The effect upon business and commerce of these various forces, by the spring of 1933, is not a matter of surmise; it is incontrovertibly established. The

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National Recovery Administration in *National Recovery Administration Policies and the Problem of Economic Planning*, printed in *America's Recovery Program* (Oxford University Press, 1934), pp. 107, 120–121:

"Such then was the transformation of the readjustment processes of the depression into a 'vicious spiral' of deflation, or more accurately, into a series of reenforcing and widening vicious ellipses with two foci rather than a center, depending upon the settings—the vicious ellipses of lower purchasing power and lower volume, lower volume and lower prices, lower values and lower credit worthiness, while each and all required for solution reversal of the trend of liquidation and contraction. Such was the culmination in an economic and financial *reductio ad absurdum* of the liquidity complex and the cut-throat competition to the points of: (a) making bank deposits illiquid, (b) wiping out the net profits above operating expenses and charges of a representative composite of American corporations, (c) eliminating farm income as a result of a drop of two-thirds in agricultural prices, so that not only farm debt but local tax charges for schools and other communal needs could not be met, (d) of a reduction from 1929 levels of over half to two-thirds in basic industrial employment and pay rolls respectively, and in hourly rates of about one-third—as compared with a fifth for German labor and only one-twentieth for British labor—and (e) of depressing below subsistence requirements the wages of unskilled labor in a number of industries where cut-throat competition under the credit and depression crises became particularly rife to the destruction of decent labor and trade conditions. It was this deficit condition on current account in an economy dependent predominantly upon the internal exchange of goods and services on a mass production and a mass consumption basis, that the National Recovery Act and Administration were called upon to remedy."

following Government indices illustrate the severity of the decline:

	1929 Average [1]	February 1933 [2]	Percent of decline
Industrial production	119	65	45
Commodity prices	95.3	59.8	37
Factory employment	101.1	59.4	41
Factory pay rolls	107.7	40	63

[1] Survey of Current Business, Ann. Suppl., 1932, pp. 9, 25, 55, 65.

[2] *Id.*, April 1933, pp. 22, 24, 27, 29. The index numbers for production and employment are adjusted for seasonal variation.

Estimated national income fell from $81,136,000,000 in 1929 to $48,894,000,000 in 1932 (a 40% drop) and total wages received in mining, manufacturing, construction, and transportation from $17,179,000,000 in 1929 to $6,840,000,000 in 1932 (a 60% drop).[35] Estimates of the number unemployed in March 1933 vary from over 13,650,000 to over 17,150,000.[36]

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[35] Sen. Doc. No. 124, 73d Cong., 2d Sess., *Report on National Income, 1929 to 1932*, p. 14.

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

The effect of these factors upon the interstate movement of goods was necessarily severe. A reasonably accurate index of such interstate movements is found in the statistics of railway freight traffic. The aggregate of whole carloads of freight declined from 52,827,925 in 1929 to 28,200,000 in 1932, a decline of 46%.[37] Revenue freight originating in Class I roads declined from 1,339,091,000 tons in 1929 to 646,223,000 tons in 1932, a decline of 51%.[38]

These facts underlay the declaration of Congress in the Recovery Act that there existed "a national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce."

Proposals for remedying the crisis in 1933 were many and varied. But there was substantial agreement on certain basic facts, namely, that the paralysis of commerce was national in extent and that national measures were required to overcome it. There was moreover widespread belief that among the most effective measures to this end would be the elimination of the wastes and excesses of competition which the depression had intensified and the establishment of a level below which wage cutting should not proceed. The view was

[37] Information Bulletin No. 639 of Car Service Division of American Railway Association.

[38] Department of Commerce, Bureau of Foreign and Domestic Commerce, Statistical Abstract of the United States, 1933, p. 357.

widely held, moreover, that a prompt increase in total wage distributions would provide a necessary stimulus to start in motion the cumulative forces making for expanding commercial activity.[39] A reduction in hours of labor works, of course, in the same direction, since it distributes wage payments among a larger number of workers and to this extent tends to increase the proportion of such payments promptly spent.

The interrelation of the various phases of our commercial system, particularly marked in a time of severe stress, has been clearly recognized by this Court. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372:

> The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail,

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[39] See for example the statement of Senator Wagner, who assisted in drafting the Recovery Act and explained its provisions to the Senate (Cong. Rec., vol. 77, pt. 5, pp. 5153–5154):

"I want to emphasize the minimum-wage provisions. In my opinion the depression arose in large part from the failure to coordinate production and consumption. During the years 1922–29 corporate earnings rose very much faster than wage rates. * * * The great mass of consumers did not receive enough pay to take the goods off the market. * * * In retracing our steps to the land of plenty, we must set up sounder security than bubbles. The only safeguard is a well-planned wage program, dispersing adequate purchasing power throughout the economic system."

Wages and salaries of employees constitute between 60 and 65 percent of our national income. *National Income, 1929–1932*, Sen. Doc. No. 124, 73d Cong., 2d Sess., p. 14.

> when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.

The problem, in short, was not confined to production or distribution or consumption, but was concerned with the interrelation of all these aspects of the economic order. Nor was the problem confined to particular States.

Modern industry, dominated in an increasing degree by large scale enterprises serving multi-state and national markets and drawing on widespread sources of supply, is not confined by state lines. The modern development of so-called "central office" enterprises, with establishments in many States under a single control, is a recent mechanism by which single enterprises are enabled to cover expanding areas. But whatever the form which large scale industry takes, its territorial and economic concentration extends and intensifies the interstate character of its activities. These characteristics are well known; they are illustrated by the data set forth in part 10 of the Appendix. Industrial management or self-government is necessarily carried on with purposes and instruments nationwide or multi-state in scope. When a measure of public regulation is required, Government cannot afford to be any less realistic than business itself in adapting the scope of control to the scope of the commercial problem.

But the problem of public regulation in the interest of commerce was not confined in the crisis of 1933 to those industries in which concentration had progressed furthest. Thus, for example, a well-organized industry with well-organized labor support may maintain fair prices and fair wages but will steadily lose its market as low wages in other industries reduce general purchasing power. Progressive and excessive price and wage cutting tend to destroy commercial intercourse.[40]

Congress alone could deal effectively with the causes contributing to the breakdown of interstate commerce. The situation could not have been met by the voluntary action of separate trade groups, because such action to be successful had to be general, and because in almost every trade or industry a minority which would have taken advantage of the situation blocked the possibility of voluntary cooperative action by the majority.

Nor could the situation have been met by separate action of the States. It would have been impossible to obtain prompt and uniform action by the individual state legislatures. The intense competition among the States for the national or

[40] "We cannot achieve order unless we establish it everywhere. One exploiting employer can drag an entire trade down to his level; one disorganized trade can unsettle an industry; and one bankrupt industry can cause maladjustment throughout the nation." (Speech of Senator Wagner in behalf of the National Industrial Recovery Act, Cong. Rec., Vol. 77, Part 5, p. 5154.)

regional market in numerous industries had been perhaps the most powerful deterrent in the past to state legislation dealing with minimum wages, maximum hours and other elements in commercial competition. See p. 51, *supra.* Moreover, attempts to make such state legislation effective by applying it to goods from other States would have been invalid under the Commerce Clause of the Constitution. Cf. *Baldwin* v. *Seelig, Inc.,* 55 S. Ct. 497. The historic purpose of that clause was the prevention of barriers erected by one State against the products of another. But it was not intended that the Constitution should substitute for the barriers of the States the chaos of uncontrollable excesses of competition affecting commerce among the States.

The solution which the framers of the Constitution provided was the regulatory power of the Federal Government. That power was meant to be exercised over "the commerce which concerns more states than one." *Minnesota Rate Cases,* 230 U. S. 352, 398; *Gibbons* v. *Ogden,* 9 Wheat. 1, 194.[41]

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[41] It will be remembered that the Constitutional Convention was called largely because the Articles of Confederation had not given the Federal Government power to regulate commerce. Soon after the Convention assembled it adopted by a vote of nine States in favor, none opposed, and one divided, the following resolution proposed by Governor Randolph of Virginia:

"* * * that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all

Congress was not impotent to deal with the conditions causing a paralysis of commerce, nor was it impotent to apply the remedies deemed by it necessary and appropriate to remedy those conditions. Instances of Federal regulation of local activities and practices which affect interstate commerce in a single trade or industry have been previously discussed. The power of Congress, it is submitted, is no less effective to deal with activities and practices which because of their widespread character and effect contribute substantially to the impairment of interstate commerce as a whole. If the power "to foster, protect, control and restrain" interstate commerce, *Texas & New*

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cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation" (Madison's Debates, H. R. Doc. No. 398, 69th Cong. 1st Sess., p. 117).

Shortly thereafter Paterson proposed his New Jersey plan, which included the provision that Congress could "pass Acts for the regulation of trade and commerce as well with foreign nations as with each other" (Madison's Debates, p. 205).

The New Jersey plan was, however, rejected and the Virginia plan reapproved. Subsequently the wording of Randolph's resolution was, by a vote of eight to two, clarified to read as follows:

"*Resolved*, that the national legislature ought—

"1. To possess the legislative rights vested in Congress by the confederation; and

"2. Moreover, to legislate in all cases for the general interests of the Union, and

"3. Also in those to which the States are separately incompetent, or

Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 570, includes the power to regulate the commissions of livestock brokers, *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, to forbid the forging of bills of lading, *United States* v. *Ferger,* 250 U. S. 199, and to prevent the giving of premiums in penny candy packages, *Federal Trade Commission* v. *Keppel and Bro.,* 291 U. S. 304, that power must include the control of practices, such as those involved in the case at bar, whose cumulative effect in

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"4. In which the harmony of the United States may be interrupted by the exercise of individual legislation" (Madison's Debates, pp. 389, 466).

This resolution was then sent to the Committee of Detail for drafting. The Committee changed the indefinite language of the resolution into an enumeration of the powers of Congress closely resembling Article I, Section 8, of the Constitution as finally adopted. The commerce clause, which was adopted unanimously *without further discussion*, read as it does now (Madison's Debates, p. 475). The absence of objection to or even comment upon the change is susceptible only of the explanation that the Convention believed the enumeration conformed to the standard previously approved. And since the commerce clause is the only one of the enumerated powers in which Congress was given any broad power to regulate trade or business the Convention must have understood that it was granting through the commerce clause wide powers over trade and business which would enable the national government to provide for situations which the States separately would be unable to meet.

For an account of the adoption and early application of the commerce clause, see Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 Harv. L. Rev. 1335.

the crisis had demoralized the whole of interstate commerce.

The contention is not that Congress may control any form of activity which may conceivably to some degree affect interstate commerce, or that an economic crisis confers such power. The contention rests upon the facts. The depressed state of the national economy made it evident that interstate commerce was demoralized and endangered by acts which under other conditions might not seriously affect it. Because of this effect and this danger Congress could bring those acts within its regulatory power under the commerce clause. In *Wilson* v. *New,* 243 U. S. 332, 348, this Court, speaking of legislation based upon the commerce clause, said that "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." This is but an application to an unusually exigent situation of the now familiar principle that the facts which call forth legislative measures may be determinative of the validity of an exercise of legislative power. *Stafford* v. *Wallace,* 258 U. S. 495, 513; *Nashville, C. & St. L. Ry.* v. *Walters,* 55 S. Ct. 486, 488.

