

# The National Industrial Recovery Act

## An Analysis

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1. What were the economic conditions leading to the enactment of the Industrial Recovery Act?

X:96:(273) The Industrial Recovery Act accomplish the "in planning" between management, labor, and government, advocated by President Roosevelt?

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2. What are the industrial control provisions of the Industrial Recovery Act, and what do they mean to business and workers?

3. How many of the old trade associations ineffectual under the Sherman Law, and what powers have been granted which they formerly lacked?

5. What participation by labor is intended by the Industrial Recovery Act in the preparation of codes and agreements dealing with wages, hours, and labor standards?

Central Book Company · New York

9754

THIS volume is a practical discussion of the industrial control provisions of the National Recovery Act. It supplements the author's earlier and more complete "Trade Associations: The Legal Aspects," dealing with trade associations under the Sherman Law.

It describes the extent to which trade associations have been strengthened through the liberalization of the anti-trust laws by the National Recovery Act, and how recalcitrant minorities in an industry can be controlled through self-regulating codes of fair competition, or under compulsion of Presidential codes and licenses.

It indicates the extent to which labor's grievances under the Sherman Act have been overcome under the Recovery Act, and the degree of participation intended for labor in the preparation of the codes of fair practices dealing with wages, hours, and fair standards.

It contains the author's observations on the implications of the law, based on his long affiliation with the trade association movement in the United States.

\$2.50

Central Book Company  
New York  
PUBLISHERS

380  
380  
25

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NEW YORK  
CENTRAL BOOK COMPANY  
1933

**THE NATIONAL INDUSTRIAL  
RECOVERY ACT  
AN ANALYSIS**

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By Benjamin S. Kirsh**

**MADE IN U. S. A.**

TO  
DEBORAH BARACH KIRSH

## PREFACE

THIS short volume, dealing with the industrial control provisions of The National Recovery Act, supplements the author's earlier and more complete "Trade Associations: The Legal Aspects," published in 1928. It does not discuss the public works or tax sections of the Act. It must be borne in mind that for those industries which do not take advantage of, or are not brought under, the new Act, the prohibitions of the older law are still applicable.

The present writer has attempted to outline, by a practical discussion, the economic and legal essentials for those who are interested in the operation of the recently enacted statute. The comparison of the powers of trade associations under the older law, with the wider range of permissive action under the National Industrial Recovery Law, is based upon his experience in and acquaintance with trade organizations as counsellor to several associations.

Necessarily, any writing on the National Industrial Recovery Act, at this time, must be limited to the implications of the new law based on past experience and present industrial necessi-

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ties. The integral relationship between the terms of the Act and its enforcement is apparent. Many of the powers granted to the President may never be used. Administrative regulations may have to be substantially revised.

Yet, as a comparative study, no one who has studied the old anti-trust system, with its uncompromising rigidity, its prohibitions against vital cooperative endeavors, and the effects of its policies in precluding the effective enforcement so essential to the exercise of authority, control, and discipline in trade association administration, can fail to grasp how far the Recovery Act has departed from the old road.

The National Industrial Recovery Act is emergency in character and is limited to two years. Whether at the end of that period we shall revert toward the old system or continue partly or wholly on the new, only the future can determine.

This little volume was written at this time in the hope that it might be of service to those groping for information or interested in the implications of the new law. The author cherishes the hope that, at a later date, he may undertake a more comprehensive study of this subject.

The author wishes to acknowledge his indebtedness to Mr. David L. Podell of the New York Bar, one of the draftsmen of the National

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Industrial Recovery Act. He has had the benefit of his distinguished advice on numerous points in the preparation of this volume.

The author also desires to express his thanks to Mr. Nathan Greene of the New York Bar for his valuable criticisms and suggestions on those sections of the book dealing with the interests of labor.

BENJAMIN S. KIRSH.

74 Trinity Place  
New York City  
June, 1933.

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## CHAPTER I

# The Necessity for the Recovery Act

THE National Industrial Recovery Act embodies a new American industrial policy. It extends into the domain of private business, legal and economic concepts which before its passage were restricted to public utilities and business affected with a public interest.<sup>1</sup> It clothes with a public interest, during the period of national emergency, enterprises which formerly were protected from governmental interference.

The organization of industry which it will foster, and the sanctions it provides to effectuate its purposes, involve a distinct revision of the traditional legal view of free private enter-

<sup>1</sup> Dexter Merriam Keezer and Stacy May, "The Public Control of Business," N. Y. 1930, Chapter V, "The Elusive Nature of Public Interest Enterprises"; Walton Hale Hamilton, "Affectation with a Public Interest," 39 Yale L. J. 1089, June, 1930; Breck P. McAllister, "Lord Hale and Business Affected with a Public Interest," 43 Harv. L. R. 759, March, 1930.

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prise and competition, developed by the Supreme Court of the United States in interpreting the Constitution and the federal anti-trust laws.

The World War furnished abundant, valuable experience in governmental control of production, prices, and sales, through the War Industries Board and War Service Committees,<sup>2</sup> and of wages and labor standards through the War Labor Board, the War Labor Policies Board, and other governmental instrumentalities.

The Recovery Act, however, is a venture, in peace times, in the direction of a bold experimentation, suggested in the famous dissenting opinion of Justice Brandeis in the *Oklahoma Ice case*.<sup>3</sup> While the emphasis of the war-time control of industry was upon a more efficient

<sup>2</sup> "American Industry in the War, a Report of the War Industries Board," by Bernard M. Baruch, 1921; "Industrial America in the World War," Grosvenor B. Clarkson, 1924 (Rev. ed.); Clark, Hamilton and Moulton, "Readings in the Economics of the War," J. Maurice Clark, Walton H. Hamilton, and Harold G. Moulton, 1918.

<sup>3</sup> *New State Ice Co. v. Liebmann*, 285 U. S. 262, 280 et seq., 310, 311.

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and greater production in a time of labor scarcity and high wages, the theory of the Recovery Act is to relieve unemployment and raise wage-returns, and to rehabilitate the prevailing condition in which industry is suffering from an excess of productive capacity.

It comes as a direct response to insistent demands from all sections of enlightened American opinion, for an orderly planning of industrial enterprise after an era of chaotic and uncoordinated business rivalry.<sup>4</sup>

"The first step taken by the bill," stated Senator Wagner,<sup>5</sup> in opening the debate on the Recovery Bill in the Senate, "is to make competition constructive rather than ruinous, and

<sup>4</sup> The literature on economic planning has already become extensive and is set forth in the dissenting opinion of Brandeis, J., in the *New State Ice case*, note 3, *supra*, especially Hearings before a sub-committee of the Committee on Manufacturers. U. S. Senate, 72nd Congress, 1st session, on S. 6215.

For additional more recent volumes related to these subjects, cf. Edgar L. Heermance, "Can Business Govern Itself?" N. Y. 1933, and R. G. Tugwell, "Industrial Discipline," N. Y. 1933.

<sup>5</sup> Congressional Record, 73rd Congress, 1st session, Vol. 77, No. 70, p. 5254.

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to permit cooperation whenever a wise policy so dictates." The Senator argued that the anti-trust laws, enacted to curb monopolistic growth, had been ineffectual, that large scale enterprises had evaded the provisions, and that the very groups favored by the statutes—the small tradesman, labor, and the consumer—were the unintended victims of its oppression.

The isolation of the individual entrepreneur has been terminated during the emergency period. By centering control, authority, and discipline in trade association management, the Recovery Act guards against a remote direction of private enterprises by an absentee officialdom.

Passed as an emergency measure, the duration of the Recovery Act is limited to two years, or less if the President by proclamation, or Congress by joint resolution, shall terminate it. It was invoked to combat extraordinary economic stress, in which a general lack of purchasing power produced an increasing number of business bankruptcies and liquidations.

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To prevent further disastrous price competition, it was necessary to restore purchasing power. The broad purpose of the Act is to stimulate industrial and commercial activity by eliminating unfair and destructive competitive practices, creating employment on a large scale, improving labor standards and conditions, rehabilitating depressed industry and trade, and conserving natural resources.

It is designed to stabilize industry at a profit-making level for entrepreneurs, with adequate wages for workers, and with equal competitive opportunities for members of an industry in the distribution of its products. To accomplish these purposes, the law contemplates industrial self-regulation by management and labor, under governmental supervision.

Whether this legislation, written with a definite time limitation as an emergency measure, represents a permanent revision of the historic American attitude toward industrial questions, whether it ushers in a collective trend in our economic system, will depend upon the experi-

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ence of business, labor and the public in the administration of the Act, but it would seem logical that this is the beginning of some form of nationally planned economy of a character best conforming to American social thought.

The Recovery Act is generic, a companion piece to the Agricultural Adjustment Act, and is related to other legislative measures of the "New Deal," embracing commerce, taxation and finance. It is but one of a series of similar projects advocated by the Roosevelt administration as a direct, frontal attack upon unemployment among workers and stagnation in business. By the restoration of a measure of prosperity, the raising of commodity price levels, the creation of millions of jobs, and the increase in the purchasing power of the country, it is hoped to break the back of the depression.

The ineffectiveness of many of the old trade associations lay in the fear of incurring the severe penalties of the anti-trust laws, and the inability to curb outsiders or recalcitrants out-

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side their sphere of influence. An unrestrained competition in the preceding era of prosperity had the effect of encouraging individuals and industries to expand productive capacity without regard to scientific adjustment to future needs, and the price-cutting which it induced.

Under the Recovery Act, with the gaining of Presidential approval for a code of fair competition, the operation of the federal anti-trust laws is suspended—at least to the extent of eliminating cut-throat competition. However, it would be a mistake to regard the law, on the one hand, as no more than a modification of the Sherman Anti-Trust Act in favor of producers alone, or, on the other, as a blanket permission to employers and workers to enter into mutually satisfactory agreements without regard to the interest of the consuming public. The legislation contemplates a “partnership” between government and industry\*—“a partnership in planning”—through control by the President’s

\* Radio address of President Roosevelt to the nation, on May 7, 1933, reported in *New York Times*, May 8, 1933.

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agencies, designed to afford adequate safeguards for the public welfare.

In its broad scope, the Recovery Act gives private industry the opportunity to undertake effective economic coordination, with the aid of labor, and with the sanction of the federal government. It concedes to industrialists and workers alike the lawful right to work out codes dealing with prices, production, wages and working conditions, withdrawing from these subjects the forbidding shackles of the old anti-trust laws.

Initiative, in the first instance, rests with industry itself, but there is a reserved power held by the President to compel it to submit to codes of fair competition, if industry fails to grasp the opportunity or is delinquent in its social responsibilities. The free hand of industry will be stayed only where abuse or failure to act invites government action. It is intended to give industry every opportunity to govern itself.

The law is at once a combination answer to the growing demand for revision of the federal

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anti-trust laws, and a protection to labor interests against exploitation by long hours and starvation wages on the part of unscrupulous employers. Two fundamental flaws in the industrial structure have been attacked with one blow. Manufacturing interests have long pointed out that the policy of the Sherman Law prohibited them from agreeing to curtail production by eliminating a surplus which depressed prices and led, in turn, to the use of sweat-shop labor in order to cut the cost of manufacturing with the hope of providing a profit. Simultaneously, labor interests have demanded legislative relief from unemployment, requiring a lessening of the hours of labor to spread more widely the available work among more workers, and a minimum wage sufficient to cover the increasing lag between wages and prices.

Thus, features of the Nye<sup>†</sup> and the Walsh bills to amend the Sherman, Clayton, and Fed-

<sup>†</sup> See Hearings before a sub-committee on the Judiciary, U. S. Senate, 72nd Congress, 1st session, on S. 2626, S. 2627, and S. 2628, Government Printing Office, Washington, 1932.

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eral Trade Commission Acts, are included in the Recovery Act, and the provisions affording protection to workers are intended to incorporate the essential ideas of the Black-Connery Bill, together with the counter-proposal of Secretary of Labor Perkins, to limit the hours of employment in industry, and to insure the payment of minimum wages on a health, efficiency, and comfort level.

Under legislation restricted to arbitrarily limiting the number of hours and fixing minimum wages, industry, already struggling on at a loss, could not stand the added burdens without receiving higher prices for its products. Moreover, unless industry could formulate its own wage-stabilization codes, there would be inherent dangers of dealing with rigid statutory law and its bureaucratic administration. The elimination of cut-throat competition necessitated the revision of the Sherman Law, subject to the governmental supervision provided for in the Recovery Act.

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The new law strengthens the hand of those directing the management of trade associations by permitting the legalization of objectives that have heretofore been prohibited by the Sherman Act, such as agreements dealing with prices and production. It must be borne in mind, however, that the purpose is not to permit the fixing of prices at inflated levels, but rather to legalize rules forcing competitors not to sell below a cost including fair wages to employees. It condemns to the sphere of illegality abuses which are destructive of profits and wages. It validates the use of sanctions provided by trade association membership agreements and by-laws, as well as governmental remedies created by the Act, against the recalcitrant minority fringe.

