GROWTH OF FEDERAL LICENSING

Submitted to the Faculty of
the Law School
of Georgetown University
In Partial Fulfillment
Of the Requirements for the
Degree of Juris Doctor
Federal licensing has, to my knowledge, never been made the
subject of a dissertation or thesis and therefore was chosen as an
appropriate field for an original investigation.

The term "growth" is synonymous with the history of the develop-
ment of the Federal Government. From a holding unit designed to tie
together the several states into a more compact unit, in order to promote
internal coordination and to present to the world a nation, the Federal
Government has so exercised with the sanction of the courts its delegated
powers that today all individuals in every walk of life are affected by
its legislative acts, rules and regulations.

Outstanding in this growth has been the development of the
field of Federal Regulation. Congress in selecting the means or method
by which its regulatory purposes were to be accomplished has with great
frequency during the last 20 years looked to the license.

The original scope of this paper was to include a tracing of the
growth of federal licensing, the right of revocation, the licensee's rights
and remedies with a discussion as to constitutional limitations of this
federal power. However, the task has proven to be greater than anticipated,
time being a limiting factor, and therefore herein is presented only the
growth of this federal power.
The licensing acts have been segregated into groups under the particular federal power upon which they are based. Certificates of "convenience and necessity" in connection with the regulation of railroads by the Interstate Commerce Commission have not been included because it is felt that this is a special field adequately covered by many writings. The general plan has been to present a summary of the licensing provisions of the several acts, any appropriate history, and a discussion of those cases which have arisen under the particular acts presented.

Most of the material has been collected on the other questions which originally were to be included and it is planned to complete the development sometime in the near future.

Washington, D. C., April, 1935
Charles V. Koons
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INTRODUCTION
The rapid and almost miraculous growth of the United States as a nation has only been equalled by the growth of the Federal Government. From a unit designed to hold together the various states in order that a solid front might be presented to the world, the Federal Government through the liberal and necessary interpretation of its powers has expanded internally until it, like an octopus, has stretched forth its arms into practically every walk of life. Scarcely can one move before some Federal question, some rule of conduct, some regulation confronts him. The founders of our Constitution in their wildest imaginative explorations did not and could not have conceived of such a growth in power. Whether such a growth is good or bad is beyond the scope of this paper, yet it might be well to say that such a growth finds its basis in that same "frontier spirit" which gave rise to the unprecedented growth of our position as a world power. To say that it is bad, is to judge the past, to say that it is good is to predict the future.

One of the most outstanding arms of the federal growth has been that of the power to regulate with respect to the conduct of the individual. A skimming of the regulatory surface will adequately bear out this statement. The evidence shows that the Federal Government determines what vessels shall engage in commerce, foreign and interstate;
the qualifications of officers, pilots and mates; who shall be customs brokers, what nursery stock shall be imported; who shall engage in interstate commerce; what goods shall be shipped in interstate commerce; how goods may be shipped in interstate commerce, their labeling, their contents, their weight, their trade names, their process of preparation and manufacture; the standards for articles shipped in interstate commerce, cotton, grain, tea and etc.; the storing and handling of interstate commodities; the methods, business practices, of those engaged in interstate commerce; who shall construct power plants, dams on navigable waters; who shall use the ether as a means of communication or advertising; how securities shall be sold; the liabilities of employers (Railroad Co.'s) engaged in interstate commerce; the interstate shipment rates for railroads; the hours of labor, minimum wages for those engaged in an interstate industry; and the prices of interstate goods and products.

The selection of the means or methods by which such regulation is to be carried out rests within the discretion of the legislative branch of the Federal Government, the Congress. Various methods from license taxes, laws, rules, regulations, commissions, boards, and licenses have been adopted depending, upon the particular problem sought to be solved.

In the last twenty years the license has been designated, as the method, in preference to the other available forms. Licensing is a strict method of control in that it substitutes administrative supervision,
which is continuous, for the case to case method of control under a system of legislative rules enforced by criminal prosecution. Licensing inevitably raises the question of prohibition for without an express statutory declaration to this effect, it is implied that the conduct or business licensed is illegal without the license.