F. THE WAGE AND HOUR PROVISIONS ARE APPROPRIATE MEASURES TO PROTECT INTERSTATE COMMERCE FROM THE BURDENS CAUSED BY LABOR DISPUTES

The wage and hour provisions, as has been shown, are in one aspect part of a code designed to eliminate unfair competitive practices. But these provisions have an additional basis. They are part of a plan established in the National Industrial Recovery Act for the prevention of restraints on commerce caused by labor disputes. Section 7 (a) of the Act contemplates provisions in the codes designed to secure the right of collective bargaining and the establishment of standards of minimum wages and maximum hours. The provision of the Act dealing with the right of collective bargaining is not here in issue and will not be discussed in detail. Together with the wage and hour provisions, however, it constitutes an appropriate means toward the assurance of greater industrial peace and the freedom of commerce consequent thereon.

The importance of standards of minimum wages and maximum hours in the field of industrial disputes cannot be questioned. By far the most frequent immediate cause of strikes has been a demand for increased wages or a resistance to decreased wages. This cause alone has been responsible for between 20% and 40% of all strikes. See U. S. Dept. of Labor, *Monthly Labor Review,* July 1934, p. 75; also Daugherty, *Labor Problems in American Industry* (1933), p. 362. Nor can the effect

of such labor difficulties upon interstate commerce be controverted. There is, of course, no method of measuring precisely the effect of strikes upon commerce among the several States. Responsible surveys, however, have indicated the extent of strikes in terms of the number of employees annually involved;[42] the average number of days lost per year;[43] and the cost of strikes to employers, em-

[42] During the period from 1915 to 1921 there was an average of 3,043 strikes each year, involving an average of 1,745,000 employees a year. During that period an average of one out of every ten employees was involved in a strike every year. In the single year 1919 there was a total of 4,160,348 employees involved in strikes. In the period from 1922 to 1926 there was an average of 1,050 strikes each year, involving an average of 775,000 workers a year. This amounted to more than one out of every twenty-five employees involved in a strike each year. The period from 1927 to 1931 averaged 763 strikes a year, involving 275,000 employees, or about one out of every seventy-five employees, each year. These figures are taken from Daugherty, *Labor Problems in American Industry* (1933) pp. 356, 358, and are based upon studies by Paul H. Douglas, *An Analysis of Strike Statistics*, Journal of American Statistical Association (Sept. 1923) pp. 866–77; *Monthly Labor Review*, June 1932, pp. 1353–62; and W. I. King, *The National Income and Its Purchasing Power* (National Bureau of Economic Research, 1930) p. 56. For other statistics on strikes see U. S. Commissioner of Labor, *Twenty-first Annual Report:* Strikes and Lockouts (1906); *Strikes and Lockouts in the United States, 1916–1932*, *Monthly Labor Review*, June 1933, pp. 1295–1304; *Monthly Labor Review*, July 1934, pp. 68–82.

[43] The average number of days lost per year by reason of strikes and industrial disturbances during the period 1915 to 1921 amounted to 50,242,000. In the period from 1922 to 1926 the yearly average was 17,050,000. From 1927 to 1931 it was 5,665,000. *Supra*, note 42.

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ployees and the public.[44] Strikes in one industry compel shut-downs and lay-offs in other industries. Frequently they engender bitterness and unrest which is reflected in decreased efficiency and increased cost of production. The development of large-scale production and the growing complexity and interdependence of the economic order have vastly increased the number and disastrousness of strikes and lockouts. See Commons and Andrews, *Principles of Labor Legislation* (1920), p. 125. The effect of labor disputes upon commerce has been recognized in Federal legislation dealing with the railroads, and in the establishment during the war of the National War Labor Board. This Court has had frequent occasion to observe and recognize the effect of strikes and other labor disputes upon commerce among the several States. *In re Debs,* 158 U. S. 564; *Duplex Printing Press Co.* v. *Deering,*

[44] The National Association of Manufacturers has reported that the cost of strikes in the ten-year period from 1916 to 1925 reached the total of $12,982,048,000, of which $46,000,000 fell on employers, $1,804,000,000 on employees, and $10,682,000,000 on the general public. National Association of Manufacturers, Convention Proceedings, 1926, p. 136. J. H. Hammond and J. W. Jenks have estimated that the wage and industrial loss of the peak strike year, 1919, was about $2,000,000,000. Hammond and Jenks, *Great American Issues* (1921) p. 99. The estimate of another writer for the same period was $10,000,000,000. M. Olds, *The High Cost of Strikes* (1921) p. 210. Professor Daugherty has calculated that for the 1927 to 1931 period the average annual loss from strikes amounted to about $200,000,000. Daugherty, *Labor Problems in American Industry*, p. 360. See also *Monthly Labor Review*, September 1920, pp. 593–600.

254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Bedford Cut Stone Co.* v. *Stone Cutters Assn.,* 274 U. S. 37.

In *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, 79, this Court recognized the determination of Congress that it was "of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes." And in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 565, this Court agreed that the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" The conditions of economic stress prevailing in 1933 made the danger of labor unrest and disputes particularly serious, and afforded special reason for the adoption of preventive measures by the Federal Government. It was, of course, unnecessary that Congress wait until industrial unrest should have itself come to a crisis. The power to take preventive measures is as available as the power to provide remedies. See *Stafford* v. *Wallace,* 258 U. S. 495, 520; *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks, supra.*

Section 7(a) of the Recovery Act, contemplating and authorizing the establishment of standards of minimum wages and maximum hours, was a method of narrowing the area of labor

versy. It was calculated to remove from that area the most fruitful single source of difficulty. It was, therefore, an appropriate means of protecting commerce among the States from undue burdens attendant upon the destruction and demoralization caused by industrial strife.

II

THE RECOVERY ACT AND THE PROVISIONS OF THE LIVE POULTRY CODE FULLY SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

In *Nebbia* v. *New York,* 291 U. S. 502, this Court defined the scope of the Fifth Amendment as a limitation upon the power of the Federal Government, as follows (p. 525):

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The Objectives of the Recovery Act and the Means Selected.—The Recovery Act was expressly designed to remove obstructions to interstate and foreign commerce brought on by a long-continued

depression of unparalleled severity. Confronted by a grave national crisis believed to have been occasioned in large part by the excesses of the competitive system, Congress adopted the view that its prior policy regarding competition afforded inadequate protection for interstate and foreign commerce, and declared a policy of more definitely restricted and regulated competition. This Court is, of course, concerned neither "with the wisdom of the policy adopted" nor with "the adequacy or practicability of the law enacted to forward it." *Nebbia* v. *New York, supra,* p. 537. The Court there stated (p. 537):

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern*

> *curities Co.* v. *United States*, 193 U. S. 197, 337–8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.

The means selected in the Recovery Act for the achievement of its objectives was the formulation of codes of fair competition to be approved by the President upon the application of trade or industrial groups. Codes were to derive from the cooperative action of trades or industries. The Act seeks to make use of the judgment of those most vitally concerned and most familiar with the problems of a trade or industry, as a guide to the President in determining the provisions best calculated to effectuate the purposes of the Act with respect to such trade or industry. To insure that a code applied for represents the judgment of a trade or industry as a whole and to prevent unfair treatment to particular members thereof, no group is permitted to apply for a code unless it imposes no inequitable restrictions on admission to membership and unless it is truly representative of the trade or industry.

To safeguard against possible hardship to small enterprise, express provision is made to insure that

the codes will not be used to permit monopolies or monopolistic practices. Protection of the welfare of persons not engaged in a particular trade or industry but affected by a proposed code is insured by affording them an opportunity to be heard prior to approval of the code. Further protection of those both within and outside a trade or industry is secured by enabling the President to impose conditions on his approval of a code for the protection of consumers, competitors, employees, and others, and to provide exceptions to and exemptions from the provisions of a code.

Both the evils to be eliminated and the remedy to be applied took different forms in different industries. It would manifestly have been impossible for Congress itself to have legislated separately for each trade or industry. Any attempt at such legislation would have delayed other national measures which the public welfare insistently demanded. We submit that it was not arbitrary, unreasonable, or capricious for Congress to conclude, as it did in the Recovery Act, that the protection of interstate and foreign commerce required prompt and simultaneous action with respect to the hundreds of trades and industries whose activities had so injuriously affected the free flow of such commerce and to provide, as a means of remedying the evils, for the formulation of codes to originate from and to be based upon the cooperative action and judgment of the trades or industries concerned.

It is fundamental that the burden of proving a statute arbitrary or unreasonable rests upon the person challenging its constitutionality. *O'Gorman & Young, Inc.,* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Metropolitan Casualty Insurance Co.* v. *Brownell,* 55 S. Ct. 538. So far as the Recovery Act itself is concerned, petitioners have made no attempt to satisfy this burden, and it is submitted, therefore, that the Recovery Act cannot, upon this record, be held violative of due process of law. Petioners' attack upon particular provisions of the Code consists in the main of the claim that such provisions bear no substantial relation to the regulation of interstate commerce. The evidence adduced by the Government and considered under Point I, *supra,* amply establishes the contrary.

The restrictions imposed by the Poultry Code, as is true of all codes, embody the judgment of a substantial portion of the industry as to what is both necessary and reasonable. In this respect the restrictions upon liberty of contract imposed by codes differ materially from those involved in any statute which has hitherto come before this Court. Self-imposed restrictions, submitted by a representative group in an industry, generally, as in the case of the Poultry Code, representing the great majority of those affected, are not likely to be arbitrary or capricious. The assent of the industry is significant, if not overwhelming, evidence that they are not.

We turn now to a consideration of (1) the particular Code provisions involved in this case, and (2) the procedure whereby the Poultry Code was approved, so far as relevant to the constitutional guarantee of due process of law.

A. THE PROVISIONS OF THE LIVE POULTRY CODE ARE REASONABLE REGULATIONS BEARING A REAL AND SUBSTANTIAL RELATION TO OBJECTIVES WITHIN THE SCOPE OF THE COMMERCE POWER

The relation of the code provisions to interstate commerce has been fully discussed previously. It was there shown that such regulations have a substantial tendency to remove diseased or inferior poultry from the channels of interstate commerce, to increase the flow in interstate commerce of healthy poultry of high quality, and to eliminate and discourage practices seriously affecting the price at which live poultry is sold in interstate transactions. The regulations have thus been shown to have a substantial relation to the attainment of ends plainly within the scope of the commerce clause. That, in addition, such regulations are not unreasonable and do not operate in a capricious or arbitrary manner, is apparent from the following:

Dealings in unfit or uninspected poultry and sales to unlicensed dealers.—The code makes it unlawful to deal *knowingly* in poultry unfit for human consumption. The sale of unfit poultry is also made unlawful under local law (R. 410–412). This requirement is patently not violative of due

process. (See *North America Storage Co.* v. *Chicago,* 211 U. S. 306.) It is equally clear that the requirement of inspection prior to the sale of poultry is a reasonable regulation. (Compare *Adams* v. *Milwaukee,* 228 U. S. 572; *Asbell* v. *Kansas,* 209 U. S. 251; *Thornton* v. *United States,* 271 U. S. 414; *Mintz* v. *Baldwin,* 289 U. S. 346.) As inspection is required only in accordance with local regulations and ordinances, this requirement places no burden upon petitioners to which they are not already subject. The prohibition of sales to unlicensed dealers is similar in character. It imposes no undue burden upon petitioners to require them not to sell to persons whose dealings in poultry are outlawed by local regulations. Unlicensed dealers evade the sanitary regulations of the local board of health. They are likely to sell unfit and uninspected poultry and to resort to wholesale violations of the code.

