SUBJECT INDEX

I. Statement As to Jurisdiction and Nature of the Appeal 1

II. Statement of the Case—

(a) Status of the case 2

(b) The material facts of the cause 5

III. Assignment of Errors 9

IV. Summary of Argument, Including Points Relied On 10

V. Argument—

Point A. The Act is a statutory plan to control agricultural production, beyond the powers delegated to Congress 12

Point B. The standard for allotting farm quotas is uncertain, vague and indefinite 20

Point C. The act was unconstitutionally applied to the 1938 crop of appellants 22

VI. Conclusion 26

Appendix 27

TABLE OF CASES CITED

Bailey vs. Drexel Furniture Co., 259 U. S. 20 16

Carter vs. Carter Coal Co., 298 U. S. 238 16

Champlin Refining Co. vs. Corp. Com., 286 U. S. 110 ..... 16, 22

Coe vs. Erroll, 116 U. S. 517 16

Connally vs. General Constr., 269 U. S. 385, 391 22

Crescent Oil Co. vs. Mississippi, 257 U. S. 129 16

Glenn vs. Smith, 91 F. (2d) 447 14

Glenn vs. Smith, certiorari denied 301 U. S. 691 15

Hammer vs. Dagenhart, 247 U. S. 251 16

Heisler vs. Thomas Collier Co., 260 U. S. 246 16

Hill vs. Wallace, 259 U. S. 44 16

Kidd vs. Pearson, 128 U. S. 1 16
Linder vs. United States, 268 U. S. 5 16
Lipke vs. Lederer, 259 U. S. 557 16
Morgan vs. United States, 304 U. S. 1 24
Nichols vs. Coolidge, 274 U. S. 531 24
Oliver Mining Co. vs. Lord, 262 U. S. 172 16
Rickert Rice Mills vs. Fontenot, 297 U. S. 110 14
Rickert Rice Mills vs. Fontenot, rehearing denied 297 U. S. 726 14
United Mine Workers vs. Coronado Co., 259 U. S. 344 16
United States vs. Butler, 297 U. S. 1 ..... 12, 15, 16
United States vs. E. C. Knight Co., 156 U. S. 1 16

STATUTES CITED

Act of Congress of Aug. 24, 1937 (Section 3), U. S. C. A., Title 28, Section 380 (a) 2
Act of Congress (Agricultural Adjustment Act of 1938), U. S. C. A., Title 7, Section 1281 et sequa 2
Act of Congress (Agricultural Adjustment Act of 1933), Chap. 25, 48 Stat. at L. 31 12
Act of Congress (Kerr-Smith Tobacco Act), 48 Stat. 1275, Ch. 866 14
Act of Congress (Bankhead Act), 48 Stat. at L. 598, Chap. 157, as amended by Act of June 20, 1934, 48 Stat. at L. 1184, Chap. 667 14

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 505.

JAMES H. MULFORD ET AL., APPELLANTS,

VS.

NAT SMITH ET AL., ORIGINAL DEFENDANTS, AND UNITED STATES OF AMERICA, INTERVENING DEFENDANT, APPELLEES.

BRIEF ON BEHALF OF APPELLANTS.

I.

STATEMENT AS TO JURISDICTION AND NATURE OF APPEAL.

This is an appeal from a final decree of the United States District Court for the Middle District of Georgia, wherein a specially organized statutory court, consisting of Circuit Judge Samuel H. Sibley, District Judge C. B. Kennamer, and District Judge Bascom S. Deaver denied an injunction and relief prayed for by complainants below (appellants here) and dismissed their bill, Judge Deaver not joining in the decree and opinion.

The final decree and opinion, including findings of fact and conclusions of law were signed October 5th, 1938, and entered of record October 7th, 1938 (R. 183 *et seq.*).

Probable jurisdiction of this court was noted in the appellants' statement as to jurisdiction, duly served and filed pursuant to rule twelve of this court.

The appeal is of right under Section 3 of the Act of Congress of August 24, 1937, U. S. C. A., Title 28, Section 380 (a).

II.

STATEMENT OF THE CASE.

(A)

Status of the Case.

Appellants are farmers, who raise what is commonly known as flue-cured tobacco on their respective farms in the vicinity of Valdosta, Lowndes County, Georgia, and who intended to market and did market their 1938 tobacco crop in auction tobacco warehouses operated by defendant warehousemen in said city (R. 44).

Appellants' bill of complaint, as amended, seeks interlocutory and permanent injunctions suspending or restraining the enforcement, operation and execution of, and setting aside in whole or in part, the provisions of an Act of Congress, known as the Agricultural Adjustment Act of 1938, approved February 16, 1938, Public No. 430, 75th Congress, 52 Stat. 31, as amended, U. S. C. A. Title 7, Section 1281, *et seq.*, on the ground that said Act and certain parts thereof are repugnant to the Constitution of the United States. (Original bill of complaint, R. 1 to 6, and amendment thereto R. 24 to 29). The parts of said act which are material to an understanding of the constitutional questions involved and which include Section 312 to Section 314 (omitting certain subsections dealing with types of tobacco other than flue-cured tobacco), are set

out in the appendix hereto. This Act, in substance, provides, that the Secretary of Agriculture may under certain conditions proclaim a national marketing quota for flue-cured tobacco each year, including the year 1938, in which event he shall provide for a referendum of tobacco-producing farmers; that he shall then apportion the national quota among the several tobacco-producing states, and then through committees allot a quota to each farm. A penalty of 50 per cent of the sales price is assessed against the marketing of any tobacco in excess of the farm marketing quota, to be paid by the person acquiring the tobacco from the producer, except that, if marketed through a warehouse, the penalty is to be paid by the warehouseman, with the further provision that, in either case, the equivalent of the penalty may be deducted from the price paid the producer. The penalties are directed to be remitted to the Secretary of Agriculture and by him paid into the Treasury of the United States.