The term "license" involves several types of permission, first, the license which results from a license tax, a revenue measure, second, the regulating license, third, a combination of one and two, and fourth, a registration or designation system, such as is used by the Federal Government in the "National Securities Exchange",¹ and the "Grain Futures" Acts.²

A license in the form of a license tax is the designation of a fee which is exacted for the purpose of revenue, the business or conduct being prohibited until such fee be paid. The license then issues as a matter of course.

With reference to occupations and privileges the term "license", used in a regulating sense, denotes a right or permission granted by some competent authority to carry on a business or to do an act which without such license would be illegal to carry on or to do.³ It is a formal official permit or permission to carry on some business or do some act which would without the license be unlawful, the words license and permit are often used synonymously.

¹. Public No. 291, 73 Cong. 2nd. Sess. June 6 (1934)
². 42 Stat. 998
³. Gibbons v. Ogden, 9 Wheat 1 (1824)
There is, however, properly speaking and as generally understood a clear distinction between a license granted or required as a condition precedent to the carrying on of a business or occupation and a license tax.\(^1\) This distinction is most easily recognized in that the license tax is merely a method for the collection of revenue and the business or occupation is only prohibited until payment of the tax is evidenced by a so-called license. But where a license is required as a regulation, it may be withheld because the personal qualifications, physical conditions, or business practices do not meet the requirements or standards imposed.

Where there is a combination of the power to tax and the power to regulate the basis of the license must first be determined in order to arrive at a proper definition.

It is a general rule that a license is not a contract between the authority granting and the individual to whom it is granted, neither is it property or property right\(^2\) nor does it create a vested right.\(^3\) However, under some exceptional circumstances, such as public interest, prerequisite, a permit may grant a vested right. In Frost v. Corporation Commission of Oklahoma,\(^4\) under a law which declared cotton ginning to be a public utility and provided that no one could engage in the same without first securing a permit, the court pointed out, that this permit was something more than a mere license for it was granted in consideration of the performance of a public service and as such it constituted a property right within the protection of the Fourteenth Amendment.\(^5\)

1. In re Danville Rolling Co. 121 Fed. 432, (D.C.E.D. Penn. 1903)
3. Laing v. Americas, 86 Ga. 756 (1891)
4. 278 U.S. 515 (1928)
5. See People v. Wilson, 166 N.Y.S. 211 (1917) concerning the dealing in milk as a property right.
In summary then, it may be said that a license in its broad sense is a permit or privilege granted by competent authority to do that which by law would otherwise be unlawful. Further, that such a license is not a contract, neither is it property or a property right nor does it create a vested right.

The common law power to license is a necessary incident of the right of every sovereign to regulate, which right is limited only by the form of the government under which the sovereign exists. The Supreme Court has laid down the general principle that the right to regulate is the right to license where the license is a reasonable means for the accomplishment of the purposes of the regulation. The decisions as to the inherent or common law right to regulate within the boundaries of our constitutional limitations may be roughly segregated into two classes, first, those dealing with business "coupled with a public interest" and, second, those which come within the police power of a state. The first is really an extension of the second, but for the sake of convenience in handling this division will be used for the purpose of establishing some of the more fundamental principles of regulation by license.

The question of the regulation of a business "coupled with a public interest" first came before the Court in the historic case of Mann v. Illinois, in which the right of the State of Illinois to regulate the storage rates for grain was affirmed on the principle that the business was monopolistic in character, devoted to a public use and in a position (standing at the gateway of commerce a toll was exacted of all those who would pass) to impose on the public.

1. 94 U.S. 113 (1876)

This principle was affirmed in Budd v. N.Y., 143 U. S. 517 (1892)
In Brass v. North Dakota, this principle was extended by the removal of the monopolistic character limitation. The result would seem to be that where the peculiar circumstances of a business in one case places it in the class of those affected with a public interest that the same business must remain in that class even though all the supporting circumstances are lacking.

The business in German Alliance Ins. Co. v. Lewis, was not monopolistic in character nor received any special privileges from the state, but the court took judicial notice of the fact that most states regulate the insurance business and that the rates affected all people in the sense that one loss was divided among many and that therefore this was a business affected with a public interest.