"*Straight killing.*"—This regulation merely imposes the duty upon slaughterhouse operators of requiring persons purchasing poultry for resale to accept the run of any half coop, coop or coops (excepting culls), *as purchased by the slaughterhouse operators.* It is obvious that this provision not only does not impose any burden on the slaughterhouse operator but simplifies his business because it enables him to sell coops or half coops as purchased by him. The practice prevailing prior to the code whereby purchasers from slaughterhouse operators were permitted to select particular

ens led to price cutting and caused injury to the chickens through excessive handling. It also resulted in increased shipments of inferior poultry. The "straight killing" provision eliminates these evils. Moreover, it will eventually bring about careful grading according to size and quality before shipment, thus improving the quality of poultry moved in interstate commerce and, by enabling slaughterhouse operators to deal wholly on the basis of grades, facilitating their sales and improving their market. The burden imposed on the slaughterhouse operator by this regulation is, at the most, slight; on the other hand, its benefits to him and its relation to interstate commerce are real and substantial.

Reports.—The requirement of weekly reports showing the range of daily prices and volume of sales is a reasonable method of obtaining information essential to the proper administration and enforcement of the code. Such a reporting system facilitates the detection of violations of the code. The information required is not only readily available to the slaughterhouse operator but must be known to him in the successful operation of his business. The reports are simple to prepare. Similar requirements have been sustained in other statutes. *Baltimore & Ohio R. R.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Board of Trade* v. *Olsen,* 262 U. S.

1, 42; *Bartlett Frazier Co.* v. *Hyde,* 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654; *United States* v. *Katz,* 271 U. S. 254.

Minimum wage and maximum hours.—Petitioners made no attempt to attack the particular minimum wage and maximum hours schedules established by the code as being arbitrary or unreasonable or as operating unfairly or injuriously as to petitioners. The burden of such an attack was plainly upon petitioners and, in view of their failure to make any showing in support of such a contention, petitioners' claim must rest upon the assertion that the fixing of a minimum wage or of maximum hours of labor is *per se* violative of due process.

Legislation respecting wages and hours of labor, including the fixing of rates of compensation and maximum hours of work, has often been upheld against attack under the due process clause. Rates of compensation:[1] *Wilson* v. *New,* 243 U. S. 332;

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[1] In a number of cases statutes regulating practices affecting wage payments have been upheld. Regulating the redemption of store orders issued for wages (*Knoxville Co.* v. *Harbison,* 183 U. S. 13; *Keokee Cons. Coke Co.* v. *Taylor,* 234 U. S. 224); regulating the assignment of wages (*Mutual Loan Co.* v. *Martell,* 222 U. S. 225); requiring payment for coal mined on a fixed basis other than that usually practiced *McLean* v. *Arkansas,* 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple,* 236 U. S. 338); fixing the time for payment of wages (*Patterson* v. *Bark Eudora,* 190 U. S. 169; *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348; *St. Louis I. M. & St. Paul Ry.* v. *Paul,* 173 U. S. 404; *Erie Railroad Co.* v. *Williams,* 233 U. S. 685); establishing a system of compulsory

Tagg Bros. & Moorhead v. *U. S.*, 280 U. S. 420; *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251. Hours of labor:[2] *Wilson* v. *New, supra; Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Bunting* v. *Oregon,* 243 U. S. 426; *Muller* v. *Oregon,* 208 U. S. 412; *Holden* v. *Hardy,* 169 U. S. 366. The fact that the purpose of the regulations in those cases was different from that of the Recovery Act can hardly be material. If such regulations are not unreasonable infringements of liberty when based upon considerations involving the health and morality of workers, they are no less reasonable when designed to eliminate unfair wage cutting, destructive of interstate commerce. Such regulations were sustained in the *Wilson, Tagg Bros. & Moorhead* and *Baltimore and Ohio Railroad* cases, *supra,* as appropriate regulations of interstate commerce.

The attack upon the minimum-wage provisions of the code rests chiefly upon the case of *Adkins* v.

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men's compensation (*New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219).

[2] In many other cases regulation of hours of labor of women has been upheld. *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Dominion Hotel* v. *Arizona*, 249 U. S. 265; *Radice* v. *New York*, 264 U. S. 292. Prohibition against child labor in certain industries was sustained in *Sturges & Burn Co.* v. *Beauchamp*, 231 U. S. 320.

Children's Hospital, 261 U. S. 525. To the extent that this case was based upon the view that the statute there involved, providing minimum wages for women in the District of Columbia, was "simply and exclusively a price-fixing law" (p. 554), and that neither prices nor wages could be established in a business not "affected with a public interest", it would seem clearly inconsistent with the decision of this Court in *Nebbia* v. *New York, supra.*

Moreover, the majority opinion in the *Adkins* case indicates at least three points of difference between that case and the regulations now under attack. (1) The Court was unable to find any reasonable relationship in the *Adkins* case between the fixing of minimum wages and the protection of the health and morals of women.[3] No such difficulty exists in the present case, for there is obviously a real and substantial relation between the establishment of a minimum wage and the elimination or mitigation of competitive wage cutting. (2) In the *Adkins* case the Court stressed the fact that the

[3] The Court said (p. 556): " The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis."

law took account only of the necessities of the employee. "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business * * *. The necessities of the employee are alone considered * * *" (261 U. S. 525, 557–558). Where, as under the Recovery Act, the regulations result from the cooperative activity of industry, they can scarcely be said to ignore the necessities of the employer. And insofar as the minimum-wage and maximum-hour provisions can be said to involve concessions to labor, the Act gives to employers a reciprocal benefit by suspending *pro tanto* the operation of the antitrust laws. (3) The Court in the *Adkins* case explicitly recognized that under the doctrine of the so-called emergency cases (*Wilson* v. *New, supra, Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170) an emergency might make reasonable an interference with the liberty of contract which in ordinary times would be invalid. The Recovery Act is emergency legislation, designed to cope with a serious national depression the existence of which is a notorious fact, as this Court has judicially noticed in several recent cases.

Regulation of the hours of labor has been stricken down in but two cases: *Lochner* v. *New York,* 198 U. S. 45, and *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522 and 267 U. S. 552.

ing the first of these cases, Chief Justice Taft, dissenting in the *Adkins* case, *supra,* stated (p. 564):

> It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case,* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio.*

And in the *Wolff Packing Company* cases, the decision of the Court was based on the fact that the regulation was merely a feature of the system of compulsory arbitration established by the statute, and as "part of the system", shared "the invalidity of the whole" (267 U. S. 552, 569).

The reasonableness of the minimum wage and maximum hours provisions of the Poultry Code must be judged not only by a consideration of the conditions obtaining in the poultry industry but also in the light of the objectives of the Recovery Act as a whole and the importance given to such provisions in the statutory scheme. The Recovery Act was designed to deal with a nation-wide paralysis of commerce manifested, primarily, by an unprecedented decline in purchasing power resulting from widespread unemployment and excessively low wages. Revival of purchasing power was recognized as the major objective of any program for the rehabilitation of interstate commerce. Minimum wage provisions, by raising the wages of the lowest earners, and maximum hours provisions, by decreasing unemployment, were the chief means selected in the Recovery Act to increase purchasing

power and thus rehabilitate commerce throughout the nation.

For still other reasons the existence of millions of unemployed and of countless others who, though employed, were receiving less than a living wage, was a matter of national, and not merely local, concern. While the revenues of the Federal Government were shrinking with the decline of commercial activity, the necessity of providing relief for the millions without means of sustenance was imposing an ever-increasing financial burden upon the Federal Government.[4] The undermining of the morale of so large a portion of the population threatened the very existence of government. To provide jobs for the unemployed, to raise the level of wages so as to provide a decent standard of living, and to restore to the millions of destitute confidence and hope in the future well-being of the nation, were, under the circumstances confronting Congress, proper objectives of the Federal Government.

Where the constitutional basis of a statute is established and the question is one of reasonable-

[4] As has been pointed out (*supra*, p. 89) the number of unemployed in March 1933 was estimated at from 13,000,000 to 17,000,000. In that month 4,560,000 families, representing 15% of the total number of families in the United States, were receiving emergency relief. (Monthly report of the Federal Relief Administration, Nov. 1934, p. 1.) This does not include single persons or transients receiving relief. In November 1934, 4,233,074 families and 770,601 single persons, or a total of 19,017,815 persons representing 15% of the total population, were receiving relief. (*Ibid.*)

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ness under the due process clause, all of the advantages to be gained from the legislation become material. The Recovery Act is based upon the commerce power of Congress and is designed to attain ends within the scope of that power. That the Act is also calculated to accomplish other ends in the interest of the national welfare affords strong additional support in favor of its reasonableness.

B. THE PROVISIONS OF THE RECOVERY ACT AND THEIR APPLICATION IN THE LIVE POULTRY CODE TO PETITIONERS ARE CONSISTENT WITH THE PROCEDURAL REQUIREMENTS OF DUE PROCESS OF LAW

If a citizen is to be punished for violation of the legislative order of an executive officer due process of law requires that the order shall have been issued in accordance with the procedural requirements laid down in the statute. (See *Panama Refining Company* v. *Ryan,* 293 U. S. 388, 432.) In the instant case counsel for petitioners have conceded that the procedural requirements of the Recovery Act were complied with in the formulation of the Poultry Code (R. 404), and accordingly any claim in this respect cannot now be urged. However, for the information of the Court, there has been included earlier (pp. 8–12) a summary description of the procedure employed in promulgating the Live Poultry Code.

It was there shown that the approval of the code was preceded by (1) an application for a code made by groups found to be truly representative of the industry, (2) adequate notice of a hearing,

(3) a hearing at which all interested parties were given an opportunity to be heard, (4) submission to the President of a complete stenographic record of the hearings and of reports containing recommendations and findings of the Secretary of Agriculture and the Administrator for Industrial Recovery, and (5) findings by the President in accordance with the provisions of the Act. We submit that the steps thus taken fully satisfy all procedural requirements of due process of law.

Due process of law does not guarantee to a person a particular form or method of procedure. What is fair and reasonable varies according to the nature of the order to be issued, and the rights to be affected. The approval of codes of fair competition establishing general rules applicable to an entire industry would clearly appear to be quasi-legislative rather than quasi-judicial in character. Where the order is of such character, due process requires only that the procedure shall satisfy elementary standards of fairness and reasonableness. (See *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294.)

It is not necessary here to attempt a precise definition of the procedural requirements of due process. The Government submits that the procedure leading to the approval of the Live Poultry Code was eminently fair and reasonable, judged by the strictest of standards.

III

THE AUTHORIZATION BY CONGRESS TO THE PRESIDENT TO APPROVE CODES OF FAIR COMPETITION IS A CONSTITUTIONAL DELEGATION OF POWER

The principles by which a delegation of authority by Congress to the President are to be tested have recently been reaffirmed by this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. The Court there stated that it was necessary to "look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition" (p. 415).

In the *Panama* case the Court held that Section 9 (c) of the Recovery Act was unconstitutional, but did not pass upon the validity of the delegation contained in Section 3 (a). It was pointed out that Section 9 (c) contained no language which could be said to establish a policy or criterion to govern the President's action, and that none of the other provisions of the Recovery Act "can be deemed to prescribe any limitation of the grant of authority in Section 9 (c)" (p. 420). Finally, it was held that even if the statute could be said to impose conditions upon the President's power, the President made no findings to show that he had complied with the conditions established.

The Court indicated that it regarded Sections 3 (a) and 9 (c) as presenting entirely different

problems of delegation, both because Section 3 (a) contained a primary standard, "fair competition", and because it required findings by the President. The Court said (p. 419):

> Section 3 provides for the approval by the President of "codes" for trades or industries. These are to be codes of "fair competition", and the authority is based upon certain express conditions which require findings by the President.