A condensed statement of the grounds on which the constitutionality of said Act is challenged in the bill and amendment thereto is as follows:

(1) It is repugnant to the Tenth Amendment to the Constitution of the United States, in that it legislates on a subject and in relation to a power not delegated to the United States but reserved to the states; it is an unpermissible attempt to regulate and control the growth, production and sale of tobacco within a state; it is a statutory plan to regulate and control the production and marketing by producers of all tobacco produced within the several states, which are matters beyond the powers delegated to the Federal Government, in invasion of the powers reserved to the States (R. 5).

(2) The provisions of Subsection (b) of Section 313 of the Act fixing the bases or standards by which farm quotas are established are so vague, uncertain and indefinite as unconstitutionally to vest in the Secretary of Agri-

culture legislative powers in violation of Article I, Section 1, of the Constitution of the United States, and furnish no protection to producers of tobacco against the unreasonable, arbitrary and capricious action on the part of the Secretary of Agriculture in the establishment of farm marketing quotas, thereby denying due process of law to producers in violation of the Fifth Amendment to the Constitution of the United States. See amendment to bill of complaint (R. 25 to 27).

(3) The Act was unconstitutionally applied to the 1938 tobacco crop of appellants for the reason that the establishment of the marketing quotas, subsequent to the planting, cultivation and gathering of the 1938 crop, during which time appellants had no means of ascertaining even the approximate number of pounds each might produce and sell free of penalty, rendered it impossible for them to take into consideration at the time of planting and cultivation possible restrictions on marketing and thereby avoid the labor and expense of producing tobacco in excess of marketing quotas, thus depriving appellants of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. See amendment to bill of complaint (R. 27 to 29).

The defendant warehousemen, by petition, removed the case from the state court to the District Court of the United States for the Middle District of Georgia, on the ground that there existed a controversy between the plaintiffs and defendants, the correct decision of which depends upon the construction of the Constitution of the United States and the validity of said Act, and on the further ground that said Act regulates all marketing of tobacco as in and directly affecting interstate and foreign commerce (R. 12 *et seq.*).

The United States of America filed its petition for leave to intervene as party defendant, and by order of the district court was permitted to intervene (R. 16 *et seq.*). The temporary restraining order passed by the state court

was continued in force by order of the district court, and the equivalent of the penalties was ordered impounded in the registry of the court by the consent of all parties (R. 19 *et seq.*).

The United States of America, intervening defendant, filed its answer admitting substantially all the material allegations of fact in the bill of complaint as amended, but denying the conclusions of law therein (R. 30 *et seq.*).

The defendant warehousemen filed their answer to the bill of complaint and amendment thereto making similar admissions of the facts alleged, claiming that they occupied a position analogous to that of an innocent and involuntary stake holder, and praying for protection and other relief (R. 33 *et seq.*).

The case was tried on a stipulation of facts and evidence before a three judge statutory court, and a final decree entered October 7th, 1938, signed by two of the presiding judges, finding in favor of defendants and denying all the prayers of the bill as amended, and dismissing the bill at the cost of the complainants (R. 183 *et seq.*).

An appeal to this court was allowed (R. 191), and a stay granted (R. 194).

(B)

The Material Facts of This Cause.

The Secretary of Agriculture (hereinafter referred to as the Secretary), pursuant to the provisions of the Agricultural Adjustment Act of 1938 (hereafter referred to as the Act), on February 18th, 1938, proclaimed a national marketing quota for flue-cured tobacco in the amount of 705,000,000 pounds (R. 39, 40).

The Secretary conducted a referendum of flue-cured tobacco-producing farmers on March 12th, 1938, which resulted favorably to the national marketing quotas (R. 40, 41).

The Secretary apportioned the national quota among the seven states producing flue-cured tobacco on July 22nd, 1938. This was only six days before the Georgia and Florida markets opened (R. 41).

The above apportionment was readjusted on August 13th, 1938, increasing the national quota to 748,079,000 pounds (R. 102).

The farm quotas were allotted immediately preceding the opening of the Georgia and Florida markets on July 28th, 1938 (R. 45).

The appellants' bill of complaint was filed July 27th, 1938 (R. 11), at which time each plaintiff had reached the conclusion from the best available information that he had produced and would offer for sale tobacco in excess of his farm quota (R. 45).

Practically all flue-cured tobacco is raised in six states including Georgia and Florida (R. 52). From two-thirds to three-quarters of this tobacco is shipped in interstate commerce to other states or foreign countries (R. 66). Virginia is the only state that manufactures more tobacco than it produces (R. 65). Only a small percentage of tobacco raised in Georgia and Florida is manufactured in these states (R. 65), although Georgia has several redrying plants in which the tobacco is processed before shipment (R. 63).

Approximately 750,000 families engage in the production and marketing of tobacco; around 300,000 of these engage in the marketing and producing of flue-cured tobacco (R. 5).

Approximately eighty-five per cent of all tobacco is marketed through tobacco auction warehouses. A few sales are made direct to dealers; some is marketed through co-operative associations (R. 56).

