* to govern the President's course, that it does not require any finding by the President as a condition of his action. The same is true with respect to Section 3 providing for codes of fair competition, except

that monopoly and oppression of small business are required to be *negatived* before the President can act at all. The Court next says that so far as Section 9(c) is concerned, it gives to the President unlimited authority to determine the policy, to lay down the prohibition or not to lay it down as he sees fit, and disobedience to his order is made a crime punishable by fine and imprisonment. The same is precisely true of Section 3 with respect to the approval of the Live Poultry Code except that it does not provide for imprisonment.

The Court next examines the context of the Recovery Act to determine whether it furnishes a declaration of policy or standard of action which can be deemed to relate to the subject of "hot oil". It finds nothing in the balance of Section 9 (which section, in any event, is of no interest in our case). It then turns to the other provisions of Title I of the Act and considers in detail Section 1 which is termed in the Act a "declaration of policy," but which is found by the Court to be *simply an introduction* (p. 418). It remarks that this general outline of policy contains nothing as to the circumstances or conditions in which transportation of "hot oil" shall be prohibited in interstate commerce. It remarks that as to production, the section lays down no policy of limitation, that it speaks in general terms of the conservation of natural resources but prescribes no policy for the achievement of that end. It concludes that Congress did not undertake to say that the transportation of "hot oil" was injurious or unfair competition, that Congress did not declare in what circumstances the transportation should be forbidden or require the President to make any determination as to any facts or circumstances. Also that it did not require the President to choose "among the numerous and

diverse objectives broadly stated",[2] did not require the President to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary, and left the matter to the President without standard or rule to be dealth with as he pleased. The Court then concludes that no ingenious or diligent construction to supply a criterion permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrator executing a declared legislative policy. All of the above seems equally applicable to Section 3 and the Live Poultry Code but with far greater force.[3]

The Court then passes to the sections of the Recovery Act following Section 1 (p. 419). It remarks that Section 3 provides for the approval by the President of codes of fair competition for trades and industries, and that the authority is based upon certain express conditions which require findings by the President. An examination of this section clearly shows that the findings required have nothing to do with the conditions in New York City live poultry slaughterhouse markets, or any other trade, business or industry, affecting the necessity or propriety of the adoption of a code of fair competition for the industry. The findings required merely go to the representative character of the trade or industrial associations or groups proposing codes, to the non-existence of monopolistic conditions and oppression of small business. Hence the vitally necessary requisite that Congress

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[2]The Court might well have added "some of which are diametrically opposed to others."

[3]That Section 3, unlike Section 9, "incorporates by reference" Section 1, has no bearing, since this Court in the *Oil* cases assumed that Section 1 might be employed to aid Section 9, if it declared any policy.

prescribe the affirmative circumstances and conditions to govern the President in his approval of a code for a particular industry are clearly lacking. Nowhere in the Recovery Act are any such circumstances or conditions prescribed at all.

From the foregoing it can be clearly seen that the approval by the President of the United States of the Live Poultry Code was an unconstitutional exercise of delegated legislative authority, first, because Congress omitted to lay down any intelligible policy, or indeed any policy at all, for the governing of the industry; second, because Congress provided no standard to guide the President's action in determining whether a code of fair competition should be approved for any industry, much less for the intrastate operations of the live poultry business; third, because the President is not required to make and (as we shall later show) has made no findings of fact as to the necessity or propriety of a code of fair competition for the intrastate operations of the live poultry business to bring his act of approval within any standard for action that the Recovery Act may contain; and fourth, because Congress has set no limits as to what the "fair competition" provisions of such code may be, but on the contrary has left it to the unrestrained discretion of the President, without any judicial review, to write the law of fair competition for the intrastate operations of the live poultry business, without any procedure complying to any extent with the due process of law required of him.

In further support of our contentions two leading State court cases in courts of last resort of high reputation, one case before the advent of the Recovery Act and one case under a State Recovery Act, are directly in point. In *People* v. *Klinck Packing Company,* 214 N. Y. 121, the New York

Court of Appeals in an opinion concurred in by Judge Cardozo held a provision of an hours-of-labor statute unconstitutional because the Commissioner of Labor was permitted in his discretion to exempt employees engaged in industrial or manufacturing processes necessarily continuous, and in which the maximum labor day was 8 hours, from the provisions of the statute.[4] The Court said at pages 138-139:

> "The question whether the statute shall take effect in any, all, or no cases is left wholly to his volition. Under its terms he has the power without check or guidance, so far as we can perceive, to veto the entire clause and decide that its benefits shall never be extended to any case although it comes within the precise terms of the statute, or to permit the exemption in one case and deny it in another precisely similar one. Of course, it is not to be assumed that the commissioner of labor would intentionally be arbitrary and unreasonable in the exercise of this power, but nevertheless the legislature has attempted to confer upon him the opportunity which would permit of these shortcomings and we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

In *Gibson Auto Co., Inc.* v. *Finnegan, Attorney General, et al.,* (March 5, 1935), 259 N. W. 420, the Supreme Court of Wisconsin held the Wisconsin State Recovery Act unconstitutional as an illegal delegation of legislative power. This Act was patterned after the National Recovery Act, the main distinction being that the Governor had no power to prescribe a code for a trade or industry if one was not

[4]Cf. Secs. 3 (a) and 10 of the Recovery Act.

presented to him by a trade or industrial association for approval. This does not really differentiate the case from ours, however, since the President or Governor has no more right to exercise legislative authority than an administrative body designated by the legislature.

After reciting the provisions of the State Recovery Act, which are closely in accord with those of the National Recovery Act, the Court stated its opinion that it was difficult to conceive of a more complete abdication of legislative power than that involved in the Act before it, in that the power to determine whether or not there should be a law at all was delegated. It further stated that the power to declare whether or not there should be a law, to determine the general purpose or policy to be achieved by the law, and to fix the limits within which the law should operate is a power vested by the Constitution in the legislature and may not be delegated.

The Court then contrasted the provisions of the State Recovery Act with another Wisconsin statute for the protection of the safety and welfare of industrial workers. This statute required employers to furnish safe employment and to furnish and use safety devices and safeguards and to use methods and processes reasonably adequate to render employment and places of employment safe and to do every other thing reasonably necessary to protect the life, health, safety and welfare of employees. The power, jurisdiction, and authority was given by the statute to the Industrial Commission to investigate, ascertain, declare and prescribe what safety devices, safeguards or other means or methods of protection are best adapted to render employees safe in their places of employment and to protect their welfare as required by law. The Court called attention to the fact that this Act did not give the

trial Commission or any other subordinate person, body or group the option to say whether in any particular line of industry there should be a safe place of employment. This the legislature reserved for itself, declaring the objects to be obtained as the protection of life, health, safety and welfare of employees, thus providing a definite objective in the achievement of which the Industrial Commission was merely to aid by filling in the details. The obvious differences between such a valid Act and the invalid State Recovery Act were noted by the Court. The same fundamental differences obtain between such a valid Act and the invalid National Recovery Act.

That the patent deficiencies of the National Recovery Act have been reorganized in high quarters may be gathered from the fact that the President in his message to Congress on February 20, 1935, said:

> "I recommend that the policy and standards for the administration of the Act should be further defined in order to clarify the legislative purpose and to guide the execution of the law, thus profiting by what we have already learned."