A. THE RECOVERY ACT CONTAINS A SUFFICIENT STANDARD

Section 3 (a) authorizes the President to "approve a code or codes of fair competition" for a trade or industry or subdivision thereof—

> Upon the application to the President by one or more trade or industrial associations or groups * * * if the President finds
>
> (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and
>
> (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them,
>
> (3) and will tend to effectuate the policy of this title. (Numbers ours.)[1]

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[1] The President's discretion is further restricted by other provisions of the Act.

Section 3 (a) provides that "codes shall not permit monopolies or monopolistic practices" and "that where such

It is the Government's position that Section 3 (a) establishes "fair competition" as the primary standard to guide the President in approving codes. As the Court declared in the *Panama* case (p. 426), "Congress * * * may establish primary standards, devolving upon others the duty to carry out the declared legislative policy." Both the words "fair" and "competition" are important. They indicate that codes to be approved by the President are to be restricted to regulations of competition and practices affecting competition, and that the regulation is to be directed to the placing of competition upon a fair plane.[2]

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code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes."

All Codes are required to contain the conditions set forth in Section 7 (a) of the Act with respect to collective bargaining and compliance with wage and hour schedules.

Section 5 provides that neither the Act nor any regulations under it "shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor * * * prevent anyone from marketing or trading the produce of his farm."

[2] In the Hearings before the House Ways and Means Committee (H. R. 5664, 73d Cong., 1st Sess.) Senator Wagner stated (p. 96):

"The purpose of the present bill is not to abolish competition but to lift its standards and to raise its plane so as to eliminate destructive practices, unfair practices, competition in the reduction of wages, and the lengthening of hours. In other words, efficiency, rather than ability to sweat labor and undermine living standards, will be the determining factor in business success."

That Congress intended "fair competition" to be the standard for the President's action appears from Section 3 (b) of the Recovery Act, in which it is stated that "the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof", and that "Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act."

Fair competition is a familiar concept. Congress has employed it—or the antithetical expression "unfair methods of competition"—in the Federal Trade Commission Act (15 U. S. C. Sec. 45) and in the Tariff Act of 1922 (19 U. S. C. Sec. 174). It has been recognized by numerous important industries in the formulation of codes of fair competition in trade practice conferences held under the auspices of the Federal Trade Commission. (See: Federal Trade Commission, *Trade Practice Conferences* (1933).)

This court has recognized that the phrase "unfair methods of competition" was designedly one which "does not admit of precise definition, but the meaning and application of which must be arrived at by * * * the gradual process of * * * inclusion and exclusion." *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304, 312; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 648. Under the Federal Trade

mission Act the determination of what practices constituted unfair methods of competition was left ultimately to the courts. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421; *Federal Trade Commission* v. *Keppel & Bro., supra.* Under the Tariff Act of 1922, the ultimate determination as to what methods of competition were unfair was left to the President, who was to be guided though not bound by the recommendations of the Tariff Commission. *Frischer & Co.* v. *Elting,* 60 F. (2d) 711, certiorari denied, 287 U. S. 649. Under the Recovery Act, the determination of what provisions are proper for codes of fair competition is again left to the President; and his discretion in approving codes under Section 3 (a) is limited to codes submitted to him by representative groups in the various industries.

The codes will therefore consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems. What practices are regarded as fair or unfair will, of course, vary with the industry. But in each industry the concept of fair competition will have a practical and known meaning, and the members of the industry will be persons well fitted to decide what that meaning is. There is authority for such a resort to business experience and practice in making rules applicable to particular industries. See *St. Louis & Iron Mountain Ry. Co.* v.

Taylor, 210 U. S. 281, 286–7 (American Railway Association authorized to designate standard height of draw bars); *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126–7 and *Erhardt* v. *Boaro,* 113 U. S. 527 (rules as to mining claims).[3]

It is not, of course, material that the rules of fair competition submitted by industry and approved by the President may be broader in scope than the "unfair methods of competition" condemned by this Court under the Federal Trade Commission Act. The purpose of Congress in the Recovery Act clearly included the prohibition of practices regarded by industry as unfair because of their tendency to destroy the price structure without economic justification.[4] Moreover, the codes were

[3] These cases indicate that a delegation to an industrial as contrasted with a Governmental body is not invalid, even when the action of the industry becomes effective without being approved by a government official. This Court has recently recognized that the power to recommend a plan which is to become effective only upon approval by a public official does not constitute a delegation of authority to a non-governmental agency. *Doty* v. *Love,* 55 S. Ct. 558. The reasoning of that case would seem no less applicable to a code submitted by industry but given force and effect only upon approval by the President than to a plan of reorganization submitted by creditors but to be approved by the Chancellor. A Code so proposed is an inchoate instrument without legal force until it receives Presidential approval.

[4] Section 4 (b) begins "Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title * * *." This clearly indicates that destructive price and wage cutting practices were to be prohibited under the Act.

clearly intended to prohibit the practice now considered the most harmful and unfair of all methods of competition—the exploitation of employees through the cutting of wages and lengthening of hours of labor. See Sections 1, 4 (b), and 7 and pp. 136–137, *infra.* In determining whether a delegation of authority to the Executive is a valid one, the question is not whether the primary standard has the same meaning as in a prior statute, but whether there is an adequate policy or standard prescribed for the Executive.

The standard in the Recovery Act would seem more definite than that in the Federal Trade Commission Act. The Federal Trade Commission Act forbids "unfair methods of competition." The Recovery Act authorizes codes of "fair competition." The Trade Commission Act contains no indication at all as to what the phrase "unfair methods of competition" is to mean. In the Recovery Act, on the other hand, Congress has set forth criteria by which the phrase "fair competition" is to be construed, and has required the President to find that the codes conform to these criteria.

The primary standard of "fair competition" in the Recovery Act is given further meaning and substance by the requirement in Section 3 (a) that the President must find that codes of fair competition "will tend to effectuate the policy of this title." The words "policy of this title" clearly refer to the "policy" which Congress declared in the

section entitled "Declaration of Policy"—Section 1.[5] All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act. All fit into a single pattern for the accomplishment of this broad purpose by the elimination of practices believed to be inimical to that purpose. It may be argued that Section 1 may not in itself contain a standard or policy sufficient to guide the discretion of the President. But the requirement that the President find that codes of fair competition will tend to effectuate the policy there laid down both (1) sets a limit upon

[5] The declaration of policy in 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."

The holding in the *Panama* case that this declaration could not be read by implication into Section 9 (c) as a qualification of the unlimited power conferred by that section does not indicate that the declaration has no application to Section 3 (a), into which it is specifically incorporated by reference.

his power to approve codes and (2) gives additional substance and meaning to the phrase "fair competition" by serving as a guidepost to what the codes of fair competition contemplated by the Act were to include.

This Court has frequently upheld legislation in which other language as general as "fair" or "unfair" competition was used, and in which the broad term was given content by the remainder of the statute and the nature of the subject regulated.

A striking example is *New York Central Securities Corp.* v. *United States,* 287 U. S. 12. That case involved Section 5 (2) of the Interstate Commerce Act (41 Stat. 481), which authorized the Interstate Commerce Commission to approve acquisitions of stock by railroads in other railroads "whenever the Commission is of opinion * * * that the acquisition * * * will be in the public interest." The term "public interest" by itself establishes no definite standard and is considerably more vague than "fair competition." It is to be noted that Section 5 (2) refers to no other portion of the Interstate Commerce Act as defining the phrase or giving it substance and meaning, and no other section of the Act does so. Moreover, no section of the Interstate Commerce Act purports to establish any general policy which would apply to Section 5 (2). It thus appears that while the phrase "fair competition" in the Recovery Act is limited and given meaning by other provisions of the statute, the expression "public

interest" in the Interstate Commerce Act is neither limited nor defined by such criteria. And yet the delegation in the latter Act was upheld, upon the ground that "public interest" was given content by the provisions and manifest purposes of the Transportation Act of 1920 viewed as a whole. The Court declared (pp. 24–25):

> Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. * * * The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and

to the issue of certificates of public convenience and necessity.

Other cases in which the use of general expressions as a standard has been upheld are *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (public convenience, interest or necessity); *Avent* v. *United States,* 266 U. S. 127, and *United States* v. *Chemical Foundation,* 272 U. S. 1 (in the public interest); *Colorado* v. *United States,* 271 U. S. 153, 168, and *Chesapeake and Ohio Railway* v. *United States,* 283 U. S. 35, 42 (certificates of public convenience and necessity); *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard,* 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan,* 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States,* 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby,* 264 U. S. 32 (undesirable resident).

The fact that the grant of power to the President in Section 3 (a) is expressed in permissive language through the use of the word "may" rather than the imperative "shall" does not render the delegation invalid. In many cases statutes containing grants of authority expressed in permissive language have been upheld, although in all of them the objection could have been made that the statute did not *compel* the administrative agency to act even after making findings or determining what was

sary to comply with the standard established. See *United States* v. *Grimaud,* 220 U. S. 506; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Intermountain Rate Cases,* 234 U. S. 476; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416; *Avent* v. *United States,* 266 U. S. 127; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Sproles* v. *Binford,* 286 U. S., 374; *New York Central Securities Corporation* v. *United States,* 287 U. S. 12. It is sufficient that a standard is established to guide the Executive in the exercise of his discretion whether the delegation be expressed in permissive or mandatory terms.[6] In the case at bar the President is clearly to be guided by the policies and standards found in the Act in determining whether to approve codes; and he cannot

[6] This court has held in a number of cases that "may" should be regarded as imposing a mandatory duty when used to define the powers of a public official. *Michaelson* v. *United States*, 266 U. S. 42, 70; *Supervisors* v. *United States*, 4 Wall. 435, 446; *Mason* v. *Fearson*, 9 How. 248; *Galena* v. *Amy*, 5 Wall. 705; *Ritchie* v. *Franklin County*, 22 Wall. 67. In accordance with this rule the word "may" in Section 3 (a) should be so construed as to avoid any possible constitutional objection. It would seem to have been the intention and will of Congress that the President should approve codes after the necessary findings have been made, and should not arbitrarily reject codes as to which he had found all the legislative requirements to have been fulfilled. There is no suggestion that the President has ever failed to approve a code after making the necessary findings. Under such circumstances, the validity of the Act under a construction different from that actually adopted would not seem to be in issue. *Edelman* v. *Boeing Air Transport Co.*, 289 U. S. 249, 253, *Pacific Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304.

approve codes without making the findings required by Congress.

The cases discussed above are ample authority for the proposition that there is an adequate standard for the delegation contained in Section 3 (a) of the Recovery Act. The precise degree of detail with which policies are required to be described by Congress must, of course, vary with the character of the subject of regulation. This Court has made it plain in the leading decisions on the question of delegation that it will not permit the doctrine of delegation so to restrict the power of Congress as to interfere with its ability to legislate. The doctrine of delegation was intended to protect and not to destroy the power of Congress.

The leading decisions reflect the importance of practical considerations, of the necessity for the delegation as a means of administering the law, in determining how definite a standard set by Congress must be. Beginning with *Wayman* v. *Southard,* 10 Wheat. 1, this Court, speaking through Chief Justice Marshall, adverted (pp. 34–35, 46–47) to the need for flexibility in conforming the Federal practice to the judicial systems of the States in a statute delegating to the Federal judiciary power to alter the rules relating to process as the courts "in their discretion deem expedient" (p. 39). The statute upheld in *Field* v. *Clark,* 143 U. S. 649, permitted the President to impose reciprocal duties on goods imported from countries which discriminated against American products, a

function which could best be exercised by a governmental agency capable of prompt action after forming a judgment based upon changing conditions. The law sustained in *Buttfield* v. *Stranahan,* 192 U. S. 470, authorized the Secretary of the Treasury to fix standards of purity, quality, and fitness for consumption with which imported tea must comply. The Court declared (p. 496):

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

In upholding the statute authorizing the Secretary of War to determine whether a bridge was an "unreasonable obstruction" to navigation, the Court in *Union Bridge Co.* v. *United States,* 204 U. S. 364, emphasized the fact (p. 386) that—

> investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time.