Without coercive corrective measures, employers alive to their social responsibilities to their workers were powerless to act in the light of the greed of unscrupulous competitors. The protection which the old law granted to price-cutters and to employers of sweatshop labor has been removed in favor of a system which

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compels conformity, under a code of fair competition, to standards which will benefit the industry at large.

No thoughtful, although friendly, observer of the old trade association can deny that it lacked the power of enforcement of salutary measures aimed at demoralizing price and production tactics by a small minority, at those times when the need for some permissible sanction was most patent. Cut-throat competition could not be stopped without trade association regulations, codes of ethics, or trade practice conferences that could be rigorously enforced under the authority of the law. There was a necessity of dealing summarily with minorities disrupting the industry, which could not be successfully achieved.

Under an anti-trust law policy which rendered illegal, and even criminal, agreements relating to price, production, territory, and customers, and gave rise to liability for triple damages to any aggrieved party, and placed a premium upon and offered an incentive to the

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individual marketing or production practice of any trader no matter how uneconomic or unwise, there could be no lawful check by the association either upon an individual's excessive production or selling at increasingly lower prices. Nor could effective cooperation be worked out among loosely organized sellers, whose fear of the law prevented them from uniting with strong bonds against buyers who gave false information to sellers and pitted them against their competitors in order to beat down prices to ever lower levels.

For the most part, however, the Sherman Law drove trade associations underground into secret, surreptitious and illegal practices—bootlegging under the anti-trust laws. In the case of the more timid, or cautious, even the dissemination of open price information, or the discussion of statistics and cost accounting information, would be shunned as violative of the strict law.

Resort to group pressure and penalties by the organized units were ineffective in a crisis, be-

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cause realization of their legal infirmity, when subjected to a test, reduced their value as effective sanctions. A small number of less scrupulous associations engaged in forceful measures, even to the lengths of making alliances with racketeering elements, justifying their tactics as the necessary illegitimate offsprings of too rigorous an anti-trust policy.

The sanctions of the National Industrial Recovery Act offer the constructive remedy to trade associations. The legal validation of price, production, and territorial agreements and of penalties to enforce them; the fines imposed by the Act for the violation of codes of fair competition; the drastic licensing provisions completing the circle, with fines and jail terms for extreme offenders, together with the power to deprive them of their right to engage in interstate commerce, supply the missing link for carrying out the provision of the codes. Coercive sanctions are drastic measures; but their necessity, in extreme cases, was recognized in the pithy statements of President Roosevelt:<sup>8</sup>

<sup>8</sup> *Supra*, 6.

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“Government ought to have the right and will have the right, after surveying and planning for an industry, to prevent, with the assistance of the overwhelming majority of that industry, unfair practices, and to enforce this agreement by the authority of government.”

and Owen D. Young: \*

“I hate not only the term, but the idea of coercion, and yet we are forced to recognize that every advance in social organization requires the voluntary surrender of a certain amount of individual freedom by the majority and the ultimate coercion of the minority. It is not the coercion of the recalcitrant minority but the voluntary submission by a large majority which should impress us.”

With this summary of background of the conditions which led to the passage of the National Industrial Recovery Act, we can proceed to an examination of its provisions.

\* Quoted in “The Swope Plan,” by J. George Fredrick, New York, 1931, page 58.

## CHAPTER II

# An Explanation of the Recovery Act

THE reasons for the efforts of business and industrial leaders in seeking exemption from the anti-trust laws are discussed elsewhere in this volume. The permission they sought was essentially for the purpose of enabling them to enter into voluntary agreements and adopt codes that would insure fair competition in industry and trade and would eliminate what President Roosevelt denounced as "cut-throat underselling by competitors unwilling to join in such public-spirited endeavor."

Labor campaigned for liberalization of the anti-trust laws for reasons of its own. Not only did the operation of these laws encourage employers to compete with one another in lengthening hours of work, cutting wages, and in effecting technological improvements which threw increasing numbers out of work, but in

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actual litigation these laws had the practical effect of severely curbing labor's interests in its conflicts with employers.

The Recovery Act is designed to give the managers of production and distribution their long-sought wish of exemption, provided, however, that they accept certain stated conditions designed to improve the status of labor, prevent monopoly and discrimination against small enterprises, and further the general policy of the Act.

The exemption from the provisions of the anti-trust laws is granted for the period of the Recovery Act and for sixty days thereafter, to any agreement or code of fair competition voluntarily entered into by the members of a trade, industry or subdivision thereof, and approved by the President; or to any code that he has prescribed. It is accorded for a one-year period to any license he has been compelled to issue.

The exemption holds only during the time that the code, agreement, or license continues in effect. It covers not only the provisions of

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the codes, agreements, or licenses, but also any action complying with them, taken during this period of the grace.

Once a code of fair competition is approved or prescribed, or a license issued, it becomes, in effect, the law applicable to the trade, industry or subdivision and violators, whether they have agreed to the code or not, subject themselves to the severe penalties prescribed in the Act.

In the vast majority of instances, it is anticipated that trade and industrial groups will seek the President's approval for codes of fair competition developed by their own members out of their ripe experience and understanding of the problems facing their particular trade or industry. Since, however, the effect of Presidential approval would be to impose the code provisions upon every member, regardless of whether he desired them, Section 6 authorizes the President to prescribe rules and regulations, and the Federal Trade Commission to make any necessary investigations, to be certain that no organ-

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ization shall avail itself of the benefits of the Act unless it be truly representative of its trade or industry.

In determining whether the group submitting a code is "truly representative" of its trade or industry, "an individual" who "pursues the vocation of manual labor and sells or trades the products thereof" or "anyone who markets or trades the products of the farm," is not to be included. That Act provides that nothing in it, and no regulation thereunder, shall prevent them from earning a livelihood in this manner.

To further enable the President or his agent to decide whether a proposed code is sponsored by a truly representative group, and to provide the data upon which he must decide the propriety and sufficiency of the code, the trade or industrial group is required by the Act to file with the President a statement containing "such information relating to the activities of the association or group as the President shall by regulation prescribe."

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Not only would it be unwise for a trade or industrial group to attempt to formulate a proposed code of practices without first obtaining the completest possible information regarding conditions that must be remedied, but the provisions of the Act with regard to mandatory contents of every code make the obtaining of certain information, and its careful analysis over the trade association council-table, indispensable. Particularly important is the fullest composite information dealing with maximum hours of labor; minimum wages; production statistics, and unfair competitive practices that must be outlawed.

Where an organization voluntarily drafts a code and submits it to the President, the following conditions must be established to his satisfaction before the President is authorized to approve it:

1. That the association imposes no inequitable restriction on admission to membership, and is truly representative of such trade or industry.

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2. That the code will not promote a monopoly or monopolistic practices or oppress, eliminate or discriminate against small enterprises, and will tend to effectuate the policy of the Act.

3. That the employees will have the right to bargain collectively through representatives of their own choosing, and be free from interference, restraint, or coercion by employers or their agents, in the designation of such representatives or self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid.

4. That no employee and no one seeking employment will be required, as a condition to obtaining employment, to join any company union, or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

5. That employers will comply with maximum hours of labor, minimum rates of pay, and standards for other conditions of employment, when approved or prescribed by the President.

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6. That the President may, in his discretion, cancel or modify any order, approval, license, rule, or regulation issued under the Act.

However, even after these mandatory conditions have been consented to, the President may, nevertheless, withhold his approval unless those who submit the code agree to such further conditions as he may deem necessary for the protection of consumers, competitors, employes and others and in the furtherance of the public interest; to include requirements for the making of reports and the keeping of accounts, and to provide exceptions and exemptions from the code provisions. Furthermore, to protect the rights of outsiders, particularly retailers, it is provided that where a code or codes "affect the services and welfare of persons engaged in other steps of the economic process," they shall not be deprived of an opportunity to be heard.

One of the most bitterly contested sections of the Recovery Act was the amendment of Section 3, sub-division a, #2, dealing with requirements for the approval by the President

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of codes of fair competition. The original House and Senate bills contained language that codes of fair competition must not be designed to promote monopolies or to eliminate or oppress small enterprises and would not operate to discriminate against them.

When this section was debated in the Senate, Senator Borah moved for the further amendment of these conditions by including the following additional language:

“Provided, that such code or codes shall not promote combinations in restraint of trade, price fixing, or other monopolistic practices.”<sup>1</sup>

In passing the bill for the first time, the Senate accepted this “Borah amendment.”

The Conference Committee deleted portions of the “Borah amendment” so that it finally reads, as enacted into the Recovery Act:

“Provided, that such code or codes shall not promote monopoly or monopolistic practices.”

<sup>1</sup> Congressional Record, 73rd Congress, 1st session, Vol. 77, No. 61, June 8, 1933, p. 5381.

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It is obvious that if the "Borah amendment" had remained in the bill, the exact scope of its provisions would be highly open to question, its purport most ambiguous, and the inconsistency of its language would most assuredly have led to court proceedings to determine the exact meaning of the law.

All students of the anti-trust laws know that the practices which the Recovery Act legalizes have been known technically as "combinations in restraint of trade" and there is, of course, not only from the economic but also from the legal point of view a close relationship between agreements not to sell below cost and the idea of price fixing.

As a wag put it, the "Borah amendment" might well have had the effect of an amendment repealing prohibition, provided that intoxicating liquors could not be manufactured or sold.

The situation was stated with ability and clarity by Congressman Celler in the debates in the House. In arguing for the rejection of

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Senator Borah's amendment and the adoption of the Conference report, Congressman Celler stated:

"It seeks to prevent what is known as 'price fixing.' If prices cannot be fixed in order not to monopolize but to prevent cut-throat competition, the bill is valueless. In the way the amendment has been offered we will certainly, if we adopt it, have placed ourselves in the rather anomalous position of utterly destroying the purposes that the administration had in mind when it offered the National Industrial Recovery Act. It was offered to stabilize industry, to increase employment, to limit production, to maintain maximum hours of employment and minimum wage scales. All will fail if arrangements cannot be made as to prices." <sup>2</sup>

The Act, as passed, adopts the language of the conference report. The rule is, therefore, that the President has power to deny an application for a code if he finds that the code is

<sup>2</sup> Congressional Record, 73rd Congress, 1st session, Vol. 77, No. 73, June 10, 1933, p. 5736.

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designed to promote monopolies or monopolistic practices. However, a code, after approval by the President, is nevertheless open to attack in the courts on the ground that it "permits monopoly or monopolistic practices" and is also subject to later modification or revocation by the President.

Senator Wagner in the debates in the Senate clarified the intent of the revision made by the conference committee, which became part of the law as enacted:

"MR. WAGNER: The amendment is that no code shall permit monopoly or monopolistic practices, so that if price-fixing results in a monopoly or monopolistic practices, it is prohibited by the provisions of the measure."<sup>3</sup>

After Presidential approval has been obtained, the voluntary code becomes binding upon the industry, trade, or subdivision affected, as its "standards of fair competition."

<sup>3</sup> Congressional Record, 73rd Congress, 1st session, Vol. 77, No. 74, June 12, 1933, p. 5851. President Roosevelt in a Statement issued June 16, 1933, after he had signed the bill makes the same point.

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Violations "in any transactions in or affecting interstate commerce" are declared unfair methods of competition within the meaning of the Federal Trade Commission Act, thereby impliedly giving jurisdiction to the Commission to issue cease and desist orders.

That the Federal Trade Commission, with its valuable background of experience in investigating and combating unfair methods of competition, will undoubtedly exercise a vital role in the enforcement of the law, is evident not only from the foregoing declaration, but from the further provisos (1) that nothing in this Act shall be construed to impair the Commission's powers, and (2) that the Commission is empowered to use its existing broad powers of investigation to make investigations under this Act. In addition, the United States District Courts are empowered to prevent and restrain violations, and the United States District Attorneys required to institute the proceedings in equity under the direction of the Attorney General.

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Violations are also declared to be misdemeanors, punishable by a fine not exceeding \$500, each day a violation continues being considered a separate offense.

If the members of an industry cannot or will not agree upon a code satisfactory to themselves and to the President, he is authorized, on his own motion, or on complaint of abuses in the industry, trade or subdivision thereof, to hold a hearing, and thereupon to prescribe and approve a code of fair competition having the same effect as a code of voluntary competition.

Broadly speaking, the codes should contain standards of fair competition; trade practices which should be prohibited as unfair, oppressive, or designed to give an advantage to employers with lower standards; and methods to aid in rehabilitating industry, increase its capacity to give employment, and raise the living standards of workers.