**7. The Recovery Act prescribes no Constitutional Method or Procedure for ascertaining what are Unfair Methods of Competition, and in this respect totally Differs from the Federal Trade Commission Act.**

The Federal Trade Commission Act (U. S. C. A., Title 15, Sections 41-51, 38 Stat. 717) declares "unfair methods of competition" unlawful, and then lays down a compulsory method of procedure and a complete scheme for examining into alleged "unfair methods of competition" and making findings in respect thereto. Five impartial Commissioners

are to be appointed by the President with the advice and consent of the Senate. This Commission is empowered to prevent persons from using "unfair methods of competition" in commerce. A definite and detailed procedure is set up. If the Commission has reason to believe that any person is using any "unfair method of competition" in commerce, or if it appears to the Commission that a proceeding would be to the interest of the public, it is required to serve a formal complaint upon the person accused, setting forth the charges. This complaint must contain a notice of hearing for a date and place certain. The person so served has the right to appear and show cause why an order should not be entered requiring him to cease and desist from the alleged unfair practice. Testimony must be taken and reduced to writing. The Commission must make findings of fact, and only after having proceeded in accordance with these requirements may it issue and cause to be served an order to "cease and desist".

To enforce the order the Commission must apply to a Circuit Court of Appeals. Notice must be given to the accused party. The Circuit Court of Appeals has the power to make and enter a decree affirming, modifying or setting aside the Commission's order. The findings of fact of the Commission are conclusive only if they are supported by evidence. The Court may order additional testimony to be adduced before the Commission. In such case the Commission may modify its original order. The judgment of the Circuit Court of Appeals is to be final except for a review by the Supreme Court of the United States upon certiorari. If the Commission does not appear before the Circuit Court of Appeals to enforce its order, the accused may move the Circuit Court of Appeals to set aside the Commission's order. In the hearings before the Commission depositions

and examinations of witnesses are provided for and the right of subpoena is given.

Thus, the finding by the Federal Trade Commission that a person has been guilty of what it considers an "unfair method of competition", is made subject to effective judicial review before any compulsory order may be made. The Circuit Court of Appeals is thus enabled to restrict the findings of the Federal Trade Commission as to what are "unfair methods of competition". Only after a final decree by the Circuit Court of Appeals is there any compulsion upon the accused to alter his conduct, and he can not be penalized in any way unless he violates the court decree.

Let us now examine the Recovery Act to see if any similar method of procedure is prescribed which is protective of an individual's rights to carry on a legitimate business in the competitive arena in a manner which is free and unfettered, as he is constitutionally entitled to do, except for conduct contrary to good morals, in restraint of trade or promotive of monopoly. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421.

Section 3(a) provides for the formulation of codes of fair competition by trade or industrial associations or groups, but makes no mention whatsoever of what provisions these codes shall contain. When such a code has been formulated it is to be presented to the President of the United States for his approval. In approving such a code of fair competition the President is not restricted in any way, except that he must find that the trade or industrial association or group proposing the code is "truly representative" of the trade or industry or a branch thereof and has imposed no inequitable restrictions on admission to membership, and must further find that the code is not designed to promote monopolies or to eliminate, oppress or

discriminate against small enterprises. It is provided that the code shall not permit monopolies or monopolistic practices and it is further provided that where the code affects the services and welfare of persons engaged in other steps of the economic process they shall not be deprived of the right to be heard prior to approval by the President of the code.

There is nothing in this section or anywhere else in the Recovery Act which provides for notice to persons in the industry, particularly those not members of the applicant trade or industrial association, and no provision whatsoever is expressly made for a hearing to determine whether the provisions in the proposed code are properly contained therein. No evidence is required to be taken and no findings of fact are required to be made by the President except those we have mentioned above, which have no relation at all to the fairness or unfairness of most of the practices prohibited by the Live Poultry Code. Thus, in this respect the President is free to act in a purely arbitrary manner. A trade practice is denominated unfair simply by reason of the fact that the preponderant majority in the industry has ordained it to be such, and this without any required notice to other members of the industry, without any required hearing, without any requirement for evidence and without any requirement for findings of fact or judicial review. Thus, it is plain that the code may be formulated in a purely arbitrary and capricious manner, for it makes no difference that the National Recovery Administration may have customarily held informal public hearings to politely listen to the complaints of "persons engaged in other steps of the economic process." When presented for approval to the President his action in approving, rejecting or modifying the same may be utterly arbitrary and capricious, because he

need not say why he acts. Nevertheless as a result of the formulation of a code by an unofficial trade body in this manner and the approval thereof by the President, the wide range of prohibitions contained in such a code as the Live Poultry Code all become criminal offenses.

In the face of this remarkably loose and wholly informal procedure for the creation of crimes, it would seem appropriate to inquire whether the unofficial trade associations proposing the codes or the President in approving the codes are in any way restricted with respect to the provisions to be contained therein, the violation of which upon the President's approval is made criminal.

Section 7 of the statute requires certain labor provisions to be inserted in every code which the President approves. The statute can, however, be searched from beginning to end and no clue will be found to the problem of what other provisions may be inserted in a code. The codes are to be codes of "fair competition." These are words of large import. It does not seem that it was intended that the provisions of the codes were to be restricted to what was deemed "unfair competition" at common law or to what have been declared "unfair methods of competition" by the courts in construing the Federal Trade Commission Act.[5]

[5]In the draft of the Government's brief it is conceded that "fair competition" may be broader in scope than the "unfair methods of competition" in the Federal Trade Commission Act. It is claimed that the *clear* purpose of Congress was to forbid practices regarded by industry as "unfair" because of their tendency to destroy the price structure "without economic justification." This last term is a novel concept to us. It evidently means that the administrators of the Recovery Act may give their imagination full rein. Note for instance the claim that the lower the wages the poorer the chickens imported into New York. Those uninitiated into the mysteries of the new economics might pardonably think that the lower the wage bill the better the grade of the chickens which could be sold to the almost forgotten consumer for the same price.

The evident intention was to allow the freest latitude in formulating so-called codes of fair competition in order that the unofficial ideas of preponderant majorities in particular trades and industries, if they happened to coincide or could be made to coincide with the President's idea of "fair competition", might be enacted into law.

That such judgments of what is or is not "fair competition" are purely arbitrary and capricious there can be no doubt. It is common knowledge that in the actual formulation and approval of codes the concepts of "unfair competition" and "unfair methods of competition" have been carried to extremes never before dreamed of. Witness the great variety of provisions employed in numerous codes such as limitation of production, allotment of production, price-fixing, and the provisions of the Live Poultry Code itself requiring a certain number of employees to be hired for designated volumes of business. The obvious result, if this Court holds such procedure to be constitutional, is to thrust upon the courts the onerous duty of determining the propriety and legality of each and every provision in hundreds of codes, if they have any power at all to judicially review, except with respect to constitutionality, the Presidential fiats creating crimes out of acts not hitherto illegal or made illegal by Congress in the Recovery Act. This is in marked contrast with the Federal Trade Commission Act in which a careful sifting process is provided for.

The procedure prescribed in the Federal Trade Commission Act for defining and preventing the employment of "unfair methods of competition" is due process of law and adequately protects the business man. The procedure prescribed in the Recovery Act for the formulation and promulgation of codes of fair competition bears no resemblance whatsoever to due process of law.