And the Court stated (p. 387) that a denial of the right of delegation "would be 'to stop the wheels

of government' and bring about confusion, if not paralysis, in the conduct of the public business."

Similarly, in *United States* v. *Grimaud,* 220 U. S. 506, the impracticability of having Congress provide general regulations for each of the many different forest reservations was held to justify authorizing the Secretary of Agriculture to "make such rules and regulations * * * as will insure the objects" of such reservations. The Court said (p. 516):

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

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

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

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

The emphasis upon the practical need for the delegation is clear in *Hampton & Co.* v. *United States,* 276 U. S. 394. In upholding the Flexible

Tariff Act, which authorized the President to adjust tariff rates so that they would correspond to the differences in costs of production here and abroad, the Court took into account the inability of Congress to make the necessary adjustments (p. 405), the need for readjustment because of ever-changing conditions (p. 405) and the uncertainty as to the time when the adjustments should be made (p. 407). By way of analogy, it referred to the fixing of just and reasonable rates by the Interstate Commerce Commission stating that (p. 407):

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

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

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

And finally, in the *Panama* case, this Court declared (p. 421):

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it

> to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.

In order to determine whether the broad delegation in the Recovery Act was justified by "common sense and the inherent necessities of the governmental co-ordination" (*Hampton & Co.* v. *United States,* 276 U. S. 394, 406), let us examine briefly the situation confronting Congress. The delegation will be found justified by the unprecedented economic chaos existing in the spring of 1933, which compelled Congress to provide for the regulation of a subject of magnitude requiring great flexibility in dealing with different conditions and diverse elements in the various industries.

(1) Even in normal times a delegation similar to that in Section 3 (a) would have been necessary if Congress was to accomplish its purpose of eliminating unfair and harmful practices from the national industrial structure. But the reasonableness of and the necessity for the delegation are particularly apparent in view of the emergency confronting Congress in the spring of 1933—a

ation of which this Court has frequently taken judicial notice.

When Congress convened, the banks were closed, millions were unemployed, and business was stagnant. The nation was at the verge of panic; hope and confidence were based largely upon the belief that Congress would take immediate action. Agriculture, industry, and finance were demoralized, and measures dealing with the fundamental problems in each of these fields were deemed essential.

It was believed that the distress of industry was largely due to the excesses of competition, to competitive practices which had caused overproduction, lower and lower prices, wage cutting and unemployment. The Recovery Act was an attempt to combat these evils.

(2) To be effective, it was necessary that the Act apply to many industries, and that it become operative within a short time. This program obviously could not have been adopted in time to have been of real value if Congress had had to legislate for each industry and each detail of competitive practice.

Much more than in the case of bridges and forest reservations (compare *Union Bridge Company* v. *United States,* and *United States* v. *Grimaud, supra*), the attempt at detailed legislation by Congress would have taken so much of its attention and time as to have stopped "the wheels of Government." The only alternative was to establish a flexible procedure applicable generally, which

would permit both easy differentiation between industries and rapid amendment to keep pace with changing conditions and to correct the mistakes which would inevitably be made in initiating the program. In the words of this Court, "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility" *Panama Refining Co.* v. *Ryan, supra,* at p. 421.

The hour and wage provisions

What has been said applies with full force to the hour and wage provisions of codes since wage cutting was generally recognized as an unfair competitive practice, as heretofore discussed. But the problem of delegation with respect to hours and wages is simplified by the expressions in the Act showing the manifest intent of Congress that codes contain maximum hour and minimum wage clauses. Section 7 (a) (3) requires every code to provide that employers will comply with the maximum hours and minimum wages approved or prescribed by the President. Section 7 (c) allows the President to prescribe limited codes of fair competition dealing only with hours and wages and labor conditions. Section 4 (b) refers to destructive wage cutting as being contrary to the policy of the Act. (See note 4, p. 123, *supra.*) And the declaration of policy in Section 1 includes, among the

objects of the statute, the increase of purchasing power, reduction and relief of unemployment, and the improvement of standards of labor.

Since the policy of Congress as to whether hour or wage provisions should be included in codes is clearly expressed, the only remaining question relates to the scope of the maximum hours and minimum wages for each type of employment in each industry. It would have been manifestly impossible for Congress to have determined the minimum wage for each class of employees, or the maximum hours of labor, since the hours and wages would necessarily vary both as between different industries and within any one industry. The power was accordingly delegated to the President, with the limitation that in approving the maximum-hour and minimum-wage provisions in the various codes, he was to be guided by the schedules submitted by the industry affected, by the policy of preventing unfair competition in the exploitation of employees, and by the policy declared in Section 1 of the Act. The action of the President in determining the maximum hours of labor and minimum wages for each occupation within the limits defined by these policies would seem to be a matter of administrative detail clearly within the authority of Congress to delegate. *United States* v. *Grimaud,* 220 U. S. 506; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Company* v. *United States,* 204 U. S. 364; *Hampton & Co.* v. *United States,* 276 U. S. 394.

B. THE PRESIDENT MADE AND STATED THE FINDINGS REQUIRED BY THE STATUTE IN APPROVING THE LIVE POULTRY CODE

Section 3 (a) of the Recovery Act requires the President to make certain findings of fact as a condition of his approval of codes. In the Executive Order of April 13, 1934 (No. 6675–A; see Appendix, pp. 23–24), approving the Live Poultry Code, the President made the findings required. The Order stated:

> I, * * * do hereby find that:
>
> 1. An application has been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area in and about the City of New York; and,
>
> 2. Due notice and opportunity for hearings to interested parties have been given pursuant to the provisions of the Act and regulations thereunder; and,
>
> 3. Hearings have been held upon said Code, pursuant to such notice and pursuant to the pertinent provisions of the Act and regulations thereunder; and,
>
> 4. Said Code of Fair Competition constitutes a Code of Fair Competition, as contemplated by the Act and complies in all respects with the pertinent provisions of the Act, including clauses (1) and (2) of subsection (a) of Section 3 of Title I of the Act; and,

> 5. It appears, after due consideration, that said Code of Fair Competition will tend to effectuate the policy of Congress as declared in Section 1 of Title I of the Act.

The Executive Order refers to separate reports, recommendations and findings submitted to the President by the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act, and these reports show that the Secretary of Agriculture and the Administrator found that the Poultry Code complied with the conditions of the Act, and recommended its approval. (See Appendix, pp. 25–33.)

Petitioners contend that the findings made by the President are insufficient because they do not recount the data which induced him to approve the Code, although the President did make the findings required by the Act. In the *Panama* case this Court did not hold that where the statute establishing a standard required certain findings as a prerequisite to the exercise of the delegated authority the President need do more than comply with the statutory requirement. The Court held only that if a statute required no findings at all, but merely laid down a general policy, it was necessary for the President to indicate by findings that he was acting in conformity with that policy. There would seem to be no statutory authority or any constitutional provision which would require the President to do more than make the findings called for by the statute.

It is submitted that the findings made by the President in his Order approving the Code comply with the requirements of Section 3 (a) of the Recovery Act and with the test laid down by this Court in the *Panama* case. There the Court held that if a statute requires no findings but establishes a policy with which Executive action must conform, the President must make findings "as to the existence of the required basis of his action * * *, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual" (293 U. S. at 431). The purpose of requiring findings is to insure that the President comply with the standards set for him by Congress after due consideration of all relevant factors. The recitals and findings in the Executive Order approving the Live Poultry Code and the reports referred to therein indicate that the code was adopted after careful consideration, and that the requirements of the statute have been fulfilled.

IV. THE REMAINING SPECIFICATIONS OF ERROR URGED BY PETITIONERS ARE WITHOUT MERIT

Petitioners urge that numerous other errors occurred. The court below found that none of these alleged errors was sufficient justification for reversal (R. 1659–1660), but as some of the errors are again raised in this Court, a brief discussion of the points so urged is included in the brief.

A. SECTION 3 (f) OF THE RECOVERY ACT IS NOT INVALID BECAUSE OF INDEFINITENESS

Petitioners contend that Section 3 (f), which makes it a misdemeanor to violate any provision of a code of fair competition in any transaction in or affecting interstate or foreign commerce, is void for indefiniteness. It is questionable whether this contention is properly raised in view of the failure to specify it as error. *Seaboard Airline Ry.* v. *Watson,* 287 U. S. 86, 91.

There is no ambiguity as to what constitutes violation of a code provision. The only part of the definition which might be considered indefinite is that which limits the offense to violations in any transaction "in or affecting interstate or foreign commerce." The clear purpose of this provision is to restrict the penalty to cases within the commerce power of Congress.

We submit that there are two valid grounds for rejecting the charge of indefiniteness. First, there are many decisions by this Court and by the lower Federal courts defining the scope of the commerce power and the range of activities which may be controlled under that power, and a statute is not lacking in requisite definiteness if its words have received prior judicial definition and exposition. Second, such ambiguity as there may be in Section 3 (f) is only the uncertainty of the constitutional limits of regulation, and language of this kind does not render the description of an offense void for indefiniteness.

First. The decisions of this Court make it clear that the requirement of definiteness in criminal statutes is fulfilled not only by "a word of fixed meaning in itself" but also by words "made definite by statutory or judicial definition", or words with "a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 395. In *Nash* v. *United States,* 229 U. S. 373, this Court upheld an indictment under the Sherman Act charging a conspiracy in restraint of interstate trade. The defendant contended (p. 376) that *Standard Oil Company* v. *United States,* 221 U. S. 1, had established that the Sherman Act prohibited only combinations which unduly or unreasonably restrain trade, and that punishment of such a restraint involved a crime into whose definition there entered "an element of degree as to which estimates may differ." Answering the contention, this Court said (p. 377):

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.

In *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 460, the Court said:

> In the *Nash* case we held that the common law precedents as to what constituted undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute.

See also *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, 108–111.

It is not only judicial decisions declaring the common law which give a criminal statute content and meaning; decisions growing out of constitutional or other controversies serve precisely the same purpose. In *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, which held the criminal provisions of the antitrust laws of Kentucky void for indefiniteness, this Court expressed the view (pp. 219–220) that construction might "take the place of express language in a statute" and that "what seemed a defect" might "be cured by the construction given to the words by the court having final authority to declare their intent." See also *Smith* v. *Cahoon,* 283 U. S. 553, 563–564.

It should be noted that the criminal provisions of the Sherman Act involve two somewhat uncertain elements, what constitutes "undue" or "unreasonable" restraint and what constitutes restraint of "commerce among the several States", but that only the latter is present in Section 3 (f) of the Recovery Act. The frequent differences of opinion among Justices of this Court in Sherman Act cases and the complexity of the factual and legal considerations which usually enter into the

determination of these cases indicate that what constitutes an undue restraint of trade is as difficult of advance appraisement as is what constitutes a code violation in a "transaction in or affecting interstate * * * commerce." Section 3 (f) of the Recovery Act is therefore less indefinite than the penal provisions of the Sherman Act since, apart from its jurisdictional qualification, the application of Section 3 (f) is entirely clear.