Auction tobacco warehouses such as were operated by defendants provided practically the only available means for the marketing of the 1938 crop of appellants (R. 2).

Before flue-cured tobacco can be stored so as to keep it in a satisfactory condition for sale at some future pe-

riod, it is necessary that it be redried and packed in hogsheads. Associations which do not own their own redrying plants can have the tobacco of their members dried at private processing plants. After the tobacco has been redried and packed it can be stored for an indefinite period. During the marketing season in 1938 there were no such co-operative associations in Georgia or Florida (R. 56).

The redrying of flue-cured tobacco by a buyer usually takes place within a week after purchase from the producer. Redrying plants are owned and operated by most of the dealers and manufacturers (R. 63).

In the redrying plant the tobacco is assorted and blended according to grade and run through a redrying machine in order that it may be preserved by removing practically all of the original moisture and adding thereto a controlled amount, after which it is packed in hogsheads for storage and kept from one to five yars before manufactured (R. 62, 63).

Had not the defendant warehousemen been enjoined from deducting the equivalent of the penalties assessed under the provisions of the Act and from remitting same to the Secretary they would have been so deducted and remitted, and none of defendant warehousemen would have been financially able to respond in damages in the event the Act should be declared unconstitutional, and in that event appellants' damages would be irreparable (bill of complaint, Paragraph 15 (R. 4), and answer of intervening defendant, Paragraph 7 (R. 31), and answer of original defendants, Paragraph 15 (R. 35)).

The facilities of the railroads and other common carriers of the United States, and particularly the carriers operating in the tobacco growing sections of the Southeast where the bulk of flue-cured tobacco is produced, have been for many years past, were at the time of the passage and approval of the Agricultural Adjustment Act of 1938, and now are more than ample to move such tobacco freely and without undue delay (R. 68).

Neither in the farming industry of the sections named nor in the operation of tobacco warehouses have there been labor disputes or any danger or hint of labor disputes to threaten the free flow of tobacco in interstate or foreign commerce (R. 56).

Studies have been made which indicate that usually as among producers the total cost per pound of producing flue-cured tobacco has varied from ten to twenty cents, dependent upon various contingencies. Stated generally, one-half of the price received by farmers for their tobacco in 1938 is less than the cost of producing tobacco (R. 46).

The marketing season for flue-cured tobacco in Georgia and Florida usually begins about August 1st and ends about September 1st, and this was true in 1938. Notice of the marketing quota for the farm of each of the plaintiffs was given shortly before the opening of the auction markets of defendants. Prior to that time each of plaintiffs had practically completed the planting, cultivating, harvesting, curing and grading of his tobacco. Prior to the service of such notice, no one of the plaintiffs knew, or had any way of knowing, the amount of his marketing quota. At the time of the approval of the Act by the President on February 16th, 1938, each of plaintiffs had gone to considerable expense and labor in planting his seedbeds and in caring for same, and each had prepared and purchased fertilizer for the fields in which the tobacco was to be transplanted from these beds, all of which had entailed considerable expense. The harvesting began during the month of June, 1938, and continued during the month of July, followed by the curing and grading of tobacco. The major portion of the crop in this section is usually gathered and ready for market by the first of August and this condition existed in 1938. The planting, cultivating, curing and grading of this tobacco require much labor, care and expense. All of this necessary work had been completed and expenses incurred before the farm quotas were allotted (R. 45, 46).

(Note: The stipulation of facts is lengthy. It includes a history of the tobacco industry from the days of the Jamestown Colony to the present, and also includes many statistics and statements which we think throw no light on the issues involved, and for that reason are omitted from this brief).

III.

ASSIGNMENT OF ERRORS.

Appellants insist on each and every assignment of error set out in the assignment of errors (R. 192). These assignments condensed are as follows:

The court erred in the following particulars:

(1) In holding that Sections 312, 313 and 314 of the Act constitute a regulation of the marketing of tobacco within the power of Congress to regulate commerce with foreign countries and among the several states.

(2) In holding that the said sections of said Act constitute a valid regulation of all marketing of tobacco within the power of Congress to regulate commerce.

(3) In holding that the provisions of Subsection (b) of Section 313 relating to the establishment of marketing quotas for tobacco farms are sufficiently certain in their terms and do not unconstitutionally vest in the Secretary legislative power.

(4) In holding that the provisions of said subsection are not so vague and indefinite as to constitute a denial of due process of law to appellants.

(5) In holding that said sections of said Act are valid as against the attacks made by plaintiffs-appellants.

(6) In holding that the provisions of Subsection (d) of Section 312 of said Act whereby farm marketing quotas for tobacco were established for the 1938-1939 marketing year do not operate to deprive plaintiffs-appellants of their property without due process of law.

IV.

SUMMARY OF ARGUMENT OUTLINING POINTS RELIED ON.

POINT A (page 12).

Sections 312, 313 and 314 of the Agricultural Adjustment Act of 1938, as a part of a statutory plan outlined in the whole Act to regulate the production of major agricultural crops within the states, include provisions regulating and controlling the production and marketing by producers of all tobacco produced within the several states, which are matters beyond the powers delegated to Congress, in invasion of the powers reserved to the states under the Tenth Amendment to the Constitution of the United States.

(This point covers Paragraphs 1, 2 and 5 of the assignment of errors (R. 192).)

POINT B (page 20).