Oklahoma, in New State Ice Co. v. Liebman, sought to require a license of necessity and convenience for the privilege of manufacturing and distributing ice. The court pointed out that this business was not peculiar, it was not a natural monopoly, not dependent upon the grant of any public privilege, nor was it an attempt to protect natural resources. The regulation was held to be unreasonable and arbitrary and not beyond the Fourteenth Amendment because it was designed as experimental.

The majority of the cases concerning regulation by license fall within the scope of the police power, that is, in the interest of public welfare, safety, morals and health.

1. 153 U. S. 391 (1894)
2. 233 U. S. 569 (1914)
3. 285 U. S. 252 (1932)
In Hall v. Geiger Jones Co., the state of Ohio regulated the selling of stock, with a so-called "Blue Sky" Law, by a licensing system. The Supreme Court said, it is within the police power to prevent frauds and impositions upon the public. There being the power to regulate there is the power to accomplish the purposes of the regulation by a license system.

The right to regulate the price of theatre tickets and the fees of an employment agency through the medium of a license was denied. The Court succinctly summed up the doctrine as follows: the authority to require a license comes from a branch of the police power which may be quite distinct from the power to fix prices; the power to fix prices only exists where the business has become affected with a public interest; the power to regulate and thus the right to license does not include the power to fix prices.

1. 242 U. S. 539 (1917)
4. In Nebbia v. The People of N. Y., March 5, 1934 291 U. S. 502, the Supreme Court seemed to change their doctrine that price control could only be had in those businesses which were affected with a public interest. The court pointed out that the term "affected with a public interest" was synonymous with police power and that in each case the question was whether the public interest demanded that the price of the article be regulated. Each case then is to be decided upon its own different conception of the regulation that might be accomplished through the police power. This supports the classification of the regulation of business "coupled with a public interest as being an extension of the police power."
The regulation of the right to practice a profession through the medium of a license system is within the state police power. The state under the police power may through licenses determine who shall practice. The only limitation is that the requirements be appropriate to the calling of the profession and are obtainable by reasonable study and application.¹

The right to protect the public against cheats or frauds, which experience shows attends itinerant peddlers, by a license system has been held to be within the police power,² if the license is upon the privilege of peddling and not upon the goods so as to interfere with interstate commerce.

There is a principle in connection with these licenses which is worth noting at this point, it is, that where there is the right to regulate, thus the power to issue licenses, the same must not be arbitrarily exercised.³

The summary of these cases is, that where there is the power to regulate in the interest of the public welfare, safety, morals, and health, the license may be used to attain the desired regulation as long as it bears some real and substantial relation to the accomplishment of the police power purpose and is not exercised in an arbitrary manner.

Due to the fact that the federal government has no police power, as such, these developed principles are only useful for the purpose of analogy in investigating federal licenses.

³. Yick Wo. v. Hopkins, 118 U. S. 356 (1886)
FEDERAL LICENSING ACTS
The taxing power of the Congress is very broad and extensive. With the exception of exports\(^1\) and the state governmental agencies\(^2\) and the qualification that direct taxes must be levied by the rule of apportionment\(^3\) and indirect taxes levied by the rule of uniformity,\(^4\) the federal taxing power reaches all objects, occupations and employments in the land.

In the License Tax Cases,\(^5\) the court after speaking of the power of Congress to use the license as a means of regulation in the exercise of its interstate commerce power said: "And the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incidental."

The question, how far may Congress go into the regulatory field, particularly regulation by license, under the guise of its taxing power before the court will say that such regulation has ceased to be incidental and has become primary? Clearly in those fields where there is also the power to regulate the question does not arise,\(^6\) but in those fields where the Congress has no express power to regulate this question becomes one of primary importance.

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1. Constitution, Article 1, Sec. 8
2. Collector v. Day, 11 Wall 113 (1870)
   McCulloch v. Maryland, 4 Wheat 316 (1819)
3. Constitution, Article 1, Sec. 2, Par. 3
4. Constitution, Article 1, Sec. 8
5. 5 Wall. 462 (1866)
6. Veazie Bank v. Fenno, 8 Wall. 533. (1869)
In 1794, retail dealers in wines and foreign distilled liquors were required to obtain and pay for licenses and to renew them annually or suffer a penalty. This was repealed in 1802. From time to time license taxes have been laid on various occupations. In form these licenses are to the effect that no person shall engage in certain named trades or businesses until they obtain a license from the United States.