Second. There are many Federal statutes defining crimes so as to restrict violations to transactions within the constitutional power of Congress. A large number of Federal crimes are so defined as to include only acts committed " upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States." (Criminal Code, secs. 272, 291–293, 296, 298–301, 306; U. S. C., title 18, secs. 451, 482–484, 487, 489–492, 497.) This limitation has been placed in the definition of the crimes to bring them within Article I, Section 8, Clause 10 of the Constitution, which grants Congress power to define and punish felonies committed on the high seas, and Article III, Section 2, which extends the Federal judicial power to all cases of "admiralty and maritime Jurisdiction." Both the phrases "on the high seas" and "within the admiralty and maritime jurisdiction of the United States" are legal expressions which have required for their definition and elucidation repeated judicial decisions. (See the cases cited in U. S. C. A., title 18, sec. 451, note 3,

and U. S. C. A., Constitution, Article III, Section 2, notes 155–158.)

The obstruction of a "navigable river or other navigable water of the United States" without the consent of the United States is made a crime (U. S. C., title 33, secs. 401, 403, 406), but the meaning of "navigable" rivers or other waters of the United States is far from certain, as applied to any particular situation, and has evoked a large body of judicial decisions. (See cases cited in U. S. C. A., title 33, sec. 1, notes 1, 7, 8.)

Another statute dependent upon judicial construction to give it intelligible meaning is that which penalizes a conspiracy to injure or threaten any citizen "in the free exercise or enjoyment of any right of privilege secured to him by the Constitution or laws of the United States." (U. S. C., title 18, sec. 51.) The constitutionality of this penal provision has been upheld. *Motes* v. *United States,* 178 U. S. 458, 462.

Long practice as well as court decisions would seem to set at rest any doubt as to the constitutionality of these Federal crimes. Their qualifying language was employed in order to limit their application to situations within Federal power, and it has also been given meaning by judicial decisions. Without these qualifying expressions, the statutes would be subject to one of two alternative infirmities. If held to be separable, the courts would be obliged to limit their application to transactions

with which Congress might properly deal and the legislation might fall as too indefinite (*Smith* v. *Cahoon,* 283 U. S. 553, 564–565, *supra*); if held to be inseparable, they would be invalid in their entirety (*Trademark Cases,* 100 U. S. 82). As long as the power of Congress to create crimes is limited, as our constitutional system limits it, to particular fields, any attempt at a comprehensive exercise of the power in a given field must be framed in language which necessarily is little more definite than the field itself. It would be paradoxical if use of such language would have the effect of rendering a statute invalid.

None of the cases in which this Court has held criminal provisions invalid for indefiniteness were cases where, as here, there was a large body of judicial precedents serving to clarify the meaning of the terms of the statute or where, as here, qualifying words were used to confine the statute to the limits of an express constitutional power. See *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221, *supra* (combinations for the purpose of fixing a price that was greater or less than the "real value" of the article); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 86 (sale of commodities for an "unjust or unreasonable" price); *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 455–456, *supra* (combination in restraint of trade unless for the purpose of obtaining "a reasonable profit" which could not be obtained except by marketing the products under such a combination);

nally v. *General Construction Co.,* 269 U. S. 385, 388, *supra* (paying less than "the current rate of per diem wages in the locality where the work is performed"); *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 242 (producing crude oil in such a manner as to constitute "waste", including "economic waste" and waste incident to production "in excess of transportation or marketing facilities or reasonable market demands").

Smith v. *Cahoon,* 283 U. S. 553, *supra,* involved a statute, enforceable by criminal penalties, comprehensively regulating all motor vehicles used in transporting persons or property for compensation. This Court held the statute violative of due process as applied to private carriers for hire. It also held (pp. 563–565) that if the statutory requirements which could be constitutionally applied to private carriers were treated as separable from those which could not be constitutionally so applied, the statute would be void as to them because of failing to define their obligations "with the fair degree of certainty required of criminal statutes." This situation is clearly distinguishable from the present case where language which has received judicial interpretation limits criminal liability to acts within the regulatory power of Congress.

B. THE INDICTMENT IS NOT DEFECTIVE

1. THE CHARGES ARE NOT TOO VAGUE OR GENERAL TO BE PLEADED AS RES ADJUDICATA

The only assignment of error which purports to deal with this subject is assignment No. 1, which

merely asserts that the court erred in overruling the demurrer as to the various counts "on the grounds stated in the demurrer" (R. 1624). The demurrer alleges that the "indictment is too general, vague, indefinite, and uncertain" to be pleaded as *res adjudicata* or former jeopardy, or to enable petitioners to prepare their defense (Pars. 2, 5; R. 126).

It is not suggested either in the demurrer, the assignments of error, or the specifications, in what particulars the charges of the indictment are defective in this respect. A mere reading of the indictment reveals that the pleader has chosen to set forth the offenses with great precision and in more detail than might be required.

The conspiracy count (Count 1) sets forth the relationship of the petitioners, and alleges that they "combined, agreed, confederated and conspired with each other" to commit nine fully described offenses against the Recovery Act and the Code (R. 47–49). It then sets forth in detail twenty successive overt acts committed by designated defendants in furtherance of the objects of the conspiracy (R. 50–56).

The form of the conspiracy charge used in this case has repeatedly been held sufficient. *Joplin Mercantile Company* v. *United States,* 236 U. S. 531, 534; *Thornton* v. *United States,* 2 F. (2d) 561, affirmed 271 U. S. 414.

The offenses charged in the substantive counts are set forth in ample detail. The precise

tion, the date, place, and circumstances are described in each instance.

2. THE INDICTMENT SUFFICIENTLY SETS FORTH THE INTERSTATE COMMERCE INVOLVED AND THE EFFECT OF THE VIOLATIONS UPON SUCH COMMERCE

Paragraphs 2, 3, 4, and 5 of the indictment set forth in detail the movement of poultry from 38 states to commission men, marketmen, and retailers in New York (R. 43–45). These allegations are incorporated by reference in each of the substantive counts.

As to Counts 1 and 4, it is alleged that the defendants themselves transported poultry from Philadelphia to their wholesale slaughterhouse markets in Brooklyn, New York, and there sold the poultry without inspection while it was still moving in interstate commerce (R. 51, 57, 66–67, 68).

Each count sets forth the manner in which the specific violations affect and burden interstate commerce. For example, Count 2, charging the sale of unfit poultry, alleges that such sale causes the transportation in interstate commerce of unfit poultry, which poultry would otherwise be destroyed prior to interstate shipment, diminishes the interstate transportation of healthy and edible poultry, encourages and causes the sale of unfit poultry by other slaughterhouse men, causes misrepresentations as to the edibility of poultry, demoralizes the market value of healthy poultry, confuses the orderly marketing of live poultry

through the channels of interstate commerce, reduces substantially the price paid to interstate shippers, diminishes the consumption of live poultry in New York, reduces the volume of live poultry shipped to New York from other states, and, by causing the interstate shipment of diseased poultry, causes damage and infection to healthy poultry moving in interstate commerce (R. 63–65).

The allegations respecting the effect upon interstate commerce of each of the other violations are set forth in the same detail.

3. COUNT 38 CHARGES A VIOLATION OF THE CODE

Petitioners urge that Count 38, alleging that the defendants submitted false and fictitious reports, is demurrable because such a charge does not state a violation of the Code provision requiring the filing of reports. We submit that the District Judge correctly ruled that "the making of a false report is not a compliance with the requirement" of making a report (R. 161).

4. THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE OF THE NEW YORK ORDINANCES AND REGULATIONS

Petitioners urge that the demurrer should have been sustained as to Counts 4, 5, and 60, because the ordinances and regulations of the City of New York were not pleaded.

Counts 4 and 5 charge the sale of poultry not inspected in accordance with any rule, regulation, or ordinance of the City of New York in violation of Sec. 22 of Article VII of the Code (R. 66–69).

Count 60 alleges a violation of Sec. 15 of Article VII of the Code, which prohibits sale of poultry to any person not licensed to handle poultry where a license is required (R. 117–118).

Section 1172 of the Greater New York charter (N. Y. Laws, 1904, c. 628, Sec. 3), which petitioners conceded (R. 410) to be a state statute, provides that the Sanitary Code in force in the City of New York on January 1, 1902, is "binding and in force in the City of New York and shall continue to be so binding and in force, except as the same may, from time to time, be revised, altered, amended, or annulled *as herein provided.*" (Italics supplied.) It further provides that the New York City Board of Health is authorized "from time to time, *to add to and to alter, amend, or annul* any part of the said sanitary code", and to publish therein "additional provisions for the security of life and health in the city of New York." (Italics supplied.) It provides further that "the Board of Health *may embrace in said Sanitary Code* all matters and subjects to which, and so far as, the power and authority of said Department of Health extends." (Italics supplied.)

Section 1172 of the Greater New York charter further provides as follows:

> The sanitary code which is in force May first, nineteen hundred and four, shall constitute a chapter of the code of ordinances of the city of New York. On or before the fifteenth day of May, nineteen hundred and

> four, the secretary of the said board of health shall file with the city clerk such sanitary code which was in force on May first, nineteen hundred and four, and upon the filing of the same it shall become a general ordinance of the city of New York. No amendment to said code adopted by the board of health subsequent to May first, nineteen hundred and four, shall become valid and effectual until a copy of such amendment, duly certified to be a correct copy by the secretary of the board of health, be filed with the city clerk. Upon so filing, such amendment shall become a part of said sanitary code.

Section 19 of the Sanitary Code prohibits dealing in live poultry "without a permit therefor issued by the Board of Health, or otherwise than in accordance with the terms of said permit and with the regulations of said Board" (R. 1579–1580). Regulation 15 of the Board of Health requires inspection by the Inspection Service of the United States Department of Agriculture of all poultry brought into the City of New York [1] (R. 1580).

Section 1556 of the Greater New York charter (N. Y. Laws, 1917, c. 382, Sec. 1) provides that "all courts in the city shall take judicial notice of city ordinances."

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[1] It will be noted that the poultry inspection is a federal inspection, and it is therefore particularly appropriate for the Live Poultry Code to refer to the local ordinances and regulations requiring such inspection. (See Ex. 16, R. 1577–1579; Ex. 17, R. 1580.)

By virtue of the Greater New York charter provisions above quoted, Section 19 of the Sanitary Code would clearly appear to be an ordinance of the city of New York.[2] That such ordinances are judicially noticed by the courts of that state cannot be questioned. In *Greenberg* v. *Schlanger,* 229 N. Y. 120, the Court of Appeals of New York stated (p. 122):

> It is true that although the city ordinance upon which the plaintiff relies was not offered in evidence, as the case was tried in New York we may take judicial notice of it. (L. 1917, chap. 382.)

And see *People* v. *131 Boerum Street Co.,* 223 N. Y. 268, 271; *People* v. *Waldron,* 183 App. Div. 807, 811–812; *Cohen* v. *A. Goodman,* 189 App. Div. 209, 212; *Cohen* v. *Department of Health,* 61 Misc. Rep. 124.

It would seem equally clear that the provision of the Sanitary Code in question was also properly noticed by the District Court. In *Railroad Co.* v. *Bank of Ashland,* 12 Wall. 226, this Court held that a Federal Circuit Court in Indiana could take judicial notice of the private laws of Indiana (in that case the charter of a railroad company), because the Constitution of Indiana authorized the courts

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[2] It is to be noted that petitioners in no way question that Section 19 was a part of the Sanitary Code and that Regulation 15 was validly promulgated and in effect. (R. 212–213, 409–411; Ex. 17.) The only objection made was that they had not been pleaded in the indictment.

of that state to take judicial notice of such laws. See *Martin* v. *Baltimore & Ohio Railroad,* 151 U. S. 673, 678; *Lamar* v. *Micou,* 114 U. S. 218, 223; *Kaye* v. *May,* 296 Fed. 450, 453.