Many competitive practices that have been in trade practice conference resolutions adopted by

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industries, under the supervision of the Federal Trade Commission, may, of course, be included in the new codes of fair competition. These, and many more practices which the Commission refused to approve because of fear of anti-trust law prohibitions, can now be permitted and become effective aids in rebuilding the business fabric on a high plane of honesty and careful business planning.

- The following is a general summary of practices which may be effectively included in a code, to which may be added practices raised by special problems:

1. Fraudulent and deceptive practices, including false and misleading advertising, false invoicing, mislabelling and misbranding, use of inferior materials, short weights, and inspection thereof.

2. Misappropriation of a competitor's business, including inducing breach of contract, espionage, enticing employees, piracy of styles, and imitation of trade names.

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3. Commercial bribery, including gratuities to salesmen, lavish entertainment, inducing sales by payment of commissions or rewards to employes or distributors.

4. Price-discrimination and related secret rebate practices.

5. Sales below cost prohibitions.

6. Dumping surplus goods in markets outside normal sales territory, below the prevailing market-costs.

7. Defamation of a competitor and disparagement of products.

8. Repudiation of contracts.

9. Consignment selling.

10. Compelling the purchase of a group of products as a condition to selling a customer a single item.

11. Terms of sale, discounts, credit allowances, uniform contracts, freight, consignment selling, returns, advertising allowances.

Subject, of course, to the general requirement that the President must find that code

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provisions submitted to him adequately protect consumers, competitors, and employes, and do not aid monopoly, a code may also contain, or be supplemented by, approved provisions dealing with simplification and standardization of products; group selling; price-differentials based on classification of purchasers and outlets; allocation of markets, in order to obtain more economical production and sale within them; cooperative advertising; uniform grading, and administration of the property of insolvent debtors by representatives of the entire industry or trade affected.

• A vital code provision, optional with the President, requires "the making of reports and keeping of accounts." Without a requirement of this character, the elimination of cut-throat competition might be rendered most difficult. It will facilitate the periodic exchange of statistical data among the members of a trade, industry or subdivision thereof; between the members and their trade association headquarters, and between the latter and the President's

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research and planning board, which is authorized by the Act.

The information required will make necessary a uniform system for the collection and dissemination of business statistics, as well as a uniform cost accounting system, with principles of cost-finding remaining to be worked out, in the light of each particular industrial situation. It will include data on prices and costs, capacity, orders, production and shipments during stated periods, unfilled orders, and stocks on hand of finished goods and raw materials, and the number of persons employed, with their rates of wages, earnings, and hours of employment.

Formerly, many of these practices were regarded as bordering upon the zone of illegality. Now they are marshalled together as important aids in an industrial self-regulation based upon free information, interchanged by, and available to, management, labor, and the Government.

Codes of fair competition authorized by the Act are supplemented by permission to persons

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engaged in a trade or industry, trade or industrial organizations, associations, or groups, to enter into voluntary agreements between themselves and the President, or among themselves, and will be approved by the President if he finds that such agreements will aid in effectuating the policy of the Act, and that it will not result in monopoly or in discrimination against small enterprises.

This provision strikes at the roots of cut-throat competition, by enabling producers or distributors, on the one hand, and trade associations or labor organizations, on the other, under government supervision, to prevent overproduction and to apportion business. The one great hold of these cut-throat competitors in the past has been their lower than prevailing price policies. Under agreements setting up salutary standard conditions, they could not take advantage of firms having an established reputation for quality and service.

In the second place, it must be recognized frankly that if a profitable price is to be main-

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tained, the total production of industry must be adjusted to an amount that will balance the demand. Failure to proceed on this principle would open the way to a continued excess of production on the part of some industry members flooding the market with bootleg products, with its resulting dislocation of the market at the crucial moment of industrial convalescence. Industry must make treaties of peace with the former snipers who harrassed any business advance, and convert them to the task of a planned reconstruction in which failure might engulf all. The more inclusive these agreements become, under Government supervision, of all factors in the industrial process, the greater would be the public's interest in ferreting out violators as industrial enemies.

Further, to any industry, trade, or subdivision which observes the statutory requirements relating to labor's right to organize and bargain collectively with the managers of industry, the law accords every practicable opportunity to agree with their employes with regard to

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standards respecting maximum hours, minimum wages, and other working conditions, for the purpose of effectuating the policy of the Act.

Agreements between management and labor should dovetail in with the codes and agreements entered into among the managers of the trade, industry or subdivision affected. They should be drawn with the purpose of effecting a just balance between two policies of the Act which on the one hand seeks "to promote the fullest utilization of the productive capacity of industry," and, on the other, "to avoid undue restriction of production (except as may be temporarily required)." Management should be quick to recognize and take advantage of these means of balancing production and demand, and of increasing purchasing power. Upon approval, these standards have the effect of a code of fair competition.

In the absence of such an approved agreement, the President is authorized to investigate labor practices and policies, wages, hours of

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labor and working conditions. After notice and hearing, he may prescribe for the industry, trade or subdivision a limited code of fair competition, fixing maximum hours of labor, minimum rate of wages, and other working conditions. In establishing the code standards, he is directed to fix differentials based upon the experience and skill of the employees affected, and the locality of employment. But he is specifically forbidden to make any classification according to the nature of the work involved, that would tend to set a maximum as well as a minimum wage for the employees it affected.

Most drastic of all the provisions is the power of licensing, given to the President, when he finds that in a trade, industry or subdivision thereof, price or wage-cutting or "other activities contrary to the policy of the Act," are being practiced. If after notice and hearing he finds it "essential" to license business enterprises in order to make effective a code of fair competition or an agreement, "or otherwise

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to effectuate the policy of this title," and shall publicly so announce, no business, in or affecting interstate commerce, specified in the President's announcement, may be carried on or engaged in without first obtaining a license.

Persons who fail to comply with the President's licensing announcement, by either engaging in or carrying on a business without a license or in violation of the terms of their license, are subjected to a penalty not exceeding \$500, imprisonment of not exceeding six months, or both, for every day in which they continue such violation. In addition, if the terms or conditions of a license are violated, the President, after notice and hearing, may suspend or revoke the license, and if his order is "in accordance with law," it is final.

The licensing provisions are the teeth of the Act. In industries where members cannot get together on the contents of a code or agreement, with consequent continuing demoralization of prices, production and labor, this clause is expected to either force dissenting members

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to agree voluntarily upon a code, or else compel them to conduct their business in a manner which the Government regards to be most just in view of the relation of that industry to the broader problem of rehabilitating the American economic system.

During the course of debate on the Recovery Bill, fear was expressed that if former recalcitrant minorities in an industry should refrain from price-cutting, and join in a united effort to sell an industry's product at an agreed price, American industry, bound by agreement not to overproduce or to sell below a stated price, could nevertheless be demoralized by a flood of cheap, competing foreign goods, the manufacturers of which were not bound by the codes and agreements of their American competitors.

Recognizing this danger, Congress has provided that the President, on his own motion, or after complaint by any labor organization, or any trade or industrial organization, or group, which has complied with the provisions of the Act, that competing articles are being imported

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in substantial quantities or in increasing ratio to domestic production, and on conditions rendering or tending to render ineffective any code or agreement under the Act, may direct the Tariff Commission to investigate conditions. The Commission is thereupon required to do so immediately.

If the President, after report and hearing, finds the existence of such facts, his findings are conclusive. He shall then direct that the article or articles in question shall be permitted entry only upon such terms and conditions, subject to payment of such fees and to such limitations in the total quantity that may be imported during any specified period or periods as he shall find necessary in order that they shall not render or tend to render ineffective, American codes or agreements.

The President may, if necessary, forbid importation unless the importer first obtains a Treasury license. The regulations shall continue until the President shall inform the Secretary of the Treasury that the conditions which

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were responsible for their imposition no longer exist.

Due to unfair practices and exorbitant charges, and ruinous overproduction of oil, the Act also includes special provisions regulating the transportation of oil. They authorize the President to initiate before the Interstate Commerce Commission proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable, compensatory rates for transportation of petroleum and petroleum products by pipe lines.

Where any pipe-line company tends to create a monopoly by engaging in unfair practices or by charging exorbitant transportation rates, and the pipe-line company is controlled by a holding company, the President is authorized to institute proceedings to divorce the pipe-line company from the holding company.

Finally, in order to aid the various States in their efforts to limit excessive oil production, the President is authorized to prohibit inter-

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state and foreign commerce in petroleum or petroleum products produced or withdrawn from storage in excess of the limitations set by any State law. Violation of the President's order of prohibition is punishable by a fine not exceeding \$1,000, imprisonment for not exceeding six months, or both.

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After the foregoing explanation, in which it is shown how management and labor can take advantage of provisions of the Act, there is appended the following skeleton outline, which should prove helpful to the reader in obtaining a composite view of the Act, and to which he can revert for ready reference.

### Section 1

#### Declaration of National Emergency and Policy of Congress

- A. National emergency declared to exist. This emergency
  - 1. Produces widespread unemployment and disorganization of industry.

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2. Burdens interstate commerce.
3. Affects public welfare.
4. Undermines American standard of living.

### B. Policy of Congress declared to be

1. To remove obstructions to free flow of interstate commerce which tend to diminish amount thereof.
2. To provide for general welfare by promoting organization of industry for purpose of cooperative action among trade groups.
3. To induce and maintain united action of labor and management under adequate governmental sanction and supervision.
4. To eliminate unfair competitive practices.
5. To promote fullest possible utilization of present productive capacity of industries.
6. To avoid undue restriction of production (except as may be temporarily required).
7. To increase consumption of industrial and agricultural products by increasing purchasing power.
8. To reduce and relieve unemployment.
9. To improve standards of labor.

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10. To otherwise rehabilitate industry.
11. To conserve natural resources.

### Section 2

#### Administrative Agencies

- A. To effectuate this policy, the President is authorized
  1. To establish agencies.
  2. To accept and utilize voluntary and uncompensated services.
  3. To appoint officers and employes (without regard to civil service laws).
  4. To utilize
    - a. Federal officers and employes.
    - b. State and local officers and employes (with consent of their State).
  5. To prescribe their respective
    - a. Authorities.
    - b. Duties.
    - c. Responsibilities.
    - d. Tenure.
  6. To fix their compensation (without regard to Classification Act of 1923).
- B. President is authorized
  1. To delegate his functions and powers to administrators and staff.
  2. To establish industrial planning and research agency to aid in carrying out his functions under Act.

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- C. Act and agencies created under it limited to two-year emergency period, or to lesser period if emergency be declared ended sooner by Presidential proclamation or joint resolution of Congress.

### Section 3

#### Codes of Fair Competition and Subsection on Imports

- A. Upon application to President by one or more trade or industrial association or groups, he is authorized to approve code or codes of fair competition for (1) trade, (2) industry, or (3) subdivision thereof, provided he finds:
1. That the associations or groups
    - a. Impose no inequitable restrictions on admission to membership.
    - b. Are truly representative of such trades, industries or subdivisions.
  2. That the code or codes
    - a. Are not designed
      - (1) To promote monopolies.
      - (2) To eliminate or oppress small enterprises.
    - b. Do not tend to discriminate against small enterprises.
    - c. Tend to effectuate policy of Act.

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- B. "No code or codes shall permit monopolies or monopolistic practices."
- C. Where a code affects "the services and welfare of persons engaged in other steps of the economic process," it shall not be approved without giving such persons opportunity to be heard.
- D. As condition of approval, President is authorized
  - 1. To impose conditions
    - a. To protect
      - (1) Consumers.
      - (2) Competitors.
      - (3) Employees.
      - (4) Others.
    - b. To further the public interest.
  - 2. To include requirements for making reports and keeping accounts.
  - 3. To provide exceptions and exemptions from code provisions which in his discretion he deems necessary to effectuate policy of Act.
- E. After Presidential approval,
  - 1. Code provisions become "standards of fair competition" for trade, industry or subdivision.

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2. Violation of a standard of fair competition "in any transaction in or affecting interstate or foreign commerce" is deemed
  - a. Unfair method of competition within meaning of Federal Trade Commission Act, as amended.
- F. Nothing in Act shall be construed to impair present powers of Federal Trade Commission.
- G. U. S. District Courts are empowered to prevent and restrain violations of any approved code.
- H. U. S. District Attorneys are required, under direction of Attorney General, to institute equity proceedings to prevent and restrain violations of any approved code.
- I. Under following circumstances, President is authorized to "prescribe and approve" code of fair competition, having same effect as voluntary code above mentioned:
  1. He may do so either
    - a. On his own motion, or
    - b. On complaint to him that "abuses inimical to public interest and contrary to policy herein-declared" are

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prevalent in trade, industry or subdivision.