This Court has in no uncertain way prescribed the procedure required to make administrative action conform to due process of law.[1] In *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, this Court held that the Interstate Commerce Commission must make findings of fact based upon evidence introduced before it in the particular proceeding, that all parties must be fully apprised of the evidence submitted or to be considered, must be given opportunity to cross-examine witnesses, to inspect documents and to file evidence in explanation or rebuttal. In no other way, this Court concluded, could a party maintain its rights or make its defence or test the sufficiency of the facts to support the finding. These principles were laid down in answer to the Govern-

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[1]On June 27, 1933, at its first public hearing, the National Recovery Administration announced that inasmuch as the statute laid down no requirements for any public hearings upon codes of fair competition or any procedural requirements, it would determine its own procedure. It then stated that sponsors of codes would be called upon to present evidence on the various matters in Section 3 (a) respecting which the President is required to make findings. It further stated that persons offering objections to or modifications of any code provision or additional code provisions must file a specific statement in writing requesting simply the elimination or addition of a specific provision, or a modification in language proposed by the objector. It further stated that under no circumstances would any party opposing a code be permitted to cross-examine or address any question to any proponent of a code. No mention was made that any evidence was desired as to whether the code would relate solely to transactions "in or affecting interstate or foreign commerce" or as to whether the proposed "unfair practice" code provisions were actually "unfair methods of competition" within the meaning of that term as it had been construed in judicial decisions. Mayers, "A Handbook of N.R.A." (Second ed., 1934), p. 192.

On June 29, 1933, the National Recovery Administration further announced that it was not making a record resembling a record of judicial proceeding or of a proceeding before such tribunals as the Interstate Commerce Commission or the Federal Trade Commission. It further stated that the recommendations of the Administrator to the President would be based upon all available information however obtained.

ment's contention that the Commission could act, not only on evidence produced in the particular proceeding, but also on any information which it might have gathered in performance of its duties, although not presented as evidence therein. This Court definitely said that it could not. The same principle was declared in *United States* v. *Abilene and Southern Railway Company,* 265 U. S. 274.

In *Crowell* v. *Benson,* 285 U. S. 22, this Court declared, at pages 47 and 48, that an award under the Longshoremen's and Harbor Workers' Compensation Act could not be made without proper notice or suitable opportunity to be heard and that all proceedings before a Deputy Commissioner upon a claim under the Act should be appropriately set forth and that whatever facts he might ascertain and their sources should be shown in the record and be open to challenge by opposing evidence and that facts known to him but not put in evidence could not support an award.

In *Wichita Railroad & Light Co.* v. *Public Utilities Commission,* 260 U. S. 48, at page 59, this Court said:

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.
>
> It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the

action of the Commission. We cannot agree to this."

In *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, a very recent authority, this Court reviewed a Virginia statute purporting to authorize the State Highway Commissioner, without notice or hearing, to require railroads to eliminate grade crossings, whenever in his opinion this was necessary for public safety and convenience. The holding in the case was that due process of law had been denied because of the fact that the action taken by the State Highway Commissioner was without hearing, without evidence and without opportunity on the part of the railroad to know the basis therefor. The attempt to empower the State Highway Commissioner to so take property if and when he deemed it necessary for public safety and convenience, said this Court, at page 197, amounted to "the delegation of purely arbitrary and unconstitutional power." The railroad under such circumstances could have had no fair opportunity to demonstrate that the action of the State Highway Commissioner was arbitrary.

The Court further said at page 199: "The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary." The fact that the Virginia Supreme Court of Appeals had held that a remedy by injunction was available to the railroad company was regarded by this Court as insufficient to alter its conclusions.

**8. The President has made no Findings of Fact to bring his Action in approving the Code within any Policy or Standard which the Act may contain.**

Not only are the first and second requirements of the *Oil* cases, to-wit: intelligible policies and reasonably definite

primary standards, not complied with, but the third requirement that there be findings of fact to demonstrate that the President has acted within the limits of his delegated authority, is also completely lacking. See also *Florida* v. *United States,* 282 U. S. 194, 215, *United States* v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454.

The Executive Order of the President approving the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York, dated April 13, 1934, purports to be based upon the "reports, recommendations and findings" of the Secretary of Agriculture and the Administrator for Industrial Recovery. This Executive Order itself contains no findings of facts in any way adequate to meet the requirements of the *Oil* cases decision. In paragraph 4 thereof it is stated merely as a broad conclusion that the Code of Fair Competition constitutes a code of fair competition as contemplated by the Recovery Act and complies in all respects with the pertinent provisions of the Recovery Act including clauses 1 and 2 of subsection (a) of Section 3 of Title I of the Recovery Act (which merely provide that codes shall not be monopolistic or oppressive to small business). In paragraph 5 of the Executive Order the President states that the Code of Fair Competition will tend to effectuate the policy of Congress as declared in Section 1 of Title I of the Act. These are not findings of fact but merely conclusions or self-justifying statements merely following the words of the statute and are insufficient. *United States et al.* v. *Chicago, Milwaukee & St. Paul R. R.,* 294 U. S. 50. It is impossible by examining them to ascertain whether the President has acted within the limits of his authority or not. He does not even state by way of conclusion that Section 7 (a) has been

complied with. But most important of all he utterly fails to state, as the decision in the *Oil* cases requires, what circumstances or conditions he has found to induce him to approve the code, so that this Court may see whether the existing facts and conditions were in any way related to any legitimate object or policy prescribed by Congress in the Recovery Act, or, in any way to interstate commerce. Such action is purely arbitrary.

We turn to the documents upon which the Executive Order is based. These consist of letters of transmittal from the Secretary of Agriculture and from the Administrator for Industrial Recovery, respectively. The letter of the Secretary of Agriculture, dated April 10, 1934, to the President contains nothing but mere conclusions to the effect that the applicants for the code are truly representative of the industry; that the provisions of the code are regulations of transactions in or affecting the current of interstate and foreign commerce; that they are reasonable; that the code is not designed to promote monopolies or to eliminate, discriminate against or oppress small enterprises; that it will not prevent an individual from pursuing the vocation of manual labor or from dealing in farm products; and that it will tend to effectuate the declared policy of Title I of the Recovery Act as set forth in Section 1 thereof, the various clauses of Section 1 being then set forth *seriatim.* It is not stated which one or ones of these many, various and diverse objectives of Section 1 the code or particular provisions thereof will tend to effectuate. As in the case of the Executive Order, it is patent that there are no findings of fact here, but merely conclusions and self-serving statements from which a court reviewing the documents can form no opinion at all as to the propriety of the action taken.

The Administrator's letter, dated April 9, 1934, states that it is a report on those portions of the code which are subject to the jurisdiction of the Administrator for Industrial Recovery. He sets forth what the provisions as to maximum hours of labor and minimum wages are, and also states that the report of the Research and Planning Division indicates that this code will effect an increase in wages of about 20% in the industry and an increase in employment of 19.2%.

He does not find or indicate in any way the conditions or circumstances justifying or requiring the imposition of regulations for maximum hours of labor and minimum wages, nor the bases for the fixing thereof, nor does he find even as a conclusion that either, or both of these regulations, of themselves, as distinguished from the Live Poultry Code as a whole, will in any way effectuate the policy of Section 1 of the Act, or which of the many, diverse and contradictory policies they or the Live Poultry Code will tend to effectuate.

Neither the Executive Order of the President nor the Secretary of Agriculture's letter nor the letter of the Administrator for Industrial Recovery contains any statement which can possibly be construed as a finding that any of the competitive practices prohibited in the Live Poultry Code are actually "unfair methods of competition." For instance, the "straight killing" provision of the Live Poultry Code is certainly not an "unfair method of competition" within the meaning of the Federal Trade Commission Act. How can it be an unfair practice to permit a purchaser to buy goods, wares or merchandise of his own choice and to pay for them in accordance with their value? That is what "selective killing" amounts to. To term it an unfair practice is to interfere with ordinary business

methods and to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. Before the adoption of the Live Poultry Code, "selective killing" was always a lawful practice.