The provisions of Subsection (b) of Section 313 of said Act relating to the establishment of marketing quotas for tobacco farmers are so vague, uncertain and indefinite in their terms as unconstitutionally to vest in the Secretary of Agriculture legislative powers, and furnish no protection to producers of tobacco against the arbitrary action on the part of the Secretary of Agriculture in the establishment of farm marketing quotas, thereby constituting a denial of due process of law to producers.

(This is covered in the assignment of errors, Paragraphs 3, 4 and 5 (R. 192).)

POINT C (page 22).

Said Act was unconstitutionally applied to the 1938 tobacco crop of appellants for the reason that the establish-

ment of marketing quotas for the farms of appellants, subsequent to the planting, cultivation and gathering of their respective crops, during which time appellants did not know and had no means of knowing even the approximate number of pounds of tobacco each might raise free of penalty, rendered it impossible for them to take into consideration during said time possible restrictions on marketing and avoid the labor and expense of producing tobacco in excess of unannounced and undetermined marketing quotas, thereby depriving them of their property without due process of law.

(This point is covered in assignment of errors, Paragraphs 5 and 6 (R. 193).)

V.

ARGUMENT.

Point A.

SECTIONS 312, 313 AND 314 OF THE AGRICULTURAL ADJUSTMENT ACT OF 1938, AS A PART OF A STATUTORY PLAN OUTLINED IN THE WHOLE ACT TO REGULATE THE PRODUCTION OF MAJOR AGRICULTURAL CROPS WITHIN THE STATES, INCLUDE PROVISIONS REGULATING AND CONTROLLING THE PRODUCTION AND MARKETING BY PRODUCERS OF ALL TOBACCO PRODUCED WITHIN THE SEVERAL STATES WHICH ARE MATTERS BEYOND THE POWERS DELEGATED TO CONGRESS, IN INVASION OF THE POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We thought that the principle of law stated above, that the regulation and control of agricultural production are beyond the powers delegated to Congress, had not been an open question with courts and attorneys since the decision in the case of *United States* v. *Butler et al.*, 297 U. S. 1, in which case the Act of Congress known as the Agricultural Adjustment Act of 1933 (approved May 12th, 1933, Ch. 25, 48 Stat. at L. 31) was declared unconstitutional. On page 68 of the report of the decision in that case, the court held, apart from other questions, that:

> "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government. The tax, the appropriation of the funds raised, and the direction for the disbursement, are but parts of the plan. They are but means to an unconstitutional end.

> "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the tenth amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden."

In the dissenting opinion by Mr. Justice Stone (Mr. Justice Brandeis and Mr. Justice Cardozo concurring), there is no dissent from this pronouncement. On the contrary the dissenting opinion impliedly concurs in this statement of the law. The majority opinion holds that the Agricultural Adjustment Act of 1933 was a plan to regulate and control agricultural production. The minority opinion holds, in substance, that an offer of compensation for acreage reduction, not enforced by legal compulsion, is not such coercion as to constitute control, but that coercion by threat of loss, not hope of gain, does constitute legal compulsion. The following excerpts from the dissenting opinion support the above conclusions:

> "The tax is unlike the penalties which are held invalid in the *Child Labor Tax Case* (*Bailey* v. *Drexel Furniture Co.*), 259 U. S. 20, 66 L. Ed. 817, 42 S. Ct. 449, 21 A. L. R. 1432, in *Hill* v. *Wallace*, 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453, in *Linder* v. *United States*, 268 U. S. 5, 17, 68 L. Ed. 810, 823, 45 S. Ct. 446, 39 A. L. R. 229, and in *United States* v. *Constantine*, decided December 9, 1935 (296 U. S. 287, *ante*, 233, 56 S. Ct. 223), because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states.
>
> "Although the farmer is placed under no legal compulsion to reduce acreage it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress.

> "The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act. Threat of loss, not hope of gain, is the essence of economic coercion.
>
> "It is significant that in the congressional hearings on the bill that become the Bankhead Act (April 21, 1934), 48 Stat. at L. 598, Ch. 157, as amended by Act of June 20, 1934, 48 Stat. at L. 1184, Ch. 687, U. S. C. A., Title 7, 725, which imposes a tax of 50 per cent on all cotton produced in excess of limits prescribed by the Secretary of Agriculture, there was abundant testimony that the restriction of cotton production attempted by the Agricultural Adjustment Act could not be secured without the coercive provisions of the Bankhead Act.
>
> "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control."

The point of difference between the majority and minority opinion is therefore not on the question of the constitutionality of control, but on whether or not the Act did control or regulate production.

The unconstitutionality of such regulation and control is reaffirmed by a decision from which there is no dissent in the case of *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, rehearing denied, 297 U. S. 726.

The Kerr-Smith Tobacco Act (48 Stat. 1275, Ch. 866), in which control of tobacco production was sought to be effected by the levy of tax on the marketing of tobacco in excess of production allotment, was declared unconstitutional by the Sixth Circuit Court of Appeals in *Glenn* v. *Smith*, 91 F. (2d) 447. In that opinion it was said:

> "While tobacco which is marketed in auction warehouses does in large percentage enter into interstate commerce, the purpose of this regulation was to establish prices by restriction of production."

Although this is a circuit court opinion, we cite it because a petition for writ of certiorari was denied by the Supreme Court, 301 U. S. 691.