2. There must be public notice and hearing.
3. No other code has theretofore been approved.

J. Under following circumstances, President is authorized to cause immediate investigation of certain imported articles by United States Tariff Commission, to make his own findings, and to control imports:

1. He may direct investigation
  - a. On his own motion, or
  - b. On complaint to him by (1) any labor organization, or (2) trade or industrial organization, association or group, which shall have complied with provisions of Act, stating that articles are being imported
    - (1) In substantial quantities.
    - (2) In increasing ratio to domestic production of competition of competing commodities.
    - (3) On terms on or under conditions
      - (a) Rendering a code or agreement under this Act ineffective, or
      - (b) Seriously endangering maintenance of such code or agreement.

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2. Tariff Commission is required to give precedence to these investigations.
3. If President finds
  - a. After investigation and
  - b. After notice and hearing,
  - c. That the imported articles "render or tend to render ineffective any code or agreement," he must direct that the articles concerned shall be permitted to enter only
    - (1) Upon such terms and conditions,
    - (2) Subject to such fees, and
    - (3) Subject to such limitations in total quantity that may be imported (in course of any specified period) as he may find necessary.
4. In order to enforce Presidential limitations on imports,
  - a. President is authorized to forbid their importation without a Treasury license.
  - b. Secretary of Treasury is directed to admit only those articles that conform to President's directions with respect to
    - (1) Terms and conditions.
    - (2) Fees.
    - (3) Limitations on quantity that may be important.

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- (4) Licensing.
  - 5. President's decision as to facts is declared to be conclusive.
  - 6. Presidential conditions or limitations on imported articles shall continue until President finds, and informs Treasury, that facts which led to their imposition no longer exist.
- K. Violation of approved or prescribed code of fair competition in any transaction in or affecting interstate or foreign commerce is
- 1. A misdemeanor.
  - 2. Punishable by fine not exceeding \$500 for each offense, each day of violation being deemed separate offense.

### Section 4

#### Trade Agreements and Licenses

- A. President is authorized
- 1. To enter into agreements relating to any trade or industry with
    - a. Persons engaged in trade or industry.
    - b. Labor organizations.
    - c. Trade or industrial organizations or groups.
  - 2. To approve voluntary agreements between and among foregoing persons, organizations or groups.

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3. Provided, however, that President finds such agreements
  - a. Will help effectuate policy of this Act regarding transactions in or affecting interstate or foreign commerce.
  - b. Are consistent with requirements forbidding codes that promote monopoly or discriminate against small enterprises.
- B. President is authorized to license business enterprises
  1. Under the following circumstances
    - a. If he finds that in any trade, industry or subdivision there is practiced
      - (1) Destructive wage-cutting.
      - (2) Destructive price-cutting.
      - (3) Other activities contrary to policy of Act.
    - b. After public notice and hearing.
    - c. If he finds it essential to do so
      - (1) In order to make effective
        - (a) A code.
        - (b) An agreement.
      - (2) Otherwise to effectuate policy of Act.
    - d. He must publicly announce his decision to license.

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2. With following consequences after date fixed in President's licensing announcement:
  - a. No person may thereafter engage in or carry on any business in or affecting interstate commerce without first obtaining a license.
  - b. If terms or conditions of license are violated
    - (1) President is authorized to suspend or revoke said license, and his order is final, provided
      - (a) Due notice and opportunity for hearing has been given.
      - (b) Order is "in accordance with law.
    - (2) Each day of engaging in business without, or in violation of a license, is punishable by
      - (a) Fine, not exceeding \$500.
      - (b) Imprisonment not exceeding six months, or both.
3. Licensing provisions of Act are limited to one year from date of enactment, or lesser period if emergency is declared at an end before expiration of year.

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### Section 5

#### Exemptions from Anti-Trust Laws, and Certain Exceptions for Manual Laborers and Agri- culturists

- A. During the term of Act (or in case of license, during time licensing provisions of Act remain in effect) and for sixty days thereafter, exemption from anti-trust laws is given
  - 1. To codes, agreements, and licenses approved and in effect under the Act.
  - 2. To any action complying with provisions of Act, taken during such period.
- B. Nothing in Act, nor any of its regulations, shall prevent
  - 1. Any individual from pursuing vocation of manual labor and selling or trading in products therein.
  - 2. Any one from marketing or trading in produce of farm.

### Section 6

#### Informational Requirements and Investigations

- A. Before a trade or industrial group shall be eligible to receive benefits of provisions of Act, it must first file statement con-

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taining "such information relating to activities of association or group as the President shall by regulation prescribe."

- B. President is authorized to prescribe rules and regulations to assure that any organization availing itself of benefits of Act shall be truly representative of its trade or industry.
  - 1. Any organization violating any such rule or regulation shall cease to be entitled to benefits of this Act.
- C. Federal Trade Commission is required to make such investigations as President may deem necessary to enable him to carry out provisions of Act. Commission is permitted to exercise all powers granted it under Federal Trade Commission Act.

### Section 7

#### Employment Provisions

- A. Every (1) code, (2) agreement, and (3) license shall contain following conditions:
  - 1. Employees shall have right to organize and bargain collectively through representatives of their own choosing.
  - 2. For purpose of engaging in collective bargaining, or other mutual aid or

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- protection, employes shall be free from interference, or coercion by employers or their agents
- a. In designating their representatives.
  - b. In self-organization, or
  - c. In like concerted activities for such purposes.
3. No employe or applicant for employment shall be required, as condition of employment, to agree
- a. To join a company union, or
  - b. To refrain from (1) joining, (2) organizing, or (3) assisting a labor organization of his own choosing.
4. Employers shall comply with following, when approved or prescribed by President:
- a. Maximum hours of labor.
  - b. Minimum rates of wages.
  - c. Other working conditions.
- B. In any industry which observes requirements relating to labor's right (1) to organize and (2) to bargain collectively,
1. President is directed to accord employers and employes every practicable opportunity to establish by mutual agreement, standards with respect to
    - a. Maximum hours of labor.
    - b. Minimum rates of wages.

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- c. Other working conditions necessary in such industry.
- 2. When approved by President, these standards shall have effect of code of fair competition.
- C. Where no such mutual agreement has been approved by President for a trade, industry or subdivision thereof, he is authorized
  - 1. To investigate
    - (a) Labor practices.
    - (b) Labor policies.
    - (c) Wages.
    - (d) Hours of labor.
    - (e) Conditions on employment.
  - 2. To prescribe after investigation and hearing, a limited code of fair competition, having same effect as code of fair competition, fixing
    - (a) Maximum hours of labor.
    - (b) Minimum rates of wages.
    - (c) Other conditions of employment.
  - 3. To fix differentials, in establishing said standards, based upon
    - (a) Experience and skill of employes affected.
    - (b) Locality of employment.
    - (c) Provided, however, that no classification shall be attempted accord-

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ing to nature of work involved, which might tend to set maximum as well as minimum wage.

4. Term "person" as used in Act, is declared to include any individual, partnership, association, trust or corporation.
5. Terms "interstate and foreign commerce" and "interstate or foreign commerce," are declared to include (except where otherwise indicated) trade or commerce
  - (a) Among several states or with foreign nations.
  - (b) Between District of Columbia or any Territory of United States and any State, Territory, or foreign nation.
  - (c) Between any insular possessions or other places under jurisdiction of United States.
  - (d) Between any such possession or place and any State or Territory of United States or District of Columbia or any foreign nation, or
  - (e) Within District of Columbia or any Territory or any insular possessions or other place under jurisdiction of United States.

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### Section 8

#### Application of Agricultural Adjustment Act

- A. This Act is not intended to repeal or modify any of provisions of Agricultural Adjustment Act, approved May 12, 1933.
- B. When necessary in order to avoid conflicts between administration of Agricultural Adjustment Act and Industrial Recovery Act, President is authorized to delegate to Secretary of Agriculture any of Presidential powers and functions under this Act, with respect to trades, industries or subdivisions "engaged in the handling of any agricultural commodity or product thereof, or of any competing commodity or product thereof."

### Section 9

#### Oil Regulation

- A. President is further authorized
  - 1. To initiate before the Interstate Commerce Committee proceedings necessary to prescribe regulations
    - a. To control operations of pipe lines, and
    - b. To fix reasonable, compensatory rates for transportation of petroleum and its products by pipe lines.

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- B. The Interstate Commerce Commission is required to grant preference to hearing and determination of such cases.
- C. President is authorized to institute proceedings to divorce from any holding company any pipe-line company controlled by such holding company, when pipe-line company tends to create monopoly by
  - 1. Unfair practices.
  - 2. Exorbitant rates in transportation of petroleum or its products.
- D. President is authorized to prohibit transportation in interstate and foreign commerce of petroleum and petroleum products where they have been (1) produced, or (2) withdrawn from storage, in excess of amount permitted to be produced or withdrawn by any State law, or valid regulation or order prescribed by any duly authorized state board, commission, agency, or officer.

### Section 10

#### Rules and Regulations

- A. President is authorized to prescribe
  - 1. Necessary rules and regulations.
  - 2. Fees for licenses and filing codes of fair competition.

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- B. Violation of any such rules or regulations is punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or both.
- C. President is authorized to (1) cancel, (2) modify any order, approval, license, rule or regulation issued under Act, and an express provision to that effect shall be contained in every agreement, code or license.

With this discussion of the features of the National Recovery Act, we can proceed to an examination of the contrasts between the older anti-trust laws and the Recovery Act.

## CHAPTER III

# Trade Associations Under the Sherman Law and National Industrial Recovery Law

THE law applicable to trade associations under the National Industrial Recovery Act stands in marked contrast to that developed under the anti-trust system from 1890 to 1933.

Some of the most fundamental concepts of the older law—restraint of trade, unfair methods of competition, liberty of contract, freedom of the individual trader—must undergo drastic revision in the light of the new objectives of the Recovery Law.

These terms must now be tempered by considerations of the welfare of the industry at large at the sacrifice of what the law had hitherto protected as the legal right of an individual trader. The emphasis upon the unrestrained discretion of the entrepreneur in

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matters of price, production, territory and customers must now be brought into conformity with what the welfare of the organized group can rightfully demand. Legalized *laissez-faire* no longer prevails.

The adage that competition is the life of trade was based upon the supposition that the interests of society were best served when consumers were afforded the best wares at the cheapest price. To the extent that this meant the demoralization of the producers and the exploitation of labor, it has become outmoded.

Along with the equality of opportunity for the trader and the preservation of fair and free competition against the predatory tactics of a combination, at which the older law aimed, there is, under the Recovery Act, the recognition that the wholesome combination acting cooperatively for the benefit of the entire industry is in need of protection against ruthless individuals.

The modified idea of competition under the Recovery bill is that it be rational, intelligent

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and socially sound. It must include a freedom to combine upon economically advantageous terms and an ability to check by coercive sanctions—both those imposed by internal management and those afforded as governmental remedies—the destructive, uneconomic and wasteful competition by an unreasonable or objecting minority.

Reasonable agreements designed to promote, protect and foster industry and trade are no longer to be condemned, although their aim and consequence is the making of profitable price structures or rational production schedules. How greatly the ends contemplated by the Industrial Recovery Law are at variance with the strictures of the anti-trust laws will be evident by examining the principles developed under the former law.<sup>1</sup> This contrast establishes clearly why a substantial revision of the federal anti-trust laws was essential to lay the

<sup>1</sup> The author's volume, "Trade Associations: The Legal Aspects," New York, 1928, contains a discussion of the Federal Anti-Trust Laws.

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basis for a new approach to the problem of reorganization of trade associations.

It must be noted that the policy of the older law is continued, in part, as it is expressly provided in the Recovery Law that codes of fair competition cannot be designed to promote monopoly or monopolistic practices, or to eliminate, oppress, or discriminate against small enterprises. Moreover, the President, as a condition of his approval of a code of fair competition, may impose conditions for the protection of consumers, competitors, employes and others.

Presumably, to this extent, the policy of the Sherman Act, expressed in its preamble as an act to protect trade and commerce against unlawful restraints and monopolies, is continued. How these objectives will be harmonized in specific cases, future adjudications in the Sherman Law will determine.

What, then, were the main features of the old anti-trust system which was so restrictive

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in its nature as to forbid the ends sought under the Recovery Bill?

Notwithstanding an anomalous tolerance<sup>2</sup> toward large scale combinations integrated under a single ownership, up to the decision of the Supreme Court *Appalachian Coals case* decided March 13, 1933,<sup>3</sup> the Sherman Law prohibited agreements on the part of competing independent units in an industry, to fix, maintain or control prices or to curtail production. The policy of the law had become settled and fixed into definite rules. An agreement by competitors to fix prices was illegal even though, as in the *Trenton Potteries case*,<sup>4</sup> the fixed prices could be conceded to be fair and reasonable. The fact of an agreement was crucial.