Furthermore, there are obviously no administrative findings of any kind whatsoever which relate the provisions of the Live Poultry Code to any of the alleged policies set forth in Section 1 of the Recovery Act. Neither the conditions nor the circumstances justifying or requiring the imposition of regulations for maximum hours of labor and minimum wages, nor the bases for the fixing thereof, are indicated in any way. It is not found even as a conclusion that either of these regulations of themselves, as distinguished from the Live Poultry Code as a whole, will in any way effectuate the policy of Section 1 of the Recovery Act, much less that either of these regulations or both will effectuate any particular one of the many, diverse and conflicting policies allegedly contained therein. And the same is true with respect to each and every one of the other provisions of the Live Poultry Code. None of the practices termed by the Live Poultry Code "unfair methods of competition" has been found by any administrative officer or the President to relate to any particular one of the many, diverse and conflicting provisions and "policies" in Section 1.

Furthermore, in none of the administrative documents referred to above is there any statement that such findings as may have been made were made upon the basis of the "evidence" introduced at the public hearing. It may well be the fact, and, if the usual manner of procedure in adopting codes of fair competition is any criterion, undoubtedly is the fact, that all sorts of extraneous "evidence" and information not offered at the public hearing, and hence not

accessible to interested persons for testing, contradiction and rebuttal, was considered by the administrative officers.[1] That findings, if not properly based upon publicly offered evidence are worthless, is amply demonstrated by the cases previously discussed.

**9. The Provisions for Maximum Hours of Labor and Minimum Rates of Pay are Invalid Delegations of Legislative Power.**

The terms "minimum rates of pay" and "maximum hours of labor" mean precisely nothing unless referred to some bases, criteria or standards. All they say of themselves is that no less shall be paid and no greater time shall be worked than may be prescribed by regulations not yet in being. It must be conceded that Section 7 contains no bases, criteria or standards for the fixing of either of these matters. We must therefore look either to the remainder of the Recovery Act, or attempt to determine whether judicial, or extra-judicial glosses (if they indeed be admissible) exist which are capable of transforming these wholly indefinite abstract expressions into concepts of sufficient definiteness to adequately canalize administrative action and to prevent it from being purely arbitrary. Resort to the remainder of the Recovery Act will be fruitless, as we shall later demonstrate. We therefore seek for admissible glosses.

First as to "maximum hours of labor." Numerous statutes have been enacted prescribing 10, 9 or even 8 hours

[1]The Government concedes that after the public hearing the Live Poultry Code was substantially changed on the basis of "the hearings" and "reports", the latter quite evidently not having been available at the public hearing.

a day as maxima in limited situations. The universal basis or justification has been the relationship to individual health.[1] So far as we know, no statute before the Recovery Act has ever attempted to grant to an administrative agency the power to fix the maximum number of hours for labor, either without any respect to the health factor or without any limitation as to persons and businesses affected. The courts have therefore never had the occasion to consider what "maximum hours of labor" in the abstract means, if anything. If they had ever had the occasion to do so, the only possible definition would have been something like this: the number of hours a man or woman can safely work with due regard to health under the particular conditions of particular industries.

The setting by the Live Poultry Code of 48 hours a week as the maximum work week in live poultry markets is, however, not even attempted to be justified on the score of health. The Government evidently concedes that the sole purposes of this provision as administratively construed are (1) to effect the sharing of work in order to relieve unemployment, and (2) to complement the minimum wage provision and hold up the wages and purchasing power of workmen by preventing the exaction of more work for the minimum wage than deemed desirable. The publicly known goal of administrative endeavor under a statute does not, however, import that goal into a statute or save it from illegal delegation of legislative power by providing a policy that Congress did not provide.

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[1] *Riley* v. *Massachusetts,* 232 U. S. 671; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385; *Holden* v. *Hardy,* 169 U. S. 366; *Muller* v. *Oregon,* 208 U. S. 412; *Bunting* v. *Oregon,* 243 U. S. 426.

Just as in the case of "maximum hours of labor," the gloss, if any, upon "minimum rates of pay" in judicial decisions and in sociological and economic literature points to policies and goals not embraced within the Recovery Act, either as it reads or as administratively carried out. Prior to the Recovery Act minimum wage laws were exclusively based upon the relationship of the wages required to the health and morals (as embraced in the term "decent living") of the individual employees, and justification was always attempted on these grounds.[2] *Adkins* v. *Children's Hospital,* 261 U. S. 525. These are obviously not goals of the present Act, which concerns itself solely with industrial recovery.[3]

We turn now to the Recovery Act to see if anything therein tends to define the terms. First, there is Section 1 of the Recovery Act entitled "Declaration of Policy". In the *Oil* cases this Court declared that this was "simply an introduction" to the Recovery Act. It refers vaguely, of course, to widespread unemployment, the undermining of standards of living of the American people (not merely employees in industry) the desired increase of purchasing power (without reference particularly to labor), relief of unemployment and the improvement of standards of labor. All of this is very vague and it is certainly no justification for the administrative fixing of minimum wages and maximum hours of labor.

The various objectives of Section 1 are referred to in the *Oil* cases as "the numerous and diverse objectives broadly stated"; as "the extremely broad description of widely different matters"; and again "the many and various objects generally described".

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[2]The *Wilson* v. *New* situation was unique and not typical.
[3]The Government so concedes.

The truth is that Section 1 attempts so much that it accomplishes nothing. It is palpably a device to mask a wholly complete delegation of legislative power. If Section 1 were the only guide, there is no action conceivable which the President could not take with respect to the regulation of industry and have it fit into one or more of the pigeonholes provided in Section 1. Its various clauses are mere pious hopes, not legal standards or definitions of policy. We need not labor the point, however, since it would clearly appear that this Court has definitely disposed of this section, whether considered as an introduction to Section 9 (oil regulation) or to the preceding sections, by terming it "simply an introduction" and refusing to regard it as a substantive declaration of policy or prescription of standards for administrative action.

In any event it is hopeless to attempt to relate such undefined concepts as "maximum hours of labor" and "minimum rates of pay" to any of the "many and diverse objectives" of Section 1. As many or more people think "purchasing power" is increased by long hours as have espoused the "new-fangled" idea to the contrary. At any rate, Congress certainly did not ordain which policy should be adopted. There is the same disagreement in opinion with respect to relief of unemployment, as to whether a policy of high wages or low wages will best succeed. All Congress has decreed is that the regulation of hours and of rates of pay shall be optional with the President, without prescribing in any way how these regulations shall be carried out. In improving standards of living, long hours (and even low pay at least in the long run) may well succeed, where the opposite policy will fail. Certainly the "fullest possible utilization of the present productive

capacity of industries" is promoted by long hours, not short. Thus the alleged standards of Section 1 do not in any way make more definite or limit the wholly unlimited authorization in Section 7 for "maximum hours of labor" and "minimum rates of pay".

Lastly, we look to Section 3 and to the term "fair competition" to see if it in any way helps to define "maximum hours of labor" or "minimum rates of pay". Certainly no decision of this Court, or of any other so far as we are aware, has ever held that hours of labor or rates of pay to workmen have any relation to the well-known concepts of "unfair competition" or "unfair methods of competition." See *Howe Scale Co.* v. *Wycoff,* 198 U. S. 118; *Hanover Co.* v. *Metcalf,* 240 U. S. 403, 412; *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427-8. The idea seems to have originated with well-intentioned social welfare workers, who never having had to meet a payroll, seem to feel that it is more unjust for a business to pay employees what it can than to leave them unemployed.