In 1866, due to a discussion in the legal world, as to exactly what rights a licensee acquired by a license granted under the taxing power, Congress amended the act of 1864 by substituting the words "special tax" for the word license. The reason given, was that Congress desired to guard against misconstruction of legislative intention and to prevent people from believing that they derived from the license, obtained under the revenue acts, an authority to carry on the licensed business independently of state regulation and control.

The claim was made, that when an individual paid the fee and received the license, that he was thereby licensed to carry on the business despite any regulations which the state governments might promulgate concerning the business.

This view, however, was not sustained by the courts. In the License Tax Cases, the Supreme Court came to the conclusion that the granting of a license under the taxing power was nothing more than a

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1. Stat. at Large 377, June 5
2. 2 Stat., 148
3. 13 Stat. 248, 49, 472, 485
4. 13 Stat. 248, 49, 472, 485
5. 14 Stat. 115, 116, 137, 301
6. 5 Wall, 462. (1866)
mere form of imposing the tax in question and that it implied nothing more, except that the licensee would be subject to the penalties provided under the law if he did not pay the license fee or tax. The license conveyed no authority to carry on the licensed business within a state.

The court hinted that a certain amount of regulation of the taxed business or occupation would be constitutional, saying, "No interference by Congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature."

The conclusion being, that a taxing statute might have other objects in view, as long as the objects remained "incidental". This gave birth to the practice of using the taxing power in connection with social or moral ends.

In the case of In Re Kollock, the conclusion was reached that as long as the legislation bore some reasonable relation to the exercise of the taxing authority, it would not be invalidated because of any supposed motives which might have induced the statute. The court went on, "The act before us is, on its face, an act of levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine, as and for butter, its primary object must be assumed to be the raising of revenue."

1. 165 U. S. 526 (1897)
In the McCray case an act of Congress imposed an excessive tax on oleomargarine colored so as to resemble butter and imposed a license upon manufacturers and dealers in oleomargarine. The statute also imposed detailed requirements in the form of regulations upon the licensees as to the manufacture, sale and packing of the product. Here Congress suppressed the product excessively taxed, and set up through the means of the license a control system over those who were engaged in the manufacture and sale of oleomargarine. This act the court sustained, quoting with approval from U. S. v Jin Fuoy Moy, "It may be assumed that the statute here has a moral end as well as a revenue end in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

Thus Congress was able to regulate a business which it felt was guilty of deception in the sale of its product. This industry in its intrastate business could have been reached under no other federal power.

The Narcotic Drug Act, Dec. 17, 1914 required those who "produced, manufactured, imported, compounded, dealt in, dispensed, sold, distributed or gave away opium or coca leaves, or their compounds, derivatives" and etc. to register and pay a special tax. Sales of these drugs were made unlawful except to persons who gave orders on forms issued by the Commissioner

1. 195 U. S. 27 (1904)
2. 24 Stat., 209
4. 38 Stat., 785.
of Internal Revenue, which orders had to be preserved for official inspection. Persons were forbidden to obtain the drugs by means of such order forms for any purpose other than the use, sale or distribution by them in the conduct of a lawful business or legitimate practice of a profession.

The Supreme Court said, that the question to be decided was whether the regulation provisions had any relation to the taxing power.

In a 5 to 4 decision the court answered the question in the affirmative, saying, "Considered of themselves, we think that they (the regulations) tend to keep the traffic (drug) above board and subject to inspection by those authorities who collect the revenue."

Note here how far the regulations go. There seems to be very little difference between a license granted under a power to regulate and the license granted under this act as far as actual government control of the industry is concerned.

In the Child Labor Tax case the Supreme Court decided that Congress stepped outside of its taxing sphere when it imposed an excise tax of 10% of the annual net profit, on any person employing child labor in his business. The court held that the primary purpose of the statute was not revenue, but the imposition of a penalty, for only those were liable who employed child labor, disobeyed the law. The statute on its face was not a revenue measure, but a penalty statute.

2. 259 U. S. 20 (1922) --See also Hill v. Wallace, 259 U. S. 44 (1922)
The authorities generally do not consider, the licenses granted under the taxing power as being true licenses, but rather, as does Cooley,\(^1\) consider them as mere conveniences in the collection of revenue.