In the congressional findings prefacing the three control acts above referred to, to-wit: The Agricultural Adjustment Act of 1933, which has been declared unconstitutional by this court, the Bankhead Act obviously condemned by both the majority and minority opinion in the *Butler Case, supra,* and the Kerr-Smith Tobacco Act the commerce clause was invoked just as it is in the Agricultural Adjustment Act of 1938.

The unconstitutionality of the Bankhead Act and the Kerr-Smith Act were generally recognized and these acts were repealed.

Quoting again from the case of *United States* v. *Butler, supra*:

> "Widespread similarity of local conditions cannot confer upon Congress powers reserved to the states by the Federal Constitution."

This court has also frequently held that an emergency creates in Congress no new powers although it may call for the exercise of powers already conferred. Nor can Congress regulate commerce for the general welfare.

> "The attainment by Congress of a prohibited end may not be accomplished under the pretext of the assertion of powers which are granted."
>
> *United States* v. *Butler, supra.*

Neither the production and sale nor the manufacture and sale of *any* product within a state is interstate or foreign commerce, and Congress has no power to regulate the same, and therefore, if an Act of Congress purporting to levy a tax or to regulate commerce shows on its face that its primary purpose is not to raise revenue or to regulate commerce but to regulate under the guise of taxation or under the guise of regulation of commerce, it is invalid

as an exercise of a granted power. Supporting this statement, we cite the following cases:

Kidd v. *Pearson,* 128 U. S. 1.
Hammer v. *Dagenhart,* 247 U. S. 251.
Bailey v. *Drexel Furniture Company,* 259 U. S. 20.
Lipke v. *Lederer,* 259 U. S. 557.
Linder v. *United States,* 268 U. S. 5.
United Mine Workers of the World v. *Coronado Co.,* 259 U. S. 344.
Heisler v. *Thomas Collier Co.,* 260 U. S. 246.
Oliver Mining Co. v. *Lord,* 262 U. S. 172, 178.
Champlin Refining Co. v. *Corporation Commission,* 286 U. S. 210, 235.
United States v. *E. C. Knight Co.,* 156 U. S. 1.
Coe v. *Erroll,* 116 U. S. 517.
Crescent Oil Co. v. *Mississippi,* 257 U. S. 129.
Carter v. *Carter Coal Company,* 298 U. S. 238.
Hill v. *Wallace,* 259 U. S. 44.
United States v. *Butler, supra.*

We fail to find any decision by this court wherein it has been held or intimated that the *quantity* of legitimate goods produced or manufactured by a purely intrastate industry is subject to regulation or control by Congress on the theory that regulation was necessary to prevent overproduction.

There is a clear distinction between the right to exercise governmental control over trade in legitimate articles of commerce and the right to exercise such control over commerce in things contraband and things the use of which may reasonably be conceived to be injurious to the public or in contravention of the policy of the state of their destination.

We recognize that some intrastate industries may be regulated and controlled under the commerce clause. For example, we find reasonable and nonconfiscatory regulation of agencies and instrumentalities *engaged in* or *directly affecting* interstate commerce as illustrated by the

stockyard, board of trade, warehouse and intrastate rate cases. Again we have regulation of intrastate industries where same is necessary to prevent threatened strikes that tend to *prevent* or *obstruct* the free flow of goods in commerce, as in the Labor Relation Board cases. And Congress may forbid or control the shipment in commerce of goods that may have a detrimental effect on the public health or morals, and also regulate the shipment of certain goods, trade in which has been forbidden by the laws of any state under its police powers. The control of agricultural production is not included in any of these categories. On the contrary, this court, in the exercise of a policy of "inclusion and exclusion," has *excluded* agricultural production from the matters within the power of Congress to control.

IS THE AGRICULTURAL ADJUSTMENT ACT OF 1938 A STATUTORY PLAN TO REGULATE OR CONTROL AGRICULTURAL PRODUCTION AND DOES IT EMBRACE A PLAN TO REGULATE AND CONTROL THE PRODUCTION OF TOBACCO? WE CONTEND THAT A STUDY OF THE PROVISIONS OF THE ACT DEMANDS AN AFFIRMATIVE ANSWER.

As is hereinbefore shown, by the provisions of the Act, the Secretary of Agriculture, under certain conditions, may proclaim a national marketing quota for each year. He is empowered, in the apportionment of this quota, to determine the number of pounds of tobacco, if any, that may be produced in each state; and, through committees, to determine the exact number of pounds, if any, that may be produced on each farm. Here we find the Secretary vested with power to designate who shall and who shall not produce tobacco, and to prorate production among the individual producers. He is provided by the Act with a so-called standard by which he is to be guided in allotting production to each farmer. This standard (Subsection (b) of 313 of the Act) authorizes him to determine farm quotas not only on the

basis of past production, but also on the basis of the soil; the land, labor and equipment available for the production of tobacco; crop-rotating practices, and on the basis of other factors entering into the operation of a farm, some of which are undefined in the Act.

In this connection we respectfully request the court to read the Secretary's interpretation of the above subsection of this Act, under the heading, "Procedure for Determination of Flue-cured Tobacco Marketing Quotas" (R. 128 to 138). We find here, among other regulations, that, under this procedure, the amount of the 1938 quota is to some extent made to depend on the number of harvested and diverted acres of cotton on the farm in 1937, on the number of acres of peanuts harvested and marketed in 1937, on the number of acres of commercial truck and vegetables on the farm of 1937. In other words, if the farmer does not practice crop rotation in accordance with the ideas of the Secretary his quota is reduced.