While it is true that the regulation of the Board of Health requiring inspection is not a part of the Sanitary Code, it is to be noted that Section 19 of the Sanitary Code expressly contemplates the issuance of regulations by the Board of Health by prohibiting dealings in poultry otherwise than in accordance with the regulations of the Board. That this regulation was validly promulgated in accordance with the authority thus conferred has not been questioned. It is submitted that where an ordinance provides expressly for the promulgation of regulations, such regulations would be judicially noticed by the courts of the state, and that consequently they may also properly be noticed by a Federal District Court. Petitioners have cited no authority for the statement in their brief that such regulations would not be noticed by the state courts.[3]

There is no suggestion that petitioners were not apprised of the regulation requiring inspection.

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[3] In the analogous situation of regulations promulgated under a statute by a department of the Federal Government, this Court has held that such regulations are judicially noticed by the Federal Courts. *Caha* v. *United States,* 152 U. S. 211, 221-222; *Thornton* v. *United States,* 271 U. S. 414, 420. In the first of these cases this Court stated that "wherever, by the express language of any act of Congress,

Indeed, the petitioners testified that on some occasions they had submitted to the required inspection and on others they had not (R. 1394–1395, 1396, 1408). It is difficult to perceive in what way they have been prejudiced. If there was any defect in the pleading it would seem to be one of form which would not tend to prejudice the substantial rights of the petitioners and which, under R. S. 1025 (U. S. C., Tit. 18, Sec. 556), may be ignored.

C. THE DISTRICT COURT DID NOT ERR IN DENYING A BILL OF PARTICULARS

Most of the demands for particulars called for the specific evidence which the Government might offer in proof of its allegations. It is well established that a party may not be required to disclose his evidence in advance of the trial. *Olmstead* v. *United States,* 19 F. (2d) 842. The charges in the indictment are set forth with great particularity, and any further particulars would have served no purpose other than to entrap the Government and unnecessarily limit its proof. *Evans* v. *United States,* 153 U. S. 584.

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power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

In our discussion of the sufficiency of the indictment we have pointed out the degree of detail and definiteness with which the allegations of effect upon interstate commerce were set forth in the indictment. Petitioners have not indicated any further particulars to which they would be entitled.

D. THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY ON EACH COUNT

Petitioners contend that there was not sufficient evidence to warrant conviction on the conspiracy charge or on certain of the substantive counts. Since this is a question of fact determined by two courts below, under the familiar rule of this Court there would seem to be no question for review here unless manifest error is shown. *Bodkin* v. *Edwards,* 255 U. S. 221

Count 1, emphasized by petitioners in the court below, charged a conspiracy "to commit a large number of offenses against the United States, to wit, to violate the said National Industrial Recovery Act and the said Code" (R. 47–49), and it set forth fully the nature of the conspiracy, alleging that petitioners conspired with each other to sell unfit and uninspected poultry, to violate the "straight killing" provision of the code, to commit acts of violence, to file false reports with the Code Supervisor, to withhold reports, to pay unlawful wages, to require employees to work

cessive hours, and to obstruct the administration of the code (R. 47–49).

The court below found that this count was fully supported by the evidence. It stated (R. 1659–1660):

> Upon examination of the record it will be found that Count 1 of the indictment is amply supported. It warrants the conclusion that there was a concerted and deliberate plan on the part of the appellants to engage in the practice of selling poultry unfit for human consumption—to conceal such sales from the Code Authority, and to violate the other substantive Counts of the indictment for which they have been found guilty—sales of unfit poultry; sales of uninspected poultry; violation of straight killing; failure to make sales reports; sales to persons not licensed.

The record contains substantial evidence of a concerted plan on the part of petitioners to sell uninspected poultry. There is evidence that petitioners brought in uninspected poultry from Philadelphia (R. 619, 817, 917–918, 1009–1011); that an inspector of the New York City Health Department was misled by petitioners as to the destination of this poultry and was falsely told that it would be inspected (R. 832–833, 919–921); and that petitioners deceptively used for this poultry an inspection slip which they had received for entirely different poultry (R. 619, 621, 624, 921–922,

1577). There is also substantial evidence of a deliberate and concerted plan on the part of petitioners to sell unfit poultry and to conceal such sales from the Code Authority. The record shows a constant practice of selling unfit poultry (R. 679, 853, 858–860, 926, 928); the taking of great precautions to conceal such sales (R. 930–938, 860–863, 869–870, 926, 630–632), including threats of violence to inspectors (R. 633–635, 871–872, 1417, 605, 712–713) and resort to trickery to conceal the slaughtering and sale of unfit poultry (R. 929–937, 712–719); the slaughtering of poultry unfit for human consumption (R. 597–599, 628–629, 783, 785, 855–856, 933–934, 941–942, 715–716), and resort to the practice whereby petitioners received weight allowances from commission men in lieu of taking out and destroying the "culls" (R. 980–981, 281–282).

There is evidence that the petitioners participated regularly in the practice of violating the "straight killing" provision (R. 748, 842, 844–845), and there are a number of admissions by petitioners that they violated this provision (R. 679, 713, 788). There is evidence also of a deliberate and concerted plan on the part of the petitioners to violate the code by the submission of false weekly reports and by withholding reports (R. 785–786, 1058–1059, 1041–1042). Petitioners boasted freely of their defiance of the code and of their intention to violate its provisions (R. 636, 874–875, 511, 527, 529, 679.)[4]

[4] Ample proof of the substantive counts charged will be found in the following pages: Count 2 (sale of unfit poultry):

E. THE TRIAL COURT DID NOT ERR IN THE EXCLUSION OF EVIDENCE

Specification No. 19 asserts that the trial court erred "in refusing to permit witnesses to testify as to the reasonableness of some of the Code provisions." This specification appears to be covered only partially by assignment No. 53, which assigns as error the refusal of the court "to permit witnesses to testify as to the reasonableness of the Code requiring regulation *straight killing*" (Italics supplied) (R. 1640).

This question arises in connection with the direct examination of David Pack, who testified that he had worked as an inspector for the Code Authority for one week (R. 1222). Pack was asked what he saw on one occasion when he visited the Schechter market on East 52nd Street (R. 1224). Peti-

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R. 679, 707–710, 714–718, 767–768, 948–949, 597–599, 602–603, 631–632, Ex. 27; Counts 4 and 5 (sale of uninspected poultry): R. 649–650, 614–623, 623–624, 625–626, 661–662, 826, 827–828, 829–835, 836–837, 913–915, 916–922, 954, 987, 991–992, 999–1000, 1001, 1047–1048, 1009–1011, 1049, 1050, Ex. 15; Counts 24 to 33, inclusive (violations of "straight killing"): R. 674, 702–707, 710–712, 714–718, 733–734, 758, 759, 842–843, 946–948, 848–850, 863–864, 844–847, 850–852, 679, 776, 777–779, 877–878, 879; Counts 38 and 39 (sales reports): R. 785–787, 1047, 1058, 1041–1042, Exs. 29, 30, 36; Count 46 (wages): R. 1033, 1018–1033, 1036, 1039, Ex. 37; Count 55 (hours): R. 1018–1033, 1036, 1331–1332, 1346, Ex. 37; Count 60 (sales to persons not licensed): R. 596–597, 614–615, 676–677, 768–769, Exs. 17, 31, 36, 40.

tioners' counsel had announced that he intended to show that certain code provisions were "unreasonable and for that reason unconstitutional" (R. 1222). The trial judge stated that that question was not before the jury. Counsel then said, "I ask you for an exception, and I will abide by your Honor's ruling." The judge did not make a blanket ruling as to future offers of evidence, but said (R. 1222–1223):

> *You ask the questions and then there will be an objection and I will rule.* Now what you want to do is, you want to offer evidence to show that some provisions of the Code are unreasonable.
>
> Mr. Jacob Heller: That is correct.
>
> The Court: I will not allow you to show it. You can have an exception to my ruling. The question is not before us; the question before us, that you may present, is whether or not it affects interstate commerce, but we are not dealing with the reasonableness of the regulations which it was conceded was enacted in pursuance of the Statute. (Italics supplied.)

However, despite the suggestion of the court that counsel ask questions upon which the court would rule, no offers of proof as to reasonableness were made thereafter. There was an objection to counsel's questions as to what witness Pack saw at the Schechter market on the occasion when he was sent

there. The court stated: "Because they kill properly on some occasions would not be evidence that they did not kill improperly on another." Counsel then abandoned his examination without taking an exception, merely stating: "In this event, your Honor, we will withdraw the witness, as long as we cannot go into these matters" (R. 1224).

It does not appear from the questions asked by counsel that he was inquiring into the reasonableness of the "straight killing" provision or any other provision of the Code. His questions indicated an intent to elicit evidence to the effect that the Schechters were abiding by the "straight killing" provision on a particular occasion when Pack visited the market, that occasion not being one of those as to which the petitioners were charged with violations.

On two previous occasions, when counsel stated that he proposed to show that the "straight killing" provision was unreasonable and inquired of the witnesses as to the enforceability of "straight killing" (R. 794–5, 1206–7), the trial judge merely pointed out that such proof did not tend to show whether "straight killing" was reasonable or unreasonable (R. 794). Counsel took no exception in either case, and in the latter case he was allowed to proceed with an examination apparently designed to show that "straight killing" was

reasonable because it had no effect upon price or upon interstate commerce (R. 1207).[5]

F. THE TRIAL COURT DID NOT ERR IN READING THE INDICTMENT TO THE JURY

The trial judge, at the commencement of his charge, read to the jurors all of the first count of the indictment (R. 1484–1506). The judge did not read the other counts but merely summarized them, explaining wherein they differed from the conspiracy count (R. 1512–1528). Before reading the indictment, the court stated, "This indictment is but a charge; it is a method whereby the defendants are placed upon trial. Guilt cannot be found simply because an indictment is presented. Guilt, if found, must be found as the result of proof offered on the trial" (R. 1484). It is difficult to see wherein petitioners can complain of this action by the court. The reading of an indictment to the jury has been held not prejudicial even when done by a prosecutor at the beginning of trial. *State* v. *Brown,* 62 S. W. (2nd) 426 (Mo.). The practice of reading the first count of an indictment in full and then explaining the differences between the count read and the remaining counts was approved in *Gallot* v. *United States,* 87 Fed. 446, 451, certiorari denied, 171 U. S. 689.

[5] Petitioners were permitted to introduce a great deal of evidence designed to show that the Code provisions bore no reasonable relation to interstate commerce (R. 1088–1089, 1093, 1096–1097, 1156–1159, 1180, 1182–1183, 1186, 1202–1203, 1207–1208, 1219–1220, 1236–1237, 1243–1244, 1267, 1271–1272).

G. THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY

The principal contention urged by petitioners in this respect is that the court did not adequately instruct the jury as to the meaning of effect upon interstate commerce. Petitioners' entire objection to that portion of the charge was as follows (R. 1541–1542):

> Mr. Heller: May it please your Honor, I except to so much of your charge as does not adequately explain to the jury what is meant by affecting interstate commerce. I ask your Honor to charge that the indictment as you read it states that the defendants' conduct in each particular count alleged, tended to and did diminish the total volume or value of the commerce that comes into the State, that their particular conduct disrupted the orderly flow thereof and diminished and demoralized the character thereof, and unless the jury finds that their conduct did such a thing, their act did not affect interstate commerce.
>
> The Court: I have already charged them. I read it at great length, the whole indictment. I told them that the charge in the indictment is what the Government is required to prove and asked the jury to determine whether the Government has proved its case. I am not going to charge separate parts. I made that charge plain and distinct, and I think the jury understood it. I read the whole of the first count, too.