Thus the upholding by this Court of the definiteness of the term "unfair methods of competition" in the Federal Trade Commission Act has no bearing here, and the attempt to justify the imposition of maximum hours of labor or minimum rates of pay as being "unfair competition" is wholly unjustified. Unfair competition at common law was limited to the "passing off" of one's goods for another's. *Howe Scale* v. *Wycoff, supra; Hanover Co.* v. *Metcalf, supra.* For this reason the expression "unfair methods of competition" was employed in the Federal Trade Commission Act. We are unable to find that either prior to that Act or subsequent thereto this Court has ever sanctioned the idea that "long" hours of labor or "low" rates of pay might

be included within the terms "unfair competition" or "unfair methods of competition". In *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, this Court said at page 427:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine, as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

It is idle to argue, as the Government does, that it would not have been feasible for Congress to lay down a reasonably definite standard with respect to "maximum hours of labor." We do not claim that the policy or standard which Congress would have to lay down need be precise and inflexible as, for instance, an 8-hour day for all industry, although it may not be amiss to note that just such a legislative proposal is now being seriously advanced in the case of the 30-hour week bill now before the Congress. Surely Congress could easily have set upper and lower limits in the case of maximum hours of labor as was done in the case of the gold legislation. As matters stand at present, the President is free arbitrarily to prescribe a 10-hour week for one industry and an 80-hour week for another. He is likewise free to make minimum wages for one industry $5 a week and for another $100 a week, and need pay no heed to the financial ability of the employers

to pay. Thus the power to ruin any business or industry lies in his hands, if these delegations be sustained. The truth is that these provisions were drafted with voluntary codes in view and cannot possibly be applied to those who do not see fit to join in the application for a code.

Lastly it is to be noted that the imposition of maximum hours of labor and minimum rates of pay upon businesses and industries by the President, the latter of which has been referred to by this Court as the "heart of the contract", is not required to be governed in any way by the nature of the industry or business. Healthy industries and businesses are within the reach of the power equally with unhealthy industries and businesses. Industries or businesses affected with a public interest or which, owing to their peculiar nature, seem to demand regulation in the public interest, are not distinguished in any way from businesses or industries of which this cannot be said. All businesses and industries are grouped indiscriminately and the President may regulate at will those which he selects in his unrestrained and absolute discretion.

**10. The Manner in which the Legislative Powers Illegally Delegated in the Recovery Act have actually been Exercised.**

The Recovery Act authorizes the President to re-delegate the almost illimitable powers conferred on him by the Act to various commissions, bureaus, officers, and other agencies. The result is that these various bodies and functionaries have the power to make the laws of the United States. It is common knowledge that it is impossible for an ordinary citizen to know what these laws are, not only

cause of their tremendous volume, but also because they are constantly shifting and changing and because nowhere can be found a comprehensive collection of the thousand and one enactments which are almost daily ground out by these agencies and which in many cases are unintelligible and inconsistent.

In the report of the special committee of administrative law, submitted to the 57th Annual Meeting of the American Bar Association, the following description of these laws appears at pages 215-216:

> "The practice of filing Executive Orders with the Department of State is not uniformly or regularly followed, and the totals are really greater than above indicated. Some orders are retained or buried in the files of the government departments, some are confidential and are not published, and the practice as to printing and publication of orders is not uniform. Some orders are made known and available rather promptly after their approval; the publication of others may be delayed a month or more, with consequent confusion in numbering. The comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalties by way of fine and imprisonment for violation is without numerical precedent in the history of the government.
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> "Of the recent output, approximately half have been issued under or pursuant to the National Industrial Recovery Act, and have had to do either with its administration, agencies, and appropriations, or with the approval of codes and amendments thereof.
>
> "The total volume above stated does not include the contents of the codes and amendments, all of which according to the act, have the force and effect of law and violation of any provision of which is a

criminal offense. To June 25, 1934, 485 codes and 95 supplements have been approved, averaging 10 closely printed pages to each code and supplement. Of these, approximately 226 codes and 7 supplements were approved by Executive Orders of the President. 242 codes and 88 supplements were approved by the Administrator for Industrial Recovery, 16 codes by the Secretary of Agriculture and 1 general code by the Petroleum Administration, all under authority delegated by Executive Order. Most of the codes established 'quasi-administrative' agencies, called 'code authorities' under which were pyramided a whole hierarchy of countless divisional, regional and local agencies, and many of which were given a measure of legislative power. It would be impossible to calculate the volume of 'law' made by these agencies.

"To June 16, 1934, the Administrator for Industrial Recovery had issued 2,998 administrative orders, approving or modifying codes, providing for exceptions and exemptions therefrom, and covering a multitude of other activities of a legislative order. Countless 'interpretations' of codes have been issued by the NRA and the many code authorities, of which there is no real record or indexing, or even any trustworthy source of information. Finally, and perhaps most astounding of all, the NRA has adopted numerous regulations and sets of regulations which are to be found scattered among 5,991 press releases issued up to June 22, 1934, and the NRA staff itself has not segregated such press releases having a legislative effect from those of an informational or news character.

"The total legislative output by, or in connection with, this one administrative agency staggers the imagination. Any calculation involves guess-work but a safe guess would be that the total exceeds 10,000 pages of 'law' in the period of one year.

> This figure may be compared with the total of 2,735 double-column pages which comprise the total Federal statute laws as set forth in the Code of Laws of the United States and the cumulative supplement of 1933. When the legislative production of other Federal administrative agencies is taken into account, it should not be difficult to demonstrate that the total volume of administrative legislation now in force greatly exceeds the total legislative output of Congress since 1789."

Some idea of the volume of "law" which has been produced can be obtained from the following summary:

> "In the first year of the National Recovery Administration, 2,998 administrative orders were issued. In addition to these, the Recovery Administration has adopted numerous regulations and sets of regulations which are to be found scattered among 5,991 press releases during this period. It has been estimated that the total amount of 'law' evolved during the first year of the NRA's activities exceeds 10,000 pages, probably a greater volume than the total amount of statute law contained in the United States Code." Erwin N. Griswold, "Government in Ignorance of the Law—a Plea for Better Publication of Executive Legislation." 48 Harvard Law Review 198, 199 (1934).

When it is taken into consideration that this Live Poultry Code is only one of many hundreds; that in the first year of the National Recovery Administration 2,998 administrative orders were issued and that its additional rules and regulations were scattered through 5,991 press releases and that this constituted but a part of the mass of regulations, orders and rules, issued by agencies of Government possessed of the power to make rules and regulations

having the effect of law, it can be safely asserted that we have now *"government in ignorance of law."*[1]

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[1]An illuminating discussion of code making under the National Industrial Recovery Act is contained in an address by Gilbert H. Montague, entitled "Lawmaking by Executive Fiat under the National Industrial Recovery Act", before the New York State Bar Association on January 25, 1935, Vol. LVIII, Reports of the New York State Bar Association.

The following is a partial paraphrase of Mr. Montague's description of code making:

The routine procedure customarily followed in the formulation and adoption of codes of fair competition does not afford business men vitally interested in what the provisions of a code shall be any real opportunity to oppose provisions unsatisfactory to them. It is true that prior to the public hearing they may talk among themselves and may be "heard" at the public hearing if they happen to know about it. But the full opportunity required by due process of law to test, explain or controvert all probative matter considered in reaching a decision is not granted.

The normal procedure is that the association or group desiring the code appoints a code committee which informally confers in private with a Deputy Administrator, who necessarily has only a sketchy knowledge of the industry and who must reply upon whatever information is afforded him by the code committee or upon such information as he may receive from representatives of various advisory boards, such as the Consumers' Advisory Board, the Labor Advisory Board and the Industrial Advisory Board. In these conferences a rough draft of the code is hammered out and is submitted at a public hearing. This hearing is called by affixing a notice upon a bulletin board in the Department of Commerce Building, and persons to be affected by the code may or may not learn of the hearing.

The public hearing is the only opportunity for persons "engaged in other steps of the economic process" to which the particular code relates to be heard and objections may be made by them either orally or in typewriting.