A full discussion of the Act and regulations of the Secretary will unduly lengthen this brief. Suffice it to say that it includes detailed specifications for the regulation of farming with the imposition of a confiscatory penalty for noncompliance. It provides a more detailed and drastic regulation than was attempted by either the Agricultural Adjustment Act of 1933, the Bankhead Act, or the Kerr-Smith Act hereinbefore briefly discussed. If those three Acts were unconstitutional, there can be no doubt as to the unconstitutionality of this Act.

In the opinion written for the statutory court by the distinguished circuit judge, he says, "But the Act directly deals only with the marketing and not with the planting or production of tobacco" (R. 184). A farmer plants and cultivates his money crop with the sole end in view of marketing it. Short of a penal statute prohibiting overproduction, we can conceive of no more effective way of controlling or limiting production than

the assessment of a confiscatory penalty on the selling price of the farmer's money crop. "Congress may not do indirectly what it is forbidden to do directly." If it may not control production under the guise of the commerce clause, it has no power to control production by so-called marketing regulations, which in fact are not valid regulations of marketing, but provide only for the collection of a penalty from the producer.

Everybody, who knows anything about this Act or its operation, knows that it is a "crop-control act" and so designates it. In fact the Soil Conservation and Domestic Allotment Act is called the "voluntary crop-control act," while this Act, cumulative in its provisions to the other, is universally designated "the *mandatory* crop-control act." We can not think that this court will shut its eyes to what everybody knows.

If Congress has the power to limit and prorate production among farmers, it likewise has the power to limit and prorate, among the states and among the individual producers, the quantity of production of any industry, where a large percentage of its products eventually moves in interstate commerce. The exercise of such powers obliterates all state and national lines.

In the congressional findings, we find that the reason given for the exercise of such control is that farmers are unable without federal assistance to control effectively the orderly marketing of their commodities. We cannot here question the wisdom of this Act, but we do say that the above reason, if true, does not render the Act constitutional, and that if federal control of farm production is wise, it should be preceded by an amendment to the Constitution delegating to Congress the power to exercise control.

Point B.

THE PROVISIONS OF SUBSECTION (B) OF SECTION 313 OF THE ACT RELATING TO THE ESTABLISHMENT OF MARKETING QUOTAS ARE SO VAGUE, UNCERTAIN AND INDEFINITE IN THEIR TERMS AS UNCONSTITUTIONALLY TO VEST IN THE SECRETARY OF AGRICULTURE LEGISLATIVE POWERS, AND FURNISH NO PROTECTION TO PRODUCERS AGAINST ARBITRARY ACTION ON THE PART OF THE SECRETARY IN THE ESTABLISHMENT OF FARM MARKETING QUOTAS, THEREBY CONSTITUTING A DENIAL OF DUE PROCESS OF LAW TO PRODUCERS.

The degree of certainty required of standards of this kind varies with the different circumstances and conditions surrounding each case. In this Act the standard was directed to be applied to the 1938 tobacco crop of appellants which was in process of cultivation when the Act was approved. The standard was not and, because of the effective date of the Act, probably could not have been interpreted by the regulations of the Secretary, nor probably could the farm quotas have been allotted, as they were allotted by him, until after the 1938 crop had been cultivated and harvested at great labor and expense. Not until then did appellants "know or have any way of knowing even the approximate number of pounds of tobacco each might raise and sell free of penalty," a condition admitted by defendants to be true. This admission demonstrates that the standard was so uncertain and indefinite that no one could guess how it should or would be interpreted and applied, and that, therefore, appellants knew not what reasonable steps to take to avoid the loss incident to production in excess of undetermined quotas.

The penalty assessed is not consistent with any purpose other than to inflict punishment for the violation of the Act, and the word *penalty* carries with it the idea of punishment for violation of a law. "The validity of

its provisions must consequently be tested on the basis of the terms employed." The Act is therefore in the nature of a penal statute and at least approximately the same degree of certainty in its terms should be required as is required of a criminal statute.

The Secretary, however, is permitted to roam at will in determining the meaning of the words "past marketing," in determining whether these words apply to any one or more previous years; in determining the relative effect of each of the many designated factors on the amount of the farm quota. Interpretation and application of this standard by different persons would necessarily result differently in each case.

It has been suggested that the admission in the bill of complaint and in the stipulation of facts to the effect, that, for the purposes of this case, the farm marketing quotas were established in accordance with the applicable provisions of the Act and regulations of the Secretary, constitute a waiver of objections to the uncertainty of the standard. We do not think so nor do defendants so contend. To successfully attack the *amount* of the allotted quotas, as such, requires proof that the amount is erroneous, to prove which requires proof of a correct determination of the quota—an insurmountable obstacle. Consequently the plaintiffs could only attack the *right* to assess *any* quota on the grounds that the Act is unconstitutional, the standard uncertain and the Act unconstitutionally applied to the 1938 crop.

The uncertainty of the standard is specified in detail in Paragraph 3 of the amendment of the bill of complaint (R. 25), and it is illustrated by the instructions of the Secretary as outlined in his "Procedure for the Determination of Flue-cured Tobacco Marketing Quotas" (R. 128). We request the court to read these parts of the record. The standard outlined in said section of the act is in the appendix attached hereto.

Under the circumstances of this case, therefore, there should be strict compliance with the general rule fixed

for such standards in the case of *Conally* v. *General Constr.*, 269 U. S. 385, 391, which reads as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> "In the light of our decision, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co.* v. *Corporation Com.*, 286 U. S. 110, 243, and cases cited on page 243.