<sup>2</sup> Cf. Dissenting opinion by Brandeis, J., in *American Column and Lumber Co. et al. v. United States*, 257 U. S. 377 (*Hardwood case*), 413; Article by R. Hardy, "Loose and Consolidated Combination under the Anti-Trust Laws," 21 Geo. L. J. 123-46, January, 1933; Handler, *Columbia Law Review*, Vol. 32, No. 2, February, 1932, p. 179.

<sup>3</sup> 53 Sup. Ct. 471.

<sup>4</sup> *United States v. Trenton Potteries Co. et al.*, 273 U. S. 392.

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The benefits or justification for the agreement were immaterial.

The liberalization of the judicial attitude toward trade associations, announced in the *Maple Flooring*<sup>5</sup> and *Cement*<sup>6</sup> cases, decided in 1925, did not go to the extent of legalizing agreements among competitors to control prices.

Similarly, agreements to apportion territory,<sup>7</sup> to allot customers, and to boycott,<sup>8</sup> were unlawful *per se*, and once the facts were admitted, there was no legal excuse for their existence. As stated by the unanimous Supreme Court in *Paramount Famous-Lasky Corporation, et al., v. United States*,<sup>9</sup> at page 44:

"The prohibitions of the statute cannot '. . . be evaded by good mo-

<sup>5</sup> *Maple Flooring Mfrs. Assn. et al. v. United States*, 268 U. S. 563.

<sup>6</sup> *Cement Mfrs. Protective Assn. et al. v. United States*, 268 U. S. 588.

<sup>7</sup> *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211.

<sup>8</sup> *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600; *Paramount Famous-Lasky Corp. et al. v. United States*, 268 U. S. 30.

<sup>9</sup> Note 8, *supra*.

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tives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.' *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49."

With only rare exceptions, the decisions of the Supreme Court under the Sherman Law were, until the time of the *Appalachian Coals case*, rigid and unbending. For example, in the *Window Glass case*<sup>10</sup> there seemed to be some semblance of judicial sanction for an agreement to limit production, but the case was restricted to an unusual situation and could by no means be said to represent the general trend of the law.<sup>11</sup>

<sup>10</sup> *National Assn. of Window Glass Mfrs. et al. v. United States*, 263 U. S. 403.

<sup>11</sup> Cf. Discussion of *Window Glass case* between Walker D. Hines and Benjamin S. Kirsh in "The Federal Anti-Trust Laws: A Symposium," edited by Milton Handler, 76 *et seq.* (1932), pp. 96 *et seq.*; 101 *et seq.*

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In contrast to the *Window Glass case*<sup>12</sup> was the *Brimms case*,<sup>13</sup> where an attempt on the part of manufacturers and labor groups to work out a plan mutually advantageous to entrepreneurs and wage earners, was condemned by the Supreme Court as being violative of the anti-trust laws. The doctrine and implication of the *Brimms case* accorded more with the consistent line of authorities than the *Window Glass case*.

These general principles sum up, in the briefest manner, why trade associations, either acting alone or in agreement with labor groups, could not validly overcome demoralizing conditions with respect to production and prices.

The *Appalachian Coals case*, which marks one of the important turning points in the construction of the anti-trust laws, was recorded only three months before the enactment of the Recovery Act. In several important particulars, the Supreme Court liberalized what theretofore had been the rigorous provisions of the Sher-

<sup>12</sup> Note 10, *supra*.

<sup>13</sup> *United States v. Brimms et al.*, 272 U. S. 549.

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man Law in its application to cooperative activities affecting price, engaged in by competitors in an industry.

So important a bearing does the *Appalachian Coals case* have on the problem of price fixing under the anti-trust laws, that an extended discussion of its principles and implications is justified. It will establish that even before the legislative modification of the Sherman Act by the National Recovery Law, the Supreme Court had already begun to introduce and rely upon factors which up to that time it had neglected to consider.

The case changed the former judicial outlook that the effect of trade agreements upon consumers was paramount, and that the interest of producers and distributors was only secondary. Instead of laying the most relative emphasis on the interest of consumers, the Supreme Court in the *Appalachian case* bridged, in part, the gap between the American anti-trust law and similar principles of restraint of trade in

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Great Britain and some of the British Commonwealths.<sup>14</sup>

In analyzing the facts in the coal industry, Chief Justice Hughes brought together the interest of producers and consumers to a degree never before expressed in a Supreme Court opinion.

In other words, the plight of producers in an industry is stressed by the Court in the *Appalachian Coals* decision in a manner which can fairly be said to constitute a definite change in its attitude toward the effect of such agreements upon producers as well as consumers.

Without reviewing at great length the exact facts in the long opinion of the Supreme Court, it may be stated that, in sum, the *Appalachian case* introduced two major changes in the law as it developed from the enactment of the Sherman Law in 1890 up to the time of the decision.

<sup>14</sup> "The Law Relating to Trade Combinations," by A. L. Haslam, 1931, Reviewed by Benjamin S. Kirsh in 81 U. Penn. L. R. 1016 (June, 1933).

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1. The Supreme Court sanctioned the setting up of exclusive marketing agencies, and inferentially permitted even the fixing of prices, provided, however, that the central selling agency did not dominate the market situation by being able to control the market price of a commodity. Such domination of the market did not exist if there was effective or potential competition from competitors in the market; if there were substitute competing commodities which would break the monopoly grip, or where there was a powerful organization of buyers sufficient to equalize conditions between sellers and buyers.

2. For a long time, the Courts had differentiated between activity permitted to large scale units, integrated into a single ownership, and what they allowed to a federation of business competitors cooperating towards similar ends. This distinction was definitely swept aside by the Supreme Court for the first time by this case.

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In the practical application of the principles announced, the Court anticipated possible abuses because of the measure of liberalization it had granted. It appreciated that certain safeguards must be thrown around this newly declared liberty of competitors to cooperate.

The Supreme Court therefore remanded the case to the District Court with instructions to dismiss the proceeding without prejudice, and with the provision that the lower court should retain jurisdiction of the case and take further appropriate proceedings should future developments justify that course.

The lower court in the *Appalachian Coals case* had held the exclusive selling arrangement to be in violation of the Sherman Law. The Supreme Court reversed the Court below solely on the ground that the government had not established that the prices of coal, which, indeed, had not yet been fixed—because the sales agency had not yet been put into operation—could not be adjudged in advance to be arbitrarily high prices. It was for this reason that

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the Supreme Court, while reversing the lower court, ordered it to retain jurisdiction of the case, so that if, in actual practice, arbitrarily high prices were exacted or competitors were adversely injured or consumers were deprived of fair competitive prices, then the government could again institute its proceedings.

In short, it may be stated that the Supreme Court placed the following limitations on any exclusive sales agency plan:

1. Notwithstanding the permission granted to form an exclusive sales agency which has the power to fix reasonable prices, there must at all times be a market condition which permits effective competition among producers or distributors.

2. There must not be joint or combined activity to take unfair competitive advantage of competitors or buyers.

It is important to note that the Supreme Court specifically found in the *Appalachian case* that conditions in the coal industry were

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such that new companies were free to enter the business of producing and marketing coal in competition with existing companies. Furthermore, competing producers testified that the operation of the selling agency would not restrain competition and would not hurt their business.

For those who are interested in the particular plan before the Court, it should be observed that although the defendants controlled 73% of the production in the Appalachian territory, only a small percentage of the coal was sold in that territory because there was comparatively little industrial consumption there. Furthermore, the Court found that even in that territory, the developed and potential capacity of other producers could afford effective competition.

Moreover, although the Appalachian Coals Sales agency was intended to be only one of a series of contemplated similar exclusive agencies in other sections of the country, there was no proof in the record before the Court that

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the Appalachian Coals agency was dependent upon the formation of any other agency nor was there any division of territory between various agencies serving particular regions, and there was no evidence of any understanding between the component agencies to limit production or fix the price in any area.

It is apparent, therefore, that the *Appalachian Coals case* made some breaches in the strict anti-trust law doctrine,<sup>16</sup> especially the strict rule of the *Trenton Potteries case*.<sup>16</sup> The case modified the doctrine of the illegality of price fixing combinations to the extent that even price fixing might be permissible if there was no dominance or control of the market on the part of producers or distributors.

The case calls to mind the dissenting opinion of Justice Holmes in the *Northern Securities case*,<sup>17</sup> in which he pointed out that the terms

<sup>16</sup> Cf. Jaffe and Tobriner, "The Legality of Price-Fixing Agreements," 45 Harv. L. R. 1164 (1932), discussing the legal situation prior to the *Appalachian case*.

<sup>16</sup> Note 4, *supra*.

<sup>17</sup> 193 U. S. 197, 403, 404.

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of the Sherman Act did not aim at maintaining competition but was directed against "contracts in restraint of trade" and "conspiracies in restraint of trade"—technical conceptions developed in the formulation of the principles of the law of restraint of trade.

It seems that the price-fixing agreements condemned by the Sherman Law after the decision of the *Appalachian Coals case* were those in which the accused parties had gone farther than merely to enter into a price agreement in a market which they only partially controlled. Price agreements were thereafter to be illegal when they operated to suppress competition in the market. This suppression could be accomplished either

1. By excluding others from engaging in trade and competition with those entering into the agreement, or
2. By controlling the major part of the supply of a commodity so as to effect monopoly control of the market.

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Price agreements which affected a market only partially were to be exempted from the operation of the law. If the combination did not have the power to fix prices in the market, an agreement as to price was not necessarily illegal.

As Chief Justice Hughes stated in the *Appalachian Coals case*:

“A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. . . .

“The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. . . .

“Putting an end to injurious practices, and the consequent improvement

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of the competitive position of a group of producers is not a less worthy aim and may be entirely consonant with the public interest where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices."

Aside from the legal questions determined by the *Appalachian case*, there were practical difficulties which indicated that the measure of relief afforded by the decision would be slight in most industries. By the insistence of the Court that there should not be dominance or control of the market on the part of the combination and that a sufficient percentage of competitors had to be left out of the arrangement, it was apparent that the prices established by a permissible central sales agency could become the target of the unorganized minority. Furthermore, there would be quota difficulties and interference with the sales policies of individual companies, should the central sales idea be attempted in any industry.

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While the common sales agency might be practicable in staple mass-production commodities, the difficulties of the marketing problems become obvious where style, patented or branded items are involved.

Notwithstanding the changes which the *Appalachian Coals case* might have made in spirit, in addition to the actual substance, it is apparent that under the old law a premium was placed upon, and an incentive was offered for, the exercise of independence, discretion and initiative. A small minority could dissent from price and production plans intended to prevent demoralizing conditions in the industry at large.

The Sherman Act became, in effect, a protection to a recalcitrant minority objecting to association plans aimed to overcome chaos in production and prices in the industry. The protection of this minority lay in the legal situation developed under the anti-trust laws, but since agreements on price and production were prohibited, the dissenter was merely asserting his lawful rights against an illegal combination

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where any plan was pursued by an industry which attempted to curtail the right of anyone to engage in uneconomic price or production policy.

( The Sherman Law always pointed the finger of suspicion at producers. In legal contemplation, they were always suspected of contemplating monopoly control of the market. The relative emphasis on the protection of the consumer, as a cornerstone of American anti-trust policy, was valid enough in 1890 when the Sherman Law was enacted, and, indeed, may be said to have been justified until the last few years. But, of late, and more so since the depression set in in 1929, it had become apparent that the producer was no longer in the saddle and that the economic position of the buyer was becoming so strong as to leave him in the ascendancy over the seller. Indeed, the power and advantages of the buyers in the market were such that they could pit one seller against another and force ever lower prices upon harassed vendors. Thus, the superior power of

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the seller, which the theory of the Sherman Act supposed, was in reality contrary to the fact.)

With the policy of the Sherman Law prohibiting cooperative action among sellers to prevent flooding the market in demoralization of the price structure, and with the law placing a premium upon the right of any seller to quote prices even below the cost of production, a manufacturer could produce any amount he pleased, irrespective of a surplus of commodities. In too many instances, a producer would run amuck, glutting the market at ruinous prices. These conditions contributed toward a constant lowering of prices, unprofitable operation of industry and trade, and the exploitation of labor and unemployment. They produced the emergency which resulted in the National Industrial Recovery Act.

How to check the price cutter and the employer who could undersell his competitor by unscrupulous wage relations with exploited labor, and how to prevent those engaged in un-

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economic, destructive and wasteful competition to aid the best interests of an industry, remained the mystery both of trade association law and trade association administration.

Of course, coercion, illegal penalties, cutting off sources of supply, interference with bank credit—even engaging racketeers—were possible strong-arm alternatives not within the protection of the law; but with the exception of the least responsible associations, these measures could scarcely commend themselves as proper remedies to the self-respecting trade group.