Subsequently, a number of conferences between the code committee, the Deputy Administrator in charge and the representatives of the various Advisory Boards are held, at which numerous changes are frequently made in the text of the code as presented in the public hearing. Neither the changes themselves nor the factual information on which they are based are necessarily or even customarily made public before the approval of the code, although the changes may vitally affect the import of the code.

Eventually, the Deputy Administrator obtains memoranda, data and reports from the various Advisory Boards and makes recommendations to the supervisory Board which the President has designated

In considering this question of improper delegation of legislative power, it is well also to bear in mind that, while under the Recovery Act the only methods of enforcement provided by statute are criminal prosecutions and injunctive proceedings in the Federal courts and proceedings before the Federal Trade Commission reviewable in the Federal courts, the various administrative agencies assume the power to sit in judgment upon individuals whom they have chosen to accuse of code violations with no right of judicial review of their sentences. Accusations have been made, tried, sustained and punishments imposed and with relatively few exceptions no effort has been made to use the methods of enforcement provided by the Recovery Act, but employers have been kept in line by using the coercive force of Government boycott, compliance has been enforced by depriving persons charged with code violation of the use of the Blue Eagle, of the right to compete for Government contracts, by forbidding all contractors engaged in Government work to purchase materials or supplies produced or furnished, in whole or in part, by one who has not complied with the code, by withholding financial aid extended to industry by the Reconstruction Finance Corporation, and by threatening to revoke the licenses of radio broadcasting stations which do not deny their facilities to advertisers "who are disposed to defy, ignore or modify the codes established by the NRA."

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to succeed to the powers of the Administrator for Industrial Recovery. Such recommendations may or may not follow the memoranda, data and reports submitted by the Advisory Boards and may differ vitally from the recommendations of the code committee. The supervisory Board may then approve the code in the form recommended by the Deputy Administrator or it too may make important changes therein. After the supervisory Board has given its approval the code goes directly to the President for final approval without any further public hearings of any kind.

## SUBDIVISION II OF PART I—COMMERCE CLAUSE AND FIFTH AMENDMENT

### I

### THE SCOPE OF THE RECOVERY ACT AND THE CODES THEREUNDER. THE FULL SIGNIFICANCE OF THE ADMINISTRATION'S VIEW OF THE EXTENT OF FEDERAL POWER UNDER THE COMMERCE CLAUSE.

**1. The Government's interpretation of the Recovery Act and of the Commerce power.**

The Federal power under the Commerce Clause has here been exerted to decree that a person privately employed in a slaughterhouse in Brooklyn, New York, shall not be permitted to work more than 60 hours per week; and that his employers, who are engaged solely in the business of acquiring, slaughtering and selling chickens for local consumption after they have completed an interstate journey and come to rest as part of the general mass of property within the State, must pay him not less than 50c per hour for his services. The novelty of this extension of the Federal power was adverted to by the courts below[1] and has been conceded by the Government.[2] While it has been necessary for these defendants to prepare this brief in advance of the receipt of any brief from the Government,[3] the construc-

[1]R. 150, 1661-1663.

[2]Brief for the United States in this case in the court below, p. 20. See, Brief for the United States in *United States* v. *Belcher,* No. 628, of the present term in this court (p. 113).

[3]As previously stated, a preliminary draft of the Government's brief was received after the text of this brief was written. There is nothing in the preliminary draft of the Government's brief (as appears from a hasty examination thereof) which calls for any change in the general treatment of the case in the defendants' brief. To the extent

tion given by the Administration to the Constitution, and to the Recovery Act, in order to justify this bald interference with the liberty guaranteed by the Constitution to the citizen, both employer and employee, and this extension of Federal power into fields of local activity specifically reserved by the Constitution to the States, is not in doubt. It is apparent on the face of the statute; from the consistent administrative construction of it as embodied in the code here involved and in other codes; and from the defense which the Government has made of it in judicial tribunals, both in the courts below in this case, and in other cases.

On its face the Recovery Act goes beyond the language of the constitutional grant. The Constitution empowers the Congress "to regulate Commerce * * * among the several states" (Art. I, Sec. 8, clause 3). The Recovery Act, on the other hand, extends the Federal power to regulate, among other things, the wages and hours of employees "in any transaction *in or affecting* interstate or foreign commerce"[4] (Sec. 3(b), Sec. 3(c), Sec. 3(f), Sec. 4(b)). The code involved in this case, in common with many other codes, is not limited to the regulation of transactions in interstate commerce, but on its very face purports to govern

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that time permits, specific references will be made to certain portions of the Government's brief although reference by page number will be impossible. It may be that all of the contentions of the Government as to the scope of the commerce power made by it in the court below and in other kindred cases (upon the basis of which this brief has been written) are not specifically renewed by the brief of the Government in this case, but the logical consequences of the Government's contention in this case, as to the scope of such power, are such as to draw within it all such contentions hitherto made and herein referred to.

[4]That the Administration's construction of this statute, as detailed in the following discussion, is correct, would appear from the use of the disjunctive "or" between "in" and "affecting".

> "*every person* engaged in the business of selling, purchasing for resale, transporting or handling and/or slaughtering live poultry, from the time such poultry comes into the New York Metropolitan Area to the time it is first sold in slaughtered form" (Art. II, Sec. 1, R. 15-16) (Italics ours).

The wage and hour counts of the indictment in the instant case are therefore consistent with the language of the Recovery Act and of the code in charging, without more, that the violation of the Federal law of which these defendants are guilty consists in "affecting" interstate commerce by making a contract with an employee in their slaughterhouse business in Brooklyn prescribing mutually satisfactory terms as to hours and wages, (R. 101-102; 111-112, 47). This is said to give the defendants an advantage over other slaughterhouse men who pay employees code wages for code hours, which, it is said:

> "prevents the accomplishment of the purposes of said Code, and of the said National Industrial Recovery Act, causes a disruption in the normal flow of the interstate commerce in live poultry coming into the State of New York from other states, and diverts substantial interstate shipments of such poultry" (R. 97, see R. 102; R. 107, see R. 112).

Construing the Recovery Act, the Government frankly argued in its brief in the court below in this case that:

> "if a transaction affects interstate commerce to any extent, however slight, it is within the literal meaning of Section 3(f) of the Recovery Act" (p. 25);

that

> "it is entirely unnecessary to establish that the specific violations substantially affected interstate commerce" (p. 23);

and that to give the Recovery Act any narrower construction

> "would conflict with the general tenor of Title I, which shows no tendency to stop short of a complete exercise of the federal commerce power" (p. 25).

The Government further argued that

> "the power to legislate as to general trade practices merely 'affecting' interstate commerce though never before so broadly expressed, has been recognized since the earliest case dealing with the commerce clause" (p. 20); and
>
> that "it is immaterial" that the activity regulated occurs only "after the physical transportation has ended and the subject matter has come to rest within a state" (p. 26).

In short, the Government takes the affirmative position that the Federal power under the Commerce Clause extends to any and all transactions which "affect interstate commerce" and that the Recovery Act was enacted and is being administered upon that theory. The phrase "affect interstate commerce", it is said, "has come to have an established and somewhat technical meaning", and the Government defines it as follows:

> "A transaction is said to affect interstate commerce when, without being 'in' interstate commerce, it stands in such a relation to interstate commerce as to be subject to the federal commerce power" (p. 24).

This of course begs the question. The question is what transactions "affecting" interstate commerce, without being

"in" interstate commerce, are subject to the federal commerce power. The government answers "all".