We respectfully contend that no farmer could possibly calculate in advance of allotment the approximate amount of quota to which he might be entitled under the provisions of this standard.

Point C.

THE ACT WAS UNCONSTITUTIONALLY APPLIED TO THE 1938 CROP OF APPELLANTS FOR THE REASON THAT THE ESTABLISHMENT OF MARKETING QUOTAS FOR THE FARMS OF APPELLANTS, SUBSEQUENT TO THE PLANTING, CULTIVATION AND GATHERING OF THEIR RESPECTIVE CROPS, DURING WHICH TIME APPELLANTS DID NOT KNOW AND HAD NO MEANS OF KNOWING EVEN THE APPROXIMATE NUMBER OF POUNDS OF TOBACCO EACH MIGHT PRODUCE AND SELL FREE OF PENALTY, RENDERED IT IMPOSSIBLE FOR THEM TO TAKE

INTO CONSIDERATION DURING SAID TIME POSSIBLE RESTRICTIONS ON MARKETING AND AVOID THE LABOR AND EXPENSE OF PRODUCING TOBACCO IN EXCESS OF UNANNOUNCED AND UNDETERMINED MARKETING QUOTAS, THEREBY DEPRIVING THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

A portion of the argument under Point B is applicable here and will not be repeated.

For a full statement of the time and conditions under which the 1938 tobacco crop of appellants was planted and cultivated, as related to the passage and operation of the Act, showing how these facts sustain the conclusion that the Act was unconstitutionally applied to the 1938 crop of appellants, we request the court to read Paragraph 5 of the amendment to the bill of complaint (R. 27) (the allegations of fact therein alleged being admitted by defendants), and stipulation of facts (R. 45).

In the exercise of powers under the commerce clause Congress and its agencies must conform to the due process clause.

As shown by the record above referred to, at the time of the passage, approval and effective date of the Act, appellants had already done a large amount of painstaking work and expended considerable sums of money on their 1938 crop. The proclamation of the national quota followed by the proclamation of state quotas on July 22nd, 1938, gave them no further light. No farmer knew at any time during this period whether or not it was necessary, in order to comply with the Act, to abandon cultivation of any part of his planned or planted acreage on which his labor and money had already been spent. The standard for allotting farm quotas threw no light on this problem as it is admitted that, "until the announcement of the individual quotas petitioners did not know and had no way of knowing the probable amount of same," and that, prior to that time, "petitioners had no means of estimating the quota that might be allotted to each."

The amount of the loss that each might sustain depended upon his past lawful acts.

> "A penalty or tax, the amount of which is made to depend upon past lawful transactions, is violative of the due process clause."
> *Nichols* v. *Coolidge,* 274 U. S. 531, 542.

It is palpable sophistry to argue that the penalty is on the marketing rather than on overproduction. If a farmer cannot sell his perishable money crop, he is certainly penalized the total cost of production. So far as he is concerned, his tobacco crop is perishable. He cannot preserve it as he has no redrying facilities, nor will the operators of redrying plants receive the tobacco of each individual farmer for this purpose. There were no cooperative marketing associations in Georgia or Florida with redrying plants available to farmers as is shown by the record hereinbefore briefed under the head of "Material Facts of the Cause." In other words, the farmer must either promptly sell his tobacco crop or destroy it; or it will destroy itself. Finding themselves in this dilemma the farmers sell at half price rather than incur a one hundred per cent penalty by not selling.

The field of administrative law is comparatively unexplored by many of us, but we think that, although the facts in the two cases differ, the following excerpts from the opinion of this court in the case of *Morgan* v. *United States,* 304 U. S. 1, 22, are peculiarly applicable:

> "In administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play * * * The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is to their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex so-

> ciety are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

As applied to the sale of the 1938 crop of appellants, the Act is arbitrarily retroactive; it is tantamount to confiscation without compensation; it fails to observe the "basic concepts of fair play"; it is an "arbitrary exercise of the powers of government unrestrained by established principles of private rights and distributive justice" (and these rights include every essential incident to their enjoyment, including the right to dispose of property without drastic restrictions unreasonably imposed).

VI.

CONCLUSION.

Our courts have uniformly and jealously protected such rights as freedom of speech, the right of assembly, and freedom of the press, guaranteed by the Bill of Rights. They should continue to equally protect the similarly guaranteed rights of the states against invasion of their reserved powers, and the right of every citizen that he shall not be deprived of his property, as well as of his life and liberty, without due process of law.

The facts of this case demand a holding that the challenged provisions of the Act are unconstitutional, that the standards referred to are uncertain, that the Act was unconstitutionally applied to the 1938 crop, and that the impounded penalties be returned to appellants.

Respectfully submitted,

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APPENDIX.

Sections 312, 313 and 314 of the Agricultural Adjustment Act of 1938.

NATIONAL MARKETING QUOTA

Sec. 312. (a) Whenever, on the 15th day of November of any calendar year, the Secretary finds that the total supply of tobacco as of the beginning of the marketing year then current exceeds the reserve supply level therefor, the Secretary shall proclaim the amount of such total supply, and, beginning on the first day of the marketing year next following and continuing throughout such year, a national marketing quota shall be in effect for the tobacco marketed during such marketing year. The Secretary shall also determine and specify in such proclamation the amount of the national marketing quota in terms of the total quantity of tobacco which may be marketed, which will make available during such marketing year a supply of tobacco equal to the reserve supply level. Such proclamation shall be made not later than the 1st day of December in such year.