Consider the practical effect, the business is illegal until the fee is paid and the license is secured. As to those persons\(^2\) who are subject to the law there seems to be no great practical difference between a license granted under the taxing power and one granted under a regulatory power. The act demands a fee and the licensee is subjected to regulations which, as in the Narcotic Act,\(^3\) go to the heart of the business. Distinctions may be drawn and fine hairs split, but to the business man a license is a license whatever its name or whatever the power from which it springs.

\(^{1}\) Cooley on Taxation, vol 2, 3rd Edition page 1047

\(^{2}\) Here are listed those businesses and occupations which at various times have been subjected to licenses under the taxing power.

- Brewers USC 26; 202, 206
- Manufacturers of stills and rectifiers USC 26; 203, 204
- Manufacturers of, or dealers in oleomargarine USC 26; 207
- Manufacturers of, or dealers in process, renovated or adulterated butter, USC 26; 208
- Manufacturers of, or dealers in filled cheese USC 26; 209
- Manufacturers of, or packers of mixed flour, USC 26; 210
- Manufacturers, importers, producers and etc. of opium, coca leaves, and etc. USC 26; 211
- Manufacturers of tobacco, cigars and etc. USC 26; 212
- Brokers USC 26; 213
- Pawnbrokers USC 26; 214
- Shipbrokers USC 26; 215
- Custombrokers USC 26; 216
- Bowling Alley and billiard room proprietors USC 26; 217
- Shooting Gallery proprietors USC 26; 218
- Riding Academy proprietors USC 26; 219
- Passengers auto--for hire USC 26; 220

\(^{3}\) 38 Stat., 785
In this type of license there is no discretion as to whether the license will issue or not. If the tax is paid the license must issue. There can be no revocation. If the regulations are violated a criminal penalty only attaches.

Thus, it seems that Congress by an act which on its face is a revenue statute may, in those instances, where the public health, morals, safety, and welfare demand protection regulate businesses and occupations which are in the whole incapable of being satisfactorily regulated by the states under their police power, as long as the regulations are incidental to the revenue purpose. The Doremus Case represents, to this date, the extremity of regulation under the guise of the revenue power.

In the light of decisions discussed, it seems that in the future, the present limits of the regulatory field incident to the taxing power will not be extended. However, it must be said, that in the light of the liberal and enlarged construction given the commerce clause by the courts, and the tendency of courts to regard all legislation as prima facie constitutional that in those cases where there is a strong moral purpose coupled with a proper designing of a statute this regulatory power incident to the taxing power may be constitutionally extended.

1. McCrory Case, 195 US 27 (1904)
2. Doremus Case, 249 US 46 (1919)
3. Ibid
The Congress is given the power to regulate commerce with the foreign nations, and among the several states.\(^1\) Losing no time, the first Congress assembled under the Constitution passed laws\(^2\) providing for the regulation and licensing of ships, vessels, captains, other officers and seamen. From time to time these laws have been added to and changed. Today there exists a comprehensive licensing system covering the registration and enrollment of vessels and ships engaged in foreign and coasting trade,\(^3\) masters,\(^4\) mates,\(^4\) pilots,\(^4\) and engineers.\(^4\)

Gibbons v. Ogden\(^5\) upheld the regulating of coasting vessels; Chief Justice Marshall pointed out that this power had been exercised from the commencement of the Federal Government with the consent of all, and "that all America understands and has uniformly understood the word 'commerce' to comprehend navigation."\(^6\)

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1. Constitution Art. 1, Sec. 8, Par. 3  
2. 1 Stat. 55, 131, 305  
3. 46 USC 11-53, 255-274  
4. 46 USC 222-240  
5. 9 Wheat 1 (1824)  
6. See also Hazey v. Buchanan, 16 Pet. 215 (1842); Badger v. Gutierrez, 111 U. S. 734 (1884); The Lottawanna, 21 Wall. 508 (1874); Providence Co. v. Hill Mfg. Co., 109 U. S., 578, 589. (1883)
In reference to the enrollment and licensing of vessels engaged in the coasting trade the Supreme Court in Sinnot v. Davenport, said, "the whole commercial marine of the country is placed by the Constitution under the regulation of Congress and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power."