The view thus taken by the Government in the court below was also the ground of its brief in this Court in the *Belcher* case, and must constitute the basis of its argument in this case in this Court, unless it has recently changed its position. In the *Belcher* brief this Court was told that there is no closed class or category of transactions "affecting interstate commerce" (p. 72); that the question is one of economic fact to be determined anew in each case (p. 103); and that the limits of this new doctrine are to be worked out by the process of judicial inclusion and exclusion (pp. 93-94), with the function of the courts limited by the rules relating to the presumption of the constitutionality of legislative acts, and of the regularity of administrative and executive proceedings (pp. 116-117, 118).

The Government nowhere contends that the power thus asserted is anywhere conferred upon the United States by the express language of any grant in the Constitution. It points to no precedents in our national history for the exertion of such a power by the Federal Government, but on the contrary expressly admits that this statute goes beyond anything which the Federal Government has ever attempted heretofore. "Judicial precedents construing prior exercises of the commerce power," this Court was told in the Government's brief in the *Belcher* case, "are of little value in the present connection, because Congress had never before attempted to deal in a national way with a national breakdown of commerce" (p. 113).

It is true that despite this apparent frankness the Government attempted in the court below, and in its brief in the *Belcher* case, and will doubtless attempt in this Court,

to justify this theory of constitutional "construction" upon the basis of decisions of this Court which have upheld the national authority to reach intrastate transactions as an incident to the protection of freedom of that which is concededly interstate commerce and in order to protect such commerce from contracts, combinations, conspiracies or acts of individuals, or from regulations of States, which "directly and substantially, and not merely indirectly, remotely, incidentally and collaterally," "and not as a mere incident to other and innocent purposes" "limit or restrain, and hence regulate interstate commerce." (*Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 228, 229.) The grounds and limits of these exceptional decisions are discussed elsewhere in this brief. As the Circuit Court of Appeals in this case pointed out, the argument which the Government bases upon them is one which assumes to draw general principles from statements in opinions in particular cases without regard to the facts of the particular case or the scope and purpose of the statute involved in such cases, and that the argument "appears formidable only in case the conclusion is surreptitiously introduced during the reasoning" (R. 1662-1663).

The theory of the Recovery Act, as appears by its terms and by the Administration's construction of it, is that Federal regulation of intrastate activity is the rule and not the exception. The real question in this case is not whether some or any of the activities of these defendants might not be reached by the Federal Government as an incident to the enforcement of a proper statute directed to the regulation of commerce among the several states. (*Cf. Local 167* v. *United States,* 291 U. S. 293.) The issue is not whether the principles of the Constitution as exemplified in the supremacy clause shall continue

to be construed, as they have been in the past, to give the Federal Government such authority over intrastate transactions as is necessary to permit it adequately to make bona fide provision for the regulation of interstate commerce. The question, as disclosed by the statute and the Government's arguments in its support, as well as by consistent methods of its administration for nearly two years, is not whether there shall be adequate "play in the joints of government" to permit of the regulation of interstate commerce. The issue is whether the Constitution is to be disregarded and governmental assumption of the power to regiment all individual commercial activity and all industry—whether commerce or not and whether interstate or not—is to be sustained.

**2. The scope of the Recovery Act as evidenced by the codes enacted thereunder.**

In its brief in the *Belcher* case, the Government contended:[1]

> "The decision [of the particular case before the Court] cannot be affected by suggestions that if the present power is sustained it will extend to subjects which have only a fanciful relation to interstate commerce. No such suggestion has heretofore prevented the process of judicial inclusion and exclusion from resting upon the facts of the case presented for decision" (p. 94).

It is true that the rule of decision of this Court is not to go beyond the facts for the decision of particular cases. That rule has not, however, resulted in this Court closing

[1]The contention is repeated in the draft of the Government's brief in this case in this Court.

its eyes to the necessary effect of its decision upon matters not directly involved in the suit at bar. Thus, in *Norman* v. *B. & O.*, 294 U. S. 240, recently decided, the Court recognized that although the case then before it involved the contracts of private parties only, the principle to be decided necessarily also related to the contracts of states, municipalities and other political subdivisions, and it proceeded to rule expressly upon the status of such obligations, even though no question in respect of such an obligation was presented in the case then at bar.[1a] In the instant case, we submit, the public interest requires, just as strongly as it did in the Gold Clause Cases, that the Court take notice of the effect of its decision, not only upon these defendants, but upon the people of the nation as a whole. The code involved in this litigation is not an isolated piece of regulation. The official publication of the codes approved and promulgated under the Recovery Act fills no less than 19 closely-printed volumes of the edition issued by the National Recovery Administration, and, as will be shown, purports to regulate a vast range of activities covering wide fields of human endeavor and a large number of persons.

The Government's suggestion as quoted at the outset of this section clearly intimates either that the Federal power under the Commerce Clause and under this Act will not be extended to subjects which have only a fanciful relation to interstate commerce or it suggests that this Court should close its eyes to the fact that it has already been so extended. That the latter only can be the meaning

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[1a]In *Norman* v. *B. & O.* the Court stated:

> "The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of States and municipalities, or of their political subdivisions, that is, to such engagements as are within the reach of the applicable national power."

is clearly demonstrated by a consideration of a few of the codes which have been promulgated and placed in operation under this statute. It is not too much to say that these codes purport to regulate human activities literally from the cradle to the grave and beyond. Thus there is a Code of Fair Competition for the Infants' and Children's Wear Industry covering "the manufacture of infants' and children's wear"[2]; there is a Code of Fair Competition for the Funeral Service Industry which covers "any person, firm, corporation or other form of enterprise, engaged in the preparation of dead human bodies, for burial"[3]; a Code of Fair Competition for the Retail Monument Industry covering "the retail selling, designing, lettering, cleaning, erecting and repairing of monuments and such manufacturing, building and setting up as is incidental thereto"[4] and a Code Supplement regulating the trades of jobbers, distributors, dealers, manufacturers and assemblers of hearses and ambulances[5].

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[2] Approved Code No. 373, approved March 27, 1934, Vol. VIII, page 607, Codes of Fair Competition issued by the National Recovery Administration [Volume references hereinafter cited are to this edition].

[3] Approved Code No. 384, approved April 4, 1934, Vol. IX, page 155. This code covers: "any person, firm, corporation or other form of enterprise, engaged in the preparation of dead human bodies, for burial or disposal by embalming or other sanitary methods and/or directing and supervising funeral services prior to burial or disposal, and/or the sale of funeral merchandise at retail, and shall include all persons, firms, corporations, or other forms of enterprise, maintaining a mortuary, funeral home or other similar establishment and/or using in connection with their name and business, the words 'funeral director', 'mortician', 'undertaker', or any other title or words of similar meaning and import and such branches or subdivisions as may from time to time be included under the provisions of this code."

[4] Approved Code No. 366, approved March 26, 1934, Vol. VIII, page 511.

[5] Supplement to Code of Fair Competition for the Automobile Manufacturing Industry covering fair trade practices for the Funeral Vehicle and Ambulance Subdivision of the said Industry, approved November 8, 1933, Vol. II, page 671.

These codes state no facts to show that the business regulated has any relation to interstate commerce or that the regulation will have any effect upon such commerce other than the hoped for increase in general prosperity through the raising of wage levels and the spreading of work. Notwithstanding this, all these codes, and those hereinafter referred to, with few exceptions, are accompanied by a report of the Federal Administrator containing the standard finding substantially as follows:

> "I find that:
>
> "(a) Said Code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof and will provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among the trade groups, by inducing and maintaining united action of labor and management under adequate governmental sanctions and supervision, by eliminating unfair competitive practices, by promoting the fullest possible utilization of the present productive capacity of industries, by avoiding undue restriction of production (except as may be temporarily required), by increasing the consumption of industrial and agricultural products through increasing purchasing power, by reducing and relieving unemployment, by improving standards of labor, and by otherwise rehabilitating industry."