While it is a severe verdict to enter, one must come to the conclusion that, by and large, the trade association movement was powerless to overcome the disintegrating effects of the activities of recalcitrant minorities during an era of economic stress.

{ Due largely to the policy of the federal anti-trust laws, with their severity of outlook on production and price arrangements, any trade association plan to effectuate industrial stabili-

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zation, to maintain prices at a profitable level, to accomplish curbs on overproduction, to prevent demoralization of production and marketing, and to introduce a humane labor policy of adequate wages and proper working conditions, was foredoomed to failure. This was true although leaders in each industry saw the problem clearly enough but lacked the legal means to enforce their remedial measures effectively.

So long as some recalcitrant competitors remained outside the sphere of influence of the association, whether non-members or non-conformists within the association, business-planning by members of an association could not be effective. Where strong factors were outside of any association plan, it was even detrimental for members of the association to enter into any wise economic policy and to permit the competitor to be footloose and to obtain the business at his own price.

It was recognized by most of the factors in an industry that a study of statistical knowl-

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edge offered by a trade association could guide a member of an industry to measure his production policy according to demand rather than maximum manufacturing capacity, and to formulate his individual price policy with an intelligent relation to cost rather than on the basis of a blind, unintelligent pursuit of some rivals. But market-glutting and price-cutting by competitors made planning based on past industry experience a hazardous undertaking.

Honor and good sportsmanship became slender reeds to enforce conformity to the best laid plans of the members of an industry to attempt economic rehabilitation. Legitimate sanctions failed because the legal powers were lacking to warrant their exercise. It was a situation where business units not under control, because of either non-membership or non-compliance, could operate as they saw fit even though their actions might contribute to the ruin of the rest of the industry. The sphere of influence of the organized group was limited by the legal prohibitions, and non-conformists

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could break down the standards with impunity. In the absence of penalties, undue supervision, or group pressure, which the policy of the law prohibited, the only permissible practical remedy was in the inculcation into every unit in an industry of an unselfish appreciation of the welfare of the entire industry.

It meant the raising of the standards of trade morality. Only in this way could the problem be adequately solved to the satisfaction of a firm legal policy which forbade agreements to limit production or to fix or to maintain prices.

With the accentuation of the business depression, the existence of heavy overhead expenses and fixed obligations, compelling sales at unprofitable prices for the purpose of obtaining cash for immediate needs, made the necessity for a legal form of coercion over recalcitrants increasingly apparent.

Appeals there were, of course, but these were not of sufficiently substantial nature to hold dissenters in check. The prestige of a management headed by an eminent citizen as "Czar"

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or "Dictator," moral suasion, education, appeal to business intelligence, even the potential power to retaliate in kind against the price cutter, lacked the element of legal coercive sanctions which the Recovery Act so amply provides, and which, as we have seen, violated both the letter and the spirit of the older law.

The nearest approach to control by trade associations over demoralizing price tactics on the part of a minority fringe, other than clandestine agreements and illegal coercive tactics, was the avenue opened by codes of ethics, by-laws, or, more usually, trade practice conference resolutions. Provisions in trade association instruments generally following the implications of the *American Can case*,<sup>18</sup> forbade secret deviations from openly published prices. Such secret deviations could probably be held to be in violation of Section 2 of the Clayton Act, and, closely related thereto at this point, Section 5 of the Federal Trade Commis-

<sup>18</sup> *Van Camp and Sons v. American Can Co.*, 278 U. S. 245 (1929).

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sion Act, which prohibited unfair methods of competition in interstate commerce.

Compelling the adherence to openly announced or published prices could be supported as a fundamental of fair competition. In like manner, the secret payment from openly announced prices to customers, whether directly or indirectly, or the secret allowance therefrom of rebates, refunds, commissions, credits, discounts, freight allowances, whether in the form of money, commission, fee or gift, could be lawfully prevented. Prices could thus be brought out into the open, removing secrecy and stealthy advantages over competitors, and, in effect, permitting a competitor to meet a seller's price under the normal competitive situation, with demand and supply factors disclosed and out in the open.

The practical difficulty encountered with these secret rebate provisions was that most of these regulations, to be absolutely valid, had to conform to the cumbersome language and the

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burdensome provisions of Section 2 of the Clayton Act.

It had to be established in pursuance of that Section that the effect of such discrimination was substantially to lessen competition or to tend to create a monopoly in any line of commerce. These last qualifying clauses naturally deprived the resolutions of a great deal of their practical value when it came to a matter of enforcing the rules.

Curiously enough, the possibilities of Section 5 of the Federal Trade Commission Act, referred to above, were not fully appreciated by draftsmen of trade association instruments.

Conceding, although there was no exact case to cover the situation, that such secret and fraudulent departure from openly published prices was unfair to competitors, there was nothing under the Sherman Law which could prevent an independent spirit from candidly seeking an open reduction in price. If he proceeded boldly and openly instead of secretly, he was acting within his lawful rights. In other

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words, the trade association could not accomplish price conformity indirectly if any member determined openly to cut the price and employed no stealth in doing so.

Insofar, therefore, as such resolutions were intended as instrumentalities to prevent demoralization in prices, they were, therefore, at most, half-way guarantees to price stability.

A provision contained in many trade association by-laws and codes of ethics, and also in resolutions adopted in trade practice conferences, was the prohibition of sales below cost.

It is a curious commentary on the development of anti-trust law that this feature of prohibiting below-cost selling, one of the most important points, and, indeed, one of the major changes introduced by the Recovery Act, should never have been squarely presented to the Supreme Court of the United States for adjudication. Indeed, there are very few cases dealing with the legal status of agreements binding parties not to sell below cost. What law there was on the subject pointed to the ille-

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gality of a bald agreement to prevent a trader from selling below cost.<sup>19</sup>

The more careful draftsmen of sales-below-cost provisions included modifying language which would remove the taint of illegality. Such modifications stated that the selling of goods below cost, to be within the prohibition of the agreement, had to be either with the intent and the effect of injuring a competitor or else tended to create a monopoly or a restraint of trade. These provisos were required by definite legal limitations. The effect of these limitations was to narrow the list of punishable offenders to the price-cutter acting out of sheer malice or ill-will.<sup>20</sup>

Aside from the difficulty of proving pure malice in any but the most extreme case, it is well recognized that the motive in ordinary

<sup>19</sup> *Sears-Roebuck Co. v. F. T. C.*, 258 Fed. 307 (1919).

<sup>20</sup> Cf. *Tuttle v. Buck*, 107 Minn. 145 (1909); *Beardsley v. Kilmer*, 236 N. Y. 80 (1923); *American Bank and Trust Company et al. v. Federal Reserve Bank of Atlanta et al.*, 256 U. S. 350; *Walsh v. Judge*, 258 N. Y. 76 at p. 80.

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business transactions is at worst mostly mixed even where ill-will actuates the party. The price-cutter is rarely motivated by a desire to inflict injury upon his competitor and nothing more. He is rather acting to secure an order and to move his merchandise.

The idea of codes of fair competition, provided for in the National Recovery Act, was borrowed directly from the Trade Practice Conferences, sponsored by the Federal Trade Commission in numerous industries. In the past, insofar as trade practice conference resolutions dealt with price and production problems, these resolutions were always so hedged about with provisos and exceptions as to deprive them of practical value in dealing with the demoralizing tactics of the recalcitrant minority.

The vital matter of sales price could never be effectively covered under the policy of the Sherman Act, which not only prohibited agreements to fix or control market prices, but reserved the right to each trader to charge any price he saw fit, irrespective of how low it

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was. Under the Recovery Act, every code of fair competition must contain provisions adequately protecting the industry against irresponsible price cutters who heretofore have sold at a price having no relation to their own costs, thus bringing the price level below the cost of production, with resulting injury to every other factor in the industry.

Uniform cost-accounting methods within each trade and industry may be required by the President under the authority of the new Act. By checking on the element of cost used by each unit in an industry, the reckless quotation of selling prices should be effectively stopped. Without uniform methods of cost-accounting it would be difficult to make a comparison of elements of cost in order to carry on business intelligently.

By means of comparison and analysis of data, the actual production and distribution cost of a company can be determined by the individual members. It will reveal the great number of instances in which an ignorance of cost

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by one member or a few members within an industry has led a whole industry to sell without an adequate margin of profit or with no profit at all.

“Thus, by exact analysis, careful estimate, and specific apportionment of the precise elements of cost, a complete view of the real cost of doing business can be had. In this manner, variation in costs and actual conditions of more efficient operating units will be cogently disclosed and the component items of cost will be ascertained. It is only by discovering the cost of each commodity, of each separate process employed in production or distribution, of each separate part which comprises the finished product, that there can be averted what was picturesquely termed by a pioneer in cost education, as ‘shooting arrows in the dark.’ ”<sup>21</sup>

It can therefore be seen that the weakness of trade associations in preventing sales below cost has now been overcome by the provisions of

<sup>21</sup> Kirsh, “Trade Associations: The Legal Aspects,” p. 72.

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the National Recovery Act, legalizing such provisions in the codes of fair competition. The dissenter can now be brought into line.

The Recovery Act includes one of the salutary provisions of the proposed Nye bills, which made resolutions of trade practice conferences binding upon all members of an industry regardless of the fact that the offender had not participated in the conference.<sup>22</sup>

The effect of this provision is, that if a dissenter does not conform to the majority view as expressed in the code of fair competition approved by the President, the Recovery Act can compel him to do so. It is a check effective equally against the ignorant, reckless or unreasonable competitors, and against a trader motivated by ill-will, or one who sells below cost solely for the monopolistic purpose of driving out weaker competitors.

With the difficulties encountered under the old law in mind, it becomes plain that the for-

<sup>22</sup> Note hearings before a sub-committee of the Committee on the Judiciary, United States Senate, 72nd Congress, 1st session, Washington, 1932.

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mer lack of power has been replaced by the sanctions offered as remedies in the Recovery Act. Where the Presidential approval has been obtained, codes, agreements and licenses are to be exempt from the operations of the anti-trust laws of the United States. No longer can the lack of power hamper trade association administration.

The issue has now turned from the question of power to that of proper policing. Authority under the Recovery Act may now be centered in the association. Discipline and effective control still require vigorous vigilance to ascertain that agreements are being observed. The problem before the trade association is therefore more than merely employing the newly granted opportunity to make agreements which before the Recovery Act were prohibited; but also to be sure that there is an enforceability of the codes according to their tenor.

There are many industries where members have very little faith in the promises or pledges of their competitors, and, in truth, such lack of

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confidence is sometimes well justified. The question of the sanctions permitted by the law are therefore most vital.

It would seem, even at the beginning of the administration under the law, that internal management sanctions, penalty provisions, and arbitration judgments, where awards can be collected, and now made lawful by the Recovery Act, will be most effective in the first instance rather than resort to governmental remedies of fining offenders or proceedings to bring recalcitrants under the burden of licenses.

If the internal sanctions fail as a remedy in the first instance, then proceedings by United States Attorneys, the Federal Trade Commission, resort to licenses and the fine and imprisonment features for violation of license provisions thereafter can be invoked. It is plain with what powerful weapons the new law has armed the association under the Recovery Act, and to what extent the hands of the trade associations have been strengthened.

## CHAPTER IV

# Provisions Applicable to Labor

LABOR may rightfully regard the Recovery Act as the embodiment of the most progressive social legislation ever enacted in the United States. It embraces, in a broad way, a major effort to solve pressing questions of unemployment, wages, labor standards, the protection of women and children, by linking them integrally to the vital problem of restoring purchasing power. It guarantees the principles of collective bargaining on a scale unprecedented in this country. It encourages workers to share in the managerial functions of industry, in order to promote their interests in industrial affairs.

It is therefore surprising that some industrialists have mistaken the aim and scope of the Recovery Act by deeming it merely a liberalization of the federal anti-trust laws, without recognizing in the law a corresponding duty

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which they will be required to perform towards labor, and a general accountability to the government in the interests of the public welfare.

However, notwithstanding the broad purpose and scope of the Recovery Act in affording such an extensive program of social welfare objectives, labor should not erroneously regard the law as a *carte blanche* to enter into mutually satisfactory agreements with employers in disregard of the rights of the consuming public, nor should management and labor in particular trades or industries feel that they have been accorded a power to agree among themselves in a manner subversive of the rights of industries or trades.

We have seen, in the view of events which led up to the passage of the law, that the Recovery Act was intended as a bold stroke aimed at the reduction of widespread unemployment, the elimination of sweatshop wage payments and long hours, and the eradication of labor abuses directed against women and children in industry. Moreover, it is implicit in the law to

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plan the rationing of available jobs by the limitation of hours. By spreading employment, it is planned to absorb unemployed workers.