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> Mr. Heller: Exception. And I ask your Honor to charge that what I just said applies to each particular count separately; they must be considered separate and apart.
>
> The Court: I have already charged them at very great length. Each count, of course, depends upon the acts affecting interstate commerce. I find no necessity for further charging the jury.

It is settled "that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings." *Pennsylvania Railroad Company* v. *Minds,* 250 U. S. 368, 375. See *Beaver* v. *Taylor et al.,* 93 U. S. 46, 55; *Guerini Stone Company* v. *Carlin Construction Company,* 248 U. S. 334, 348; *Jacobs* v. *Southern Railroad,* 241 U. S. 229, 236–237. The exception of petitioners' counsel "to so much of your charge as does not adequately explain to the jury what is meant by affecting interstate commerce" was manifestly not sufficient to apprise the trial court in what particulars the charge as given was claimed to be erroneous or deficient. It is apparent that the only specific request made on this subject (and consequently the only matter properly raised here) was based upon the contention that the particular conduct of the petitioners, as distinguished from the practice generally, must be shown to have "disrupted the orderly flow" of interstate commerce, and "diminished and demoralized the character thereof."

We submit that this contention is based upon an erroneous construction of Section 3 (f) of the Act. As previously stated, this section provides that when a code of fair competition has been approved by the President "any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce" shall be a misdemeanor punishable by a fine of $500.00 for each offense. It is submitted that neither the commerce clause of the Constitution nor the language of this provision placed the burden upon the Government of establishing that the particular acts of the petitioners, as distinguished from the general practice of which they form a part, affected interstate commerce.

A class of transactions may be regulated under the commerce power although single transactions within the class, considered individually, are not capable of producing a substantial effect upon interstate commerce. It is sufficient if the entire class of transactions produces a substantial effect. Any other doctrine would render the Federal power nugatory since practices can be regulated only as they manifest themselves in particular acts. "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause." *Stafford* v. *Wallace,* 258 U. S. 495, 521. In *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 408, the Court said that if Congress deems "certain recurring practices, though not

really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint."

United States v. *Ferger,* 250 U. S. 199, illustrates the principle. The forgery of 12 fictitious bills of lading, unrelated to any actual shipments, could not substantially affect interstate commerce. The application of the statute to the defendant was held to be within commerce power, not upon any such untenable ground, but because a *general practice* of forging interstate bills of lading would burden interstate commerce by casting doubt on genuine bills (pp. 203–205). The test of the power of Congress as laid down by the Court (p. 203) was the relation of the subject regulated to commerce and "its effect upon it." In *Board of Trade* v. *Olsen,* 262 U. S. 1, 40, this Court, in sustaining Federal regulation of trading in grain futures, said: "Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." Yet no single sale could substantially affect the country-wide price.

The Federal Government may thus control practices which individually do not substantially affect interstate commerce, but which by their constant recurrence threaten it with substantial injury. The phrase "any transaction in or affecting interstate commerce", when used in legislation of a comprehensive character enacted under the commerce power, is appropriately chosen to cover (1) transactions "in" interstate commerce, (2) transactions

which in themselves substantially affect this commerce, and (3) transactions which, together with others of like nature, constitute a practice which substantially affects interstate commerce. In such a statute the words "affecting interstate commerce", like the power to which they refer, are not restricted to situations in which the individual transaction substantially affects interstate commerce. They include situations in which, as in the *Ferger* and *Olsen* cases, the effect of the individual transaction is slight but that of the aggregate of similar transactions is substantial.

The objectives of Congress and the legislative history of the Act make it clear that the words "affecting interstate or foreign commerce" were used in this broad and customary sense. Even a cursory examination of the scope of regulation authorized by title I shows that Congress was there attempting to exercise the full limits of its commerce power. Codes of fair competition are intended to outlaw unfair competitive practices, to promote and establish standards of fair competition binding upon all members of a trade or industry subject to a code. This purpose could hardly be achieved if a penalty for violating these standards could be imposed only by showing that the particular violation itself substantially affected interstate commerce, for few individual violations alone would have this effect.

Under Section 3 (f) each day a violation continues is a separate offense. Seldom would it be possible to establish that the wage rate paid to a

particular employee on a particular day or that the number of hours a particular employee was required to work in a given week was in a transaction "in" interstate commerce or was one which would by itself substantially affect interstate commerce. Violation of the important wage and hour provisions of codes would therefore be practically immune from penalty if Section 3 (f) were construed to mean that the individual violation either must be in interstate commerce or must itself substantially affect that commerce.

That it was the intention of Congress to include within Section 3 (f) every code violation within reach of the commerce power [6] is substantiated by

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[6] In the original bill (H. R. 5664) the penal provision was incorporated as part of Section 3 (b). It read:

"A violation of any provision of any such code shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense." (Hearings before House Ways and Means Committee on H. R. 5664, 73d Cong., 1st Sess., p. 2.)

The Senate Finance Committee in reporting the bill recommended that the above sentence be deleted from Section 3 (b) and that Section 3 (f) in its present form be added as a new section. The Committee's report said briefly:

"The provision in Section 3 (b) making a violation of any provision of a code of fair competition a misdemeanor has been retained in a modified form as Section 3 (f)." (Sen. Rep. No. 114, 73d Cong., 1st Sess., p. 2.)

And the two Committee amendments to carry out this change were adopted without further explanation and without debate. (Cong. Rec., vol. 77, pt. 6, pp. 5234, 5255.)

Since the original penalty provision would have applied to every code violation within reach of the commerce power

the statement of Senator Wagner when called upon by the Chairman of the Senate Finance Committee to explain to the Senate the provisions of the bill (Cong. Rec., vol. 77, pt. 5, pp. 5151–5152). Senator Wagner in the course of his explanatory statement said (*Id.*, p. 5154):

> The question of the proper exercise of Federal authority depends upon whether the bill confines itself to national matters or whether it attempts to extend to matters which are of purely local concern. The answer is clear. The language of the bill expressly provides that any compulsory measures, such as the licensing feature of the bill, and any penalties for violation of the codes, shall be confined to *business in or affecting interstate commerce.* Thus no attempt is made to extend Federal action to an area of activity not covered by the commerce clause of the Constitution. (Italics supplied.)

Indeed it would be absurd to suppose that, under the Recovery Act and the conditions leading thereto, Congress assumed to exercise less than its full constitutional power.

It is submitted, therefore, that the trial court's refusal to charge that the particular acts of petitioners must be shown to have affected interstate commerce was entirely proper. Petitioners' failure

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and since the one substituted therefor was treated as a change in form rather than in substance, it is clear that the lawmakers believed and intended that Section 3 (f) would and should have substantially the same meaning and effect.

to raise any other specific objections to the court's charge as to effect on interstate commerce, or to request additional charges on that subject, forecloses them from raising new objections on appeal. But even if it be assumed that the entire scope of the court's charge in this respect is in issue here, a brief examination of the charge will indicate that it was both proper and adequate.

The jury was instructed that the Government had the burden of proving beyond a reasonable doubt each element necessary to constitute the crime charged, and that a necessary element of the offense charged in each count was that the prohibited acts must affect interstate commerce[7] (R. 1484, 1511–1512, 1530–1531, 1541–1542, 1507). The court also charged that "the violations must have been substantial and not merely incidental" (R. 1532).

The court further instructed the jury that they must find whether, on the evidence, the violations charged "affected interstate commerce in any of the ways alleged in the indictment" (R. 1532).

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[7] The court instructed the jury in the language of the statute (R. 1529–1530), and even if it had not amplified its charge, this would have been sufficient in the absence of a proper request. See *Baugh* v. *United States*, 27 F. (2d) 257, 261, certiorari denied 278 U. S. 639, where the court said: "The court did repeatedly instruct substantially in the language of the statute, and upon the record we do not deem it necessary to determine to what extent a proper request would have imposed the duty of amplification." See also *Allis* v. *United States*, 155 U. S. 117, 122–123.

The first count of the indictment had previously been read to the jury. The indictment alleged that the violations and the transactions in which they occurred affected commerce in certain specific ways, as, for example, by demoralizing the price structure of the industry, diverting shipments of poultry, and causing a disruption of the flow of interstate commerce. (These allegations with reference to the first count are at R. 57–61. Similar allegations were made respecting each of the other counts.) In view of the instruction to the jury to find whether interstate commerce was affected "in any of the ways alleged in the indictment" and of the specific character of the allegations of the indictment as to what was meant by affecting interstate commerce, it is submitted that there is no merit in petitioners' contention that the jury was not adequately instructed on that subject.

H. THE VERDICT ON THE CONSPIRACY COUNT WAS CLEARLY UNANIMOUS

Petitioners' brief suggests that the jury's verdict on the conspiracy count was not unanimous, because, upon the polling of the jury, juror No. 9 stated that the jury "found him guilty on one section" of the conspiracy count (R. 1551). The trial judge thereupon properly inquired whether the jury had or had not agreed upon a verdict as to Count 1. The foreman replied, "We have agreed guilty on Count 1" (R. 1551). The court then

asked juror No. 9 whether he had agreed or not, and he replied, "We have agreed" (R. 1552). He definitely stated that his verdict was guilty on the first count (R. 1552). Juror No. 7 then said, "If he is guilty on this charge (i), does that consider the entire ————————." The court properly replied, "The count is presented. You said you agreed upon a verdict. Now, if you have not agreed on it, and you have agreed on the others, we will send you back on that" (R. 1552). Each of the jurors then agreed with the verdict as given, and in order to make certain that neither juror No. 7 nor juror No. 9 was in disagreement, the court again asked them specifically whether their verdict was guilty on the first count. Juror No. 9 answered, "Correct", and juror No. 7 answered "Yes, sir" (R. 1553, 1554). There can be no doubt that the confusion was entirely removed. Even petitioners' counsel apparently was satisfied, for he did not object or request any further polling of the jury (R. 1553, 1554).

I. THE TRIAL COURT DID NOT IMPOSE EXCESSIVE FINES OR INFLICT CRUEL OR UNUSUAL PUNISHMENT

In their specification of errors petitioners assert that the law which is claimed to have been violated is unconstitutional in that it imposes excessive fines, and inflicts cruel and unusual punishment, in violation of the Eighth Amendment. No assignment of error specifically covers this subject. (See

assignments 1 and 8, R. 1624, 1626.) Furthermore, no exceptions were taken to the sentences imposed (R. 1555–1556).

Total fines of $7,425.00 were imposed. Of this, $2,550.00 was imposed under the conspiracy count, and $4,875.00 under the substantive counts. No defendant was fined more than $100 on any one of the substantive counts (R. 1555–1556). Such fines cannot be deemed excessive, particularly in view of the aggravated circumstances of the offenses committed.

Nor can the provisions of the Recovery Act be considered unreasonable. Section 3(f) provides:

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

This provision is modeled after a series of penalty statutes, the validity of which has been upheld. See *Badders* v. *United States,* 240 U. S. 391; *Gulf C. & S. F. R. Co.* v. *Texas,* 246 U. S. 58; *Waters Pierce Oil Co.* v. *Texas,* 212 U. S. 86; *United States* v. *Clyde Steamship Co.,* 36 F. (2d) 691, certiorari denied, 281 U. S. 744.

CONCLUSION

It is respectfully submitted that the judgment below, in so far as it reversed the judgment of the trial court on Counts 46 and 55 relating to minimum wage and maximum hours of labor provisions, should be reversed; and should be affirmed as to the remaining counts.

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