There are also codes which on their face and by express terms exclude the suggestion that they constitute a regulation of interstate commerce, such as the Code of Fair Competition for the Transit Industry, which covers, *inter alia,*

"automotive buses transporting passengers solely within State lines, except when engaged in interstate commerce."[6]

Many other codes have also been established in relation to subjects which, it can fairly be said, have only a fanciful relation to interstate commerce. In this category there is included a Code of Fair Competition for the Barber Shop Trade, which regulates, *inter alia,* "shaving and trimming the beard, cutting and dressing the hair, and rendering kindred personal services, principally to males, for compensation," which includes bootblacks and brush-boys, and "any person in a barber shop engaged in the business of caring for and treating the finger nails."[7] The text of this code nowhere mentions interstate commerce, notwithstanding which the Executive Order approving it states, as is the general practice, that it is approved upon an application made "pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act" (Vol. IX, p. 331), and the accompanying report of the Administrator contains the standard "finding" previously quoted, including the finding that "Said Code is well designed to promote the policies and purposes of Title I of the National Industrial Recovery Act, including removal of obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof * * *" (Vol. IX, p. 335).

There is a similar code for the Bowling and Billiard Operating Trade which covers the "furnishing for a consideration of facilities and equipment for bowling and billiards"[8]; for the Motor Vehicle Storage and Parking

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[6]Approved Code No. 28, approved September 18, 1933, Vol. I, page 371.

[7]Approved Code No. 398, approved April 19, 1934, Vol. IX, page 331.

[8]Approved Code No. 346, approved March 17, 1934, Vol. VIII, page 221.

Trade[9]; for the Cleaning and Dyeing Trade[10]; for the Shoe Rebuilding Trade covering "the repairing, rebuilding and remodeling of any and all kinds of foot-wear and the performance of all work incidental thereto" and also covering bootblacks[11]; for the Advertising Display Installation Trade[12]; for the Merchant and Custom Tailoring Trade[13]; for the Real Estate Brokerage Industry, including the activity of acting as a representative in the buying, selling, exchanging or leasing of real property and writing insurance and the negotiation of loans on real property, as an adjunct to the Industry[14]; for the Retail Trade including the "selling of merchandise to the consumer and not for purposes of resale in any form"[15]; for the Burlesque Theatrical Industry covering practices and hours and wages of employees in "a type of musical entertainment known in theatrical parlance as burlesque"[16]; and for the Laundry Trade, including "the washing and ironing of articles of clothing," etc.[17]

[9]Approved Code No. 147, approved December 7, 1933, Vol. III, page 577.
[10]Approved Code No. 101, approved November 8, 1933, Vol. II, page 547.
[11]Approved Code No. 372, approved March 27, 1934, Vol. VIII, page 593.
[12] Approved Code No. 240, approved January 30, 1934, Vol. V, page 601.
[13]Approved Code No. 494, approved July 31, 1934, Vol. XIV, page 47.
[14]Approved Code No. 392, approved April 9, 1934, Vol. IX, page 259.
[15]Approved Code No. 60, approved October 21, 1933, Vol. II, page 27.
[16] Approved Code No. 348, approved March 20, 1934, Vol. VIII, page 257.
[17]Approved Code No. 281, approved February 16, 1934, Vol. VI, page 487.

All of these codes provide minimum wages and maximum hours for employees. The report of the Administrator to the President which accompanies a number of these codes (such as that for the Burlesque Theatrical Industry; that for the Advertising Display Installation Trade; and that for the Retail Monument Industry) recites that the industry covered normally employs but few employees (in one case only 1,500 in the entire country) and is not classified as a major industry; and there is no finding upon which any substantial effect upon interstate commerce could be predicated.

Examination of these codes puts it beyond dispute that the Recovery Act *has* been extended to trades and industries having only the most remote and fanciful connection with interstate commerce. These codes demonstrate beyond peradventure that the real theory of the Recovery Act is either that the Congress has authority to provide for the general welfare under the guise of the regulation of commerce, or that a desire to improve the spending power of wage earners in the nation generally with the hope thereby to increase the volume of all commerce including interstate commerce, is a sufficient ground for the Congress, in the exercise of its power "to regulate commerce * * * among the several states", to regulate the wages and hours of all wage earners, irrespective of the occupation in which employed.

**3. The gravity of the issue thus presented.**

No one can be insensible of the gravity of the issue thus raised. Certainly the present Administration is fully aware of it, as is evidenced by the care it has taken in selecting

the case in which to test the issue before this tribunal.[1] The briefest reflection convinces that if the theory is once accepted that the Constitution confers a power of undetermined extent to regulate anything and everything which

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[1]Although many opportunities have been afforded the Government to have the validity of the Recovery Act determined in this Court, it has yet to bring a case thereon to argument in this Court, and private individuals have been unable to do so either because the Administration has not seen fit to enforce orders of its various Boards or because of the Government's failure to effect review of adverse court decisions. In no less than 17 cases, the Recovery Act or its application has been declared unconstitutional during the past two years by United States District Courts from Florida to Idaho. *Purvis* v. *Bazemore,* 5 Fed. Supp. 230 (D. C. S. D., Fla., Dec. 2, 1933); *United States* v. *Suburban Motor Service Corp.,* 104 C. C. H., Par. 7103 (D. C. N. D., Ill., Feb. 10, 1934); *United States* v. *Lieto,* 6 Fed. Supp. 32 (D. C. N. D., Texas, Feb. 16, 1934); *United States* v. *Smith,* (D. C. E. D., Texas, Feb. 26, 1934); *Hart Coal Corp.* v. *Sparks,* 7 Fed. Supp. 16 (D. C. N. D., Ky., May 19, 1934); *United States* v. *Mills,* 7 Fed. Supp. 547 (D. C., Md., July 12, 1934); *United States* v. *Gearhart,* 7 Fed. Supp. 712 (D. C., Colo., Aug. 8, 1934); *United States* v. *Eason Oil Co.,* 8 Fed. Supp. 365 (D. C. W. D., Okla., Sept. 22, 1934); *United States* v. *Belcher,* 104 C. C. H., Par. 7247 (D. C. N. D., Ala., Oct. 31, 1934); *United States* v. *Kinnebrew Motor Co.,* 8 Fed. Supp. 535 (D. C. W. D., Okla., Nov. 12, 1934); *United States* v. *George,* 104 C. C. H., Par. 7298 (D. C. S. D., Fla., Jan. 19, 1935); *The Table Supply Stores, Inc.* v. *Hawking,* 104 C. C. H., Par. 7289 (D. C. S. D., Fla., Jan. 23, 1935); *United States* v. *Superior Products, Inc.,* 104 C. C. H., Par. 7300 (D. C., Idaho, Feb. 9, 1935); *United States* v. *Weirton Steel Co.,* 104 C. C. H., Par. 7308 (D. C., Del., Feb. 27, 1935); *United States* v. *National Garment Co.,* 104 C. C. H., Par. 7320 (D. C. E. D., Mo., March 9, 1935); *The Acme, Inc.* v. *Besson,* 104 C. C. H., Par. 7319 (D. C., N. J., Mar. 12, 1935).

In two of these cases, in addition to the present case, the United States has sought review in this Court, only to dismiss its appeal upon the eve of the argument. In one of these, *United States* v. *Smith,* argument was postponed over the term on motion of the Solicitor General made shortly before the cause was to be called for argument in this Court at the last term, and at the opening of the present term the Government dismissed its own appeal, 293 U. S. 633. The second case appealed to this Court by the Government has also been recently dismissed by it shortly before the case was to come on for oral argument. *United States* v. *Belcher,* 294 U. S. .