Likewise, by making agreement on labor conditions a condition of affixing the Presidential approval, to industry codes of fair competition, and by the further provision that the President may require industries to provide him with necessary information to insure labor against the sweatshop conditions which existed prior to the enactment of the law, labor standards can be effectively enforced.

Before proceeding to an examination of the provisions relating to labor, it would be helpful to review briefly the difficulties encountered under the older federal anti-trust laws, in seeking to effectuate objectives such as those now required to be dealt with in the labor sections of industry codes and agreements under the Recovery Act.

Under the Sherman Law, trade agreements between employers and workers, even if mutually satisfactory to them, ran the danger of

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contravening the policy of the law against limitation of production and price fixing. Several leading decisions<sup>1</sup> contain definite implications that trade agreements between capital and labor groups had elements which the courts pointed out to be contrary to the public welfare and violative of the federal anti-trust laws.

The Recovery Act supplies the element of social control, through provisions for govern-

<sup>1</sup> *United States v. Brims et al.*, 272 U. S. 549 (1926); *Boyle v. United States*, C. C. A. (7th Circ.) 259 Fed. 803 (1919); *Belfi v. United States*, C. C. A. (3rd Circ.) 259 Fed. 822 (1919); *The Typhothetae case, F. T. C. v. United Typhothetae of America et al.*, 6 F. T. C. 345 (1923) is indicative of the difficulties mentioned; *The Window Glass case, National Association of Window Glass Manufacturers et al. v. United States*, 263 U. S. 403 (1923) is exceptional in that it was based upon a rare set of facts. A recent New York case is interesting in that it upholds an agreement between capital and labor which before the Appalachian Coals decision would have been held an unreasonable restraint of trade, *N. Y. Clothing Manufacturers Association, Inc. v. Textile Finishers Association*, decided June 2, 1933, App. Div. 1st Dept. One of the weaknesses of the Swope Plan arose from the fact that it did not set forth an unequivocal right on the part of the government to supervise price and production agreements. Cf. author's review of "The Swope Plan," in *American Bar Association Journal*, October, 1932.

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mental supervision, to balance trade agreements between employers and workers. With government "partnership" provided for, the cooperative endeavor permitted to employers and labor to make effective the policy of the law can be formulated as a joint product of entrepreneur and wage earners.

The Act accords to labor an opportunity to participate in the formulation of provisions of codes and agreements affecting wages, hours and labor standards.

It is plain from a reading of the Recovery Act that its policy is that codes of fair competition, limited codes and agreements must conform to certain absolute conditions intended to benefit workers. The advantages granted to workers is so integral a part of the Recovery Act and its provisions are made so obligatory that it may be termed the very heart of the Statute. It is implied in the very spirit, as well as the terms of the Statute, that there should be mandatory codes of fair labor as part of

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codes and agreements, covering conditions relating to the workers' welfare.

It is for this reason that the Act explicitly provides that codes of fair competition submitted to the President for his approval must contain, under Section 7, the following absolute conditions:

1. "That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. "That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing." (This is the so-called anti-"yellow dog contract" provision of the law.)

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3. "That employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."

It is also provided in Section 7, subdivision b, that the President shall afford every opportunity to employers and employees, in any trade, industry or subdivision where the conditions contained in numbers "1" and "2" above have been complied with to establish, by mutual agreements, such standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in the trade, industry or subdivision to effectuate the policy of the law.

It is also provided that the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President, thereby bringing them within the purview of the administrative, investigational and punitive provisions of the law.

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Section 7, subdivision c, provides that where no mutual agreement has been entered into between employers and workers, and approved by the President, he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in any trade, industry or subdivision.

Upon the basis of such investigations, and after hearings, the President is authorized to prescribe a limited code of fair competition, fixing maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade, industry or subdivision investigated. This code prescribed by the President shall likewise have the same effect as a code of fair competition approved by the President.

It is also provided that the President may differentiate according to the skill and experience of the employees affected and according to the locality of employment. But no attempt can be made to introduce any classification according to the nature of the work involved

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which might tend to set a maximum as well as  
a minimum wage.

It can be seen from the scope of these provisions that the purpose of the administration is to proceed under the Recovery Act in a manner to effectuate a shorter work week generally throughout industry with a compensatory higher wage. It is sought to establish shorter hours without a reduction of wages.

From the practical standpoint, the enforcement of the Recovery Act will probably necessitate joint boards upon a national, regional and local basis, equally representative of labor and employers, under the supervision of the President's administrators. These will act in conjunction with industrial, planning and research groups for proper labor standards, to be set up by various industries.

The activities of these separate private agencies will, in turn, necessitate coordination by a governmental, industrial planning and research agency which the President is empowered to establish to aid in carrying out his quasi-legis-

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lative, quasi-judicial and administrative functions under the Act.

Where industry fails to formulate a code of fair competition or agreement, the President, through his administrators, may set up a compulsory limited code, probably with adjusters appointed by the government.

Labor standards approved either in a code of fair competition, agreement or a compulsory code written by the President, will have the force of law, and because of the government sanctions contained in the Act, will be better observed than many trade agreements impossible of fulfillment because of depressed industrial conditions.

By means of these codes, competition among manufacturers at the expense of labor standards will be eliminated by force of law. It can be seen that labor codes will be useful in unorganized industries where standards have not heretofore been enforced by collective bargaining. In many industries there are no contractual relationships between employers' associations

PROVISIONS APPLICABLE TO LABOR and unions. The various voluntary arrangements between employers and workers should be sufficient, but if the only way to protect workers against sweatshop methods and low labor standards is by resorting to the licensing provision, genuine stability can be accomplished through the coercive force of the license.

In addition to the general requirements of the Statute, code provisions of interest to labor will of necessity differ in detail in view of the special problems raised in the various industries. They will include, however, all or some of the following:

1. The maximum hours per day or hours of plant operation.
2. Number of days per week.
3. Minimum wage of various classes of labor.
4. Differentials of wage payments to workers based upon skill, experience and locality.
5. Minimum wage rates for piece workers.
6. Working conditions covering safety and health.

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7. Prohibition of certain work for women and children below certain ages.

From the point of view of labor, the labor provisions of codes and agreements will go far in the direction of overcoming the adverse decisions of the United States Supreme Court in the minimum wage cases,<sup>2</sup> and will also cover part of the ground contemplated by the as yet unratified child labor amendment.<sup>3</sup>

We have, in the preceding chapter, discussed changes made by the Recovery Act in the law of trade associations. This is true in large measure also of the changes made by the Act in the provisions of the anti-trust laws as applied to labor, although, perhaps, not so directly. There has been a unanimous feeling among leaders of labor, and this opinion has been

<sup>2</sup> *Adkins et al. v. Children's Hospital, etc.*, 261 U. S. 525 (1923); *Murphy v. Sardell*, 269 U. S. 530 (1925); *Donham v. West-Nelson Manufacturing Co.*, 273 U. S. 657 (1927).

<sup>3</sup> Two attempts by Congress to regulate products produced by child labor were declared unconstitutional by the Supreme Court, *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

PROVISIONS APPLICABLE TO LABOR shared by numerous students of the anti-trust laws,<sup>4</sup> that there was under the older law a dual or conflicting standard.

Although the primary intention of the federal anti-trust laws was to curb monopolistic industrial combinations, the history of the Sherman and Clayton Acts establishes that they have had, in actual result, a far more restraining influence upon the growth of labor combinations and labor organizations. In fact, labor leaders firmly entertain the view that the anti-trust laws had become potent instrumentalities to be used by powerful employers' groups to thwart trade union organization and protection.

The keen disappointment expressed by labor over the failure of the Clayton Act, heralded as labor's "charter of liberty," to grant the promised exemption or immunity under the

<sup>4</sup> Frankfurter and Greene, "The Labor Injunction," New York, 1930, p. 175; Edward Berman, "Labor and the Sherman Act," New York, 1930; Frankfurter and Greene, "Congressional Power over the Labor Injunction," 31 Columbia L. R. 385, 391; Frey, "The Double Standard in Applying the Sherman Act," 18 Am. Lab. Leg. Rev. 302.

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anti-trust laws, after several adverse Supreme  
Court interpretations, is well known.<sup>5</sup>

This feeling was accentuated by labor's view that the rule of reason, which was stated by the Supreme Court as the guiding principle by which the federal anti-trust laws were to be interpreted, had been construed by the decisions so as not to condemn large-scale mergers or consolidations, and, of late, to permit a somewhat larger measure of trade association cooperation, but was interpreted in an unequal or discriminatory manner against trade unions so as to destroy the very essentials for absolutely necessary labor cooperation.

Labor leaders have taken the plain position that the rule of reason, so flexible in the case of organizations among entrepreneurs, has not been extended to labor union activities to an extent to secure the full right of collective bar-

<sup>5</sup> Samuel Gompers stated at the time of the passage of the Clayton Act that it would be the Magna Charta of Labor. See "The Charter of Industrial Freedom—Labor Provisions of the Clayton Anti-Trust Law," *American Federationist*, Vol. 21, p. 957.

PROVISIONS APPLICABLE TO LABOR gaining and for the taking of what labor has taken appropriate steps to prevent the destruction of trade union organization.

The decision of the Supreme Court of the United States in the *Bedford Stone case*<sup>6</sup> was especially attacked by labor as an example of the unequal application of the law. They cited from Justice Brandeis' dissenting opinion in that case:

"The Sherman Law was held in *United States v. United States Steel Corporation*, 251 U. S. 417, to permit capitalists to combine in a single corporation 50 per cent. of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U. S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress

<sup>6</sup> *Bedford Cut Stone Co. et al. v. Journeyman's Stone Cutters Association of North America et al.*, 274 U. S. 37.

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had by the same Act willed to deny to members of a small craft of workmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.”<sup>7</sup>

It seemed that in cases involving labor under the anti-trust laws, the Courts merely inquired whether there was an attempt to restrain interstate commerce and whether the restraint was direct and substantial. If those facts existed then there was an illegal combination, even if the ultimate aim of labor union activity was to benefit its members in the matter of improvement of wages or conditions.

Justice Sutherland, speaking for a majority of the Court, in the *Bedford Stone case*, used the following significant language:<sup>8</sup>

“A restraint of interstate commerce cannot be justified by the fact that the

<sup>7</sup> Dissenting opinion of Justice Brandeis, *Bedford Stone case*, *supra*, p. 65.

<sup>8</sup> *Bedford Stone case*, *supra*, at page 47.

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ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."

In other words, the physical fact of direct and substantial interference with the flow of commodities in interstate commerce invalidated acts, under the anti-trust laws, which were designed by the union as measures of self-preservation for its members.

It is obvious from this discussion why labor is so interested in the suspension of the anti-trust laws afforded by the passage of the Recovery Act. Now, by mutually cooperative endeavor with employers and workers and acting constructively with the guidance of the government, labor can eliminate the source of many of the legal problems with which it was faced because of a series of hostile Court adjudications under the federal anti-trust laws.

There are several other related matters in which labor has gained notable victories by the passage of the Recovery Act. We have seen

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that the Recovery Act guarantees to employees the right to organize and bargain collectively through representatives of their own choosing and that they should be free from interference, restraint or coercion on the part of employers or their agents and the designation of representatives of the employees or in the matter of the self-organization or any other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Act contemplates that there shall be a reciprocal right to labor to organize in groups just as the employers will form associations. These provisions are intended to guarantee to workers the right of free association with their fellows and affords them the opportunity to deal on a basis of equality with those by whom they are employed.

The Recovery Act enacts into legislation the economic philosophy of labor leaders that the organization of workers for the making of collective bargains with employers, and their representation by experts, is economically and

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socially desirable to equalize the bargaining  
power between employing and employee groups.

It should be noted that a similarly worded  
provision of the Railway Labor Act of May 20,  
1926, was upheld by the Supreme Court against  
attack.<sup>9</sup>

It is significant to note the language of Chief  
Justice Hughes in delivering the opinion of the  
Supreme Court, upholding this Statute which  
granted the right of labor to organize and se-  
cure the advantages of collective bargaining:

“The legality of collective action on  
the part of employees in order to safe-  
guard their proper interests is not to  
be disputed. It has long been recog-  
nized that employees are entitled to or-  
ganize for the purpose of securing the  
redress of grievances and to promote  
agreements with employers relating to  
rates of pay and conditions of work.  
*American Steel Foundries v. Tri-City  
Central Trades Council*, 257 U. S.  
184, 209. Congress was not required

<sup>9</sup> *Texas and New Orleans Railway Co. v. Brother-  
hood of Railway and Steamship Clerks*, 281 U. S. 548  
(1930).