(c) Within thirty days after the date of the issuance of the proclamation specified in subsection (a) of this section, the Secretary shall conduct a referendum of farmers who were engaged in production of the crop of tobacco harvested prior to the holding of the referendum to determine whether such farmers are in favor of or opposed to such quota. If in the case of burley tobacco, or fire-cured and dark air-cured tobacco, respectively, farmers would be subject to a national quota for the next succeeding marketing year pursuant to the provisions of subsection (a) of this section, and also to a national marketing quota for the current marketing year pursuant to the provisions of subsection (b) of this section, the referendum

shall provide for voting with respect to each such quota. If more than one-third of the farmers voting in the referendum oppose such quota, the Secretary shall, prior to the 1st day of January, proclaim the result of the referendum and such quota shall not be effective thereafter.

(d) In connection with the determination and proclamation of any marketing quota for the 1938-1939 marketing year, the determination by the Secretary pursuant to subsection (a) of this secton shall be made and proclaimed within fifteen days following the date of the enactment of this Act, and the proclamation of the Secretary pursuant to subsection (c) of this section shall be made within forty-five days following the date of the enactment of this Act.

Sec. 313. (a) The national marketing quota for tobacco established pursuant to the provisions of section 312, less the amount to be allotted under subsection (c) of this section, shall be apportioned by the Secretary among the several States on the basis of the total production of tobacco in each State during the five calendar years immediately preceding the calendar year in which the quota is proclaimed (plus, in applicable years, the normal production on the acreage diverted under previous agricultural adjustment and conservation programs), with such adjustments as are determined to be necessary to make correction for abnormal conditions of production, for small farms, and for trends in production, giving due consideration to seed bed and other plant diseases during such five-year period: *Provided, however,* That to prevent in any case too sharp and sudden reduction in acreage of tobacco production in any State, the marketing quota for flue-cured tobacco for any State for any marketing year shall not be reduced to a point less than 75 per centum of the production of flue-cured tobacco in such State for the year 1937.

(b) The Secretary shall provide, through the local committees, for the allotment of the marketing quota for

any State among the farms on which tobacco is produced, on the basis of the following: Past marketing of tobacco, making due allowance for drought, flood, hail, other abnormal weather conditions, plant bed, and other diseases; land, labor, and equipment available for the production of tobacco; crop-rotation practices; and the soil and other physical factors affecting the production of tobacco: *Provided*, That, except for farms on which for the first time in five years tobacco is produced to be marketed in the marketing year for which the quota is effective, the marketing quota for any farm shall not be less than the smaller of either (1) three thousand two hundred pounds, in the case of flue-cured tobacco, and two thousand four hundred pounds, in the case of other kinds of tobacco, or (2) the average tobacco production for the farm during the preceding three years, plus the average normal production of any tobacco acreage diverted under agricultural adjustment and conservation programs during such preceding three years.

(c) The Secretary shall provide, through local committees, for the allotment of not in excess of 5 per centum of the national marketing quota (1) to farms in any State whether it has a State quota or not on which for the first time in five years tobacco is produced to be marketed in the year for which the quota is effective and (2) for further increase of allotments to small farms pursuant to the proviso in subsection (b) of this section on the basis of the following: Land, labor, and equipment available for the production of tobacco; crop-rotation practices; and the soil and other physical factors affecting the production of tobacco: *Provided,* That farm marketing quotas established pursuant to this subsection for farms on which tobacco is produced for the first time in five years shall not exceed 75 per centum of the farm marketing quotas established pursuant to subsection (b) of this section for farms which are similar with respect to the following: Land, labor, and equipment available for the

production of tobacco, crop-rotation practices, and the soil and other physical factors affecting the production of tobacco.

(d) Farm marketing quotas may be transferred only in such manner and subject to such conditions as the Secretary may prescribe by regulations.

(e) In case of flue-cured tobacco, the national quota for 1938 is increased by a number of pounds required to provide for each State in addition to the State poundage allotment a poundage not in excess of **4 per centum** of the allotment which shall be apportioned in amounts which the Secretary determines to be fair and reasonable to farms in the State receiving allotments under the Agricultural Adjustment Act of 1938 which the Secretary determines are inadequate in view of past production of tobacco, and for each year by a number of pounds sufficient to assure that any State receiving a State poundage allotment of flue-cured tobacco shall receive a minimum State poundage allotment of flue-cured tobacco equal to the average national yield for the preceding five years of five hundred acres of such tobacco.

PENALTIES

Sec. 314. The marketing of any tobacco in excess of the marketing quota for the farm on which the tobacco is produced, except the marketing of any such tobacco for nicotine or other byproduct uses, shall be subject to a penalty of 50 per centum of the market price of such tobacco on the date of such marketing, or if the following rates are higher, 3 cents per pound in the case of flue-cured, Maryland, or burley, and 2 cents per pound in the case of all other kinds of tobacco. Such penalty shall be paid by the person who acquires such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer in case such tobacco is marketed by sale; or, if

the tobacco is marketed by the producer through a warehouseman or other agent, such penalty shall be paid by such warehouseman or agent who may deduct an amount equivalent to the penalty from the price paid to the producer: *Provided,* That in case any tobacco is marketed directly to any person outside the United States the penalty shall be paid and remitted by the producer.