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to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice."<sup>10</sup>

The Recovery Act also extends to greatly further limits the prohibition against "yellow dog contracts" contained in the Norris-LaGuardia anti-injunction law.<sup>11</sup>

The Norris-LaGuardia Act closed the federal courts as a forum for the enforcement of these anti-union contracts by declaring the policy that they should not be enforceable in any Court of the United States, nor should any federal court grant legal or equitable relief based upon them.

<sup>10</sup> *Ibid*, p. 570. Cf. Edward Berman, "The Supreme Court Interprets the Railway Labor Act," *American Economic Review*, Dec., 1930, Vol. XX, No. 4, p. 618.

<sup>11</sup> 29 U. S. C. A. 102 and 103, "Federal Anti-Injunction Act," Edwin E. Witte, 16 *Minn. L. R.* 638; "Federal Anti-Injunction Bill," Jay Finley Christ, 26 *Ill. L. R.* 516.

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While the jurisdiction of the federal courts was thus curtailed, there could still be proceeding on these anti-union contracts in State courts both as against the employes and against labor organizers. The federal act did not, however, restrict remedies in law or equity in State courts.

The effect of the Recovery Act, however, goes far beyond the Norris-LaGuardia Act. It makes it an absolute condition of codes and agreements, that employers must agree to forego "yellow dog contracts" if they desire to take advantage of the provisions of the Recovery Act and secure Presidential approval. If employers wish to take advantage of the Recovery Act, they must agree not to exact "yellow dog contracts" from the employees, and, thus, for those employers taking advantage of the Act, such contracts are outlawed.

It is apparent from the discussion of the provisions of the Recovery Act dealing especially with labor, how far-reaching and progressive an economic program has been enacted into law

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and how principles and standards for which labor has long fought have now become part of the law of the nation. No longer can the unscrupulous employer of sweatshop labor enter into destructive competition with more socially minded employers, and compel his labor force to bear the brunt of his price-cutting tactics. Codes of fair competition and agreements will bind such an employer; the President, by granting his approval, will uphold high labor standards; and where voluntary action will not be curative, the compulsory features of the law with the governmental sanctions, including licensing, can be resorted to by the President. Labor can therefore well regard the provisions of the Recovery Act, along with owners and entrepreneurs, as highly beneficial to its interests.

They can appreciate President Roosevelt's statement made after signing the bill: "Workers, too, are here given a new charter of rights long sought and hitherto denied."

## CHAPTER V

### Some Observations on the National Industrial Recovery Act

In reflecting upon the National Recovery Act at the time when it goes into operation, innumerable problems come to mind. Necessarily, there is such an integral relation between the terms of the law and its administration or enforcement, that it goes without saying that the historian, writing retrospectively two years from now, will be a wiser man than the prophet who hazards a prediction today.

Chief Justice Hughes, in the *Appalachian Coals decision*, remarked, in a philosophic manner, that a statute like the Sherman Act had a generality and an adaptability comparable to that found to be desirable in the provisions of a Constitution. He pointed out that the Act did not go into detailed definitions, and, by setting forth particulars, defeat its purpose through providing loopholes for escape. This

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observation has especial significance in appraising so historic a legislative enactment as the Recovery Act.

Despite the vigorous objections raised against certain features of the Recovery Act in the Congressional debates, in the forums of political and economic discussion, and by representatives of special interests, one fact seems incontrovertible. That is, that from the leaders of industry, trade and labor, alike, and from the rank and file of the people, an overwhelming public opinion welcomed the Recovery Act as an experimental measure aimed at the restoration of a more prosperous era.

It was this urge for a major cooperative effort, invoking the enthusiasm of every element in the national life, which swept aside objections that, in less critical times, would have embodied the deep-seated political and economic instincts of the people.

Senator Reed and Representative Beck argued forcibly that there were elements of regimentation and coercive sanctions, particularly

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the licensing features of the Act, which were un-American in the extreme and utterly at variance with the traditions of the country, resembling arbitrary methods borrowed from European dictatorships.

Senator Borah uttered warnings that the Recovery Act meant a scrapping of the anti-trust laws, and a destruction of small business men and the exploitation of the consumer, by the unrestrained and uncontrolled power of big business. Constitutional lawyers expressed grave doubts whether the Recovery Act could be upheld in view of what they contended were clear and indistinguishable precedents of the Supreme Court of the United States.

Sponsors of the Recovery Act answered that emergency times required emergency legislation. Several Supreme Court decisions, they contended, notably the *Rent Law cases*<sup>1</sup> and

<sup>1</sup> *Block v. Hirsh*, 256 U. S. 135, 155 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921).

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the *Adamson Law case*,<sup>3</sup> upheld analogous legislation passed in emergency times.

They pointed to the fact that the Recovery Act was also an emergency statute, that the absolute necessity of its passage was contained in the declaration of policy, and that its duration was confined to only two years and in the case of the license provisions, strictly limited to one year.

They also showed that should the emergency cease, either the President by proclamation, or Congress by joint resolution, could terminate this legislation before its date of expiration.

Further objection on Constitutional grounds has been raised against the extension of Congressional power to reach even commerce wholly within the borders of a single State. In supporting the Recovery Act, Senator Wagner contended that Congress was not exceeding its powers, as the Recovery Act, by prohibiting acts within a State so related to interstate commerce as to be a burden upon the flow of

<sup>3</sup> *Wilson v. New*, 243 U. S. 332 (1917).

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goods into a State, was merely regulating interstate commerce. He argued that the implications of the *Shreveport Rate case*,<sup>3</sup> involving the federal power to regulate intra-state railroad rates where they adversely affected interstate rates, applied to the analogous situation contemplated by the Recovery Act.

In this connection, it should not be forgotten that while the Recovery Act is a federal enactment, some of its provisions may come into conflict with strict anti-trust laws that are still unamended.<sup>4</sup>

Aside from these technical Constitutional and legal questions, administrative determination of problems new in American life must be gradually evolved. With the exception of war-time control of industry and labor, there has never been, in this country, the degree of penetration of government agencies into the economic or-

<sup>3</sup> *Houston, East & West Texas Railway Co. v. United States*, 234 U. S. 342 (1914).

<sup>4</sup> An excellent collection and survey of state anti-trust laws is set forth in a note in 32 *Columbia L. R.*, page 346 *et seq.* (1932).

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ganization of the country provided by the Recovery Act. There will be, indeed, what in European economic thought has been termed "rationalization" of industry, but humane toward labor and profitable to entrepreneurs.

Is the diverse political machinery of the federal government well suited to the solution of problems of planning, control and regulation of the economic structure? Will the administrators of the Recovery Act be equal to the task of guiding the economic processes, and at the same time be able to adjust the conflicting interests of manufacturers, distributors, workers and consumers?

Will there be what some have visioned as the spectre of a vast governmental bureaucracy, in which subalterns possessing temporary political power will employ their official status to the detriment of economic efficiency, bringing in as a necessary incident a bribery and a blackmail not unknown in the licensing and regulating activities of some municipal governments?

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An appreciation that industrial decrees cannot be rendered by political fiat will undoubtedly induce the administrative authorities to permit industrial groups to solve their problems in the first instance by a process of self-policing, and that the ordinary function of the government in the partnership will be to lend encouragement in most industries and, when necessary, exert its authoritative sanctions against a few.

Certainly, the administration starts with the idea that the power of the federal authority will be exercised only in those cases where the doctrine of self-help has broken down. In the absence of concrete American experience under the Recovery Act, it would lead to a futile debate as to the theoretical affinity of the new concept of socialization in the direction of a planned industrial democracy, which the Recovery Act engenders, and its relationship to the cartels of Germany, the corporative system of Fascist Italy, or the planned economy of Soviet Russia.

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While collectivization in the form of Fascism or Sovietism are phrases of uncertain content as applied to present conditions in the United States, certain it is that the recent world-wide trend towards nationally planned economies, and the insistent demand in the United States for a modification of the traditional view of unrestricted competition have molded American social thought so as to overcome former hostility against any law embodying the program of the Recovery Act. It seems difficult to imagine that when the Industrial Recovery Act will have run its course, we will be able to unscramble the collective mass and return to the defective older system of an unrevised Sherman Anti-Trust Act.

From the lessons learned in administering the National Recovery Act should come a permanent American contribution to industrial organization and relationships and an ordered economic structure.

President Roosevelt struck the proper note in a statement issued after the Recovery Bill

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had become law. To try out this new philosophy  
of government, of a greater political control of  
economic processes, the whole-hearted coopera-  
tion of industry, labor, and every citizen of the  
nation will be necessary. It is indeed a great  
challenge to the American people.

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# The Industrial Control Provisions of the National Industrial Recovery Act

An Act (H. R. 5755) to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### Title I—Industrial Recovery

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which

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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 sanction 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.

### **Administrative Agencies**

SEC. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to ap-

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point, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.

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

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### Codes of Fair Competition

SEC. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds

(1) That such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and

(2) That such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title:

Provided, that such code or codes shall not permit monopolies or monopolistic practices: Provided, further, that where such code or codes affect the services and welfare of persons engaged in other steps of the economic process,

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nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes.

The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

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

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impair the powers of the Federal Trade Commission under such Act, as amended.

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

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved

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by the President under subsection (a) of this section.

(e) On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the

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United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title.

In order to enforce any limitations imposed on the total quantity of imports, in any specified period or periods, of any article or articles under this subsection, the President may forbid the importation of such article or articles unless the importer shall have first obtained from the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in

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the quantity which may be imported, and to such requirements of license, as the President shall have directed.

The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall find and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation upon entry no longer exists.

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

### **Agreements and Licenses**

SEC. 4. (a) The President is authorized to enter into agreements with, and to approve vol-

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untary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition.

(b) Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date

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fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe.

The President may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the President suspending or revoking any such license shall be final if in accordance with law. Any person who, without such a license or in violation of any condition thereof, carries on any such business for which a license is so required, shall, upon conviction thereof, be fined not more than \$500, or imprisoned not more than six months, or both, and each day such violation continues shall be deemed a separate offense.

Notwithstanding the provisions of section 2 (c), this subsection shall cease to be in effect at the expiration of one year after the date of enactment of this Act or sooner if the Presi-

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dent shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

SEC. 5. While this title is in effect (or in the case of a license, while section 4 (a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States.

(a) Nothing in this Act, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm.

SEC. 6. (a) No trade or industrial association or group shall be eligible to receive the benefit of the provisions of this title until it files with the President a statement containing

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such information relating to the activities of the association or group as the President shall by regulation prescribe.

(b) The President is authorized to prescribe rules and regulations designed to insure that any organization availing itself of the benefits of this title shall be truly representative of the trade or industry or subdivision thereof represented by such organization. Any organization violating any such rule or regulation shall cease to be entitled to the benefits of this title.

(c) Upon the request of the President, the Federal Trade Commission shall make such investigations as may be necessary to enable the President to carry out the provisions of this title, and for such purposes the Commission shall have all the powers vested in it with respect of investigations under the Federal Trade Commission Act, as amended.

### **Limitations on Application of Title**

SEC. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or

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issued under this title shall contain the following conditions:

(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and

(3) That employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

(b) The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or sub-

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division thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of section 3.

(c) Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of

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labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3.

The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage.

(d) As used in this title, the term "person" includes any individual, partnership, association, trust, or corporation; and the terms "interstate and foreign commerce" and "interstate or foreign commerce" include, except where otherwise indicated, trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory,

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or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

### **Application of Agricultural Adjustment Act**

SEC. 8. (a) This title shall not be construed to repeal or modify any of the provisions of Title I of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933; and such Title I of said Act approved May 12, 1933, may for

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all purposes be hereafter referred to as the "Agricultural Adjustment Act."

(b) The President may, in his discretion, in order to avoid conflicts in the administration of the Agricultural Adjustment Act and this title, delegate any of his functions and powers under this title with respect to trades, industries, or subdivisions thereof which are engaged in the handling of any agricultural commodity or product thereof, or of any competing commodity or product thereof, to the Secretary of Agriculture.

### Oil Regulation

SEC. 9. (a) The President is further authorized to initiate before the Interstate Commerce Commission proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable, compensatory rates for the transportation of petroleum and its products by pipe lines, and the Interstate Commerce Commission shall grant preference to the hearings and determination of such cases.

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(b) The President is authorized to institute proceedings to divorce from any holding company any pipe-line company controlled by such holding company which pipe-line company by unfair practices or by exorbitant rates in the transportation of petroleum or its products tends to create a monopoly.

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

SEC. 10. (a) The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this

## APPENDIX

title, and fees for licenses and for filing codes of fair competition and agreements, and any violation of any such rule or regulation shall be punishable by fine of not to exceed \$500, or imprisonment for not to exceed six months, or both.

(b) The President may from time to time cancel or modify any order, approval, license, rule, or regulation issued under this title; and each agreement, code of fair competition, or license approved, prescribed, or issued under this title shall contain an express provision to that effect.

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