In Cooley v. Board of Wardens of the Port of Philadelphia, the right of Congress to license pilots was affirmed on a reiteration of the principles announced in Gibbons v. Ogden, supra.

The Federal Government in the customs field has evolved an elaborate system of permits to govern the unloading and importation of goods.

The Congress in 1910 authorized collectors under the direction of the Secretary of the Treasury to license customhouse brokers and forbade the transaction of the business without a license. The requirements for the license were, first, American citizenship and, second, good moral character. The Secretary was expressly given the power of revocation after a hearing; for which notice and an opportunity to be heard by counsel was provided in the nature of a rule to show cause why the license should not be revoked. There was the right of appeal to the District Courts of the United States from the decision of the Secretary within thirty days after the decision.

1. 22 How. 225 (1889)
2. 12 How. 299 (1851)
3. 19 USC 33, 250-257
Licenses for Importation of Nursery Stock.

In 1921, Congress approved of an act to regulate the importation of nursery stock and to enable the Secretary of Agriculture to establish quarantine districts. The Act made it unlawful for any person to import or offer for entry into the United States any nursery stock without a permit issued by the Secretary of Agriculture, under such rules and regulations promulgated thereunder.

Whenever the Secretary after due notice and hearing determines that the unrestricted importation of any "plants, fruits, vegetables, roots, bulbs, seeds and other plant products not included by the term "nursery stock" would result in the introduction of injurious plant diseases or insect pests, the same is made subject to the rules and regulations governing the importation of nursery stock until the promulgation of the Secretary has been withdrawn.

Exports also, at least as to apples and pears, have come within the federal licensing field by an Act of Congress, June 10, 1933. The Secretary of Agriculture was empowered to make rules and regulations setting up standards for the exportation of apples and pears. The exportation is forbidden unless accompanied by a permit which sets forth the grade of the goods.

This power in the federal government to regulate in the field of foreign commerce is plenary, it is undisputed, of long standing; its licensing systems extend from the birth of the government.

1. 42 Stat. 8, 47 U. S. C. 34-39 (1921)
LICENSING ACTS BASED UPON THE FEDERAL INTERSTATE COMMERCE CLAUSE

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"To regulate commerce among the several states"¹ is the source of the growth and development of the power to regulate the conduct of individuals by the federal government. It is the rock upon which the foundation as to regulation has been built. Practically all the licensing acts fall within this field. As the idea of this paper is to point to the growth of the federal licensing these acts will be discussed chronologically, some will be only mentioned, others will be detailed, depending upon the characteristic features of the licensing system.

Warehouses.

The first² of the great licensing acts, United States Warehouse Act, became law on August 11, 1916.³ The power of Congress to

1. Constitution Art. 1, Sec. 8 Par. 3
   1902, July 1, 32 Stat. 729 USC 141-148. Establishments for the preparation and manufacture of viruses, serums, toxins and antitoxins to be used in interstate commerce were licensed under the Secretary of the Treasury a.¹ the sale, barter or exchange of such products from an unlicensed plant in interstate commerce was forbidden. The establishments were subjected to inspection as a condition of the license.
   In 1912, August 14, 32 Stat. 729, a board was established to make rules and regulations, to issue, suspend and revoke licenses. No provision for a hearing was set up in the statute. A penalty by way of fine or imprisonment or both was provided for offenses in violation of the act. See 29 Op Atty Gen. 340 (1912).
   In 1913, March 4, 37 Stat. 832, 21 USC 161-158. Congress provided the same system of licensing for establishments engaged in the manufacture and preparation of viruses, serums, toxins, antitoxins and analogous products for domestic animals under the direction of the Secretary of Agriculture.
   Cotton Standards Act, August 15, 1914, 38 Stat. 693, amended March 4, 1923, 42 Stat. 1517, amended March 4, 1933, 47 Stat. 1621, 7 USC 51-65. The Secretary of Agriculture was authorized to set up cotton standards and made it unlawful to transact or ship cotton in interstate commerce by any other designation. The Secretary was empowered to license classifiers and to suspend and revoke such licenses after a hearing. Violation of the Act was made a misdemeanor, subject to fine, imprisonment or both. See 33 Op Atty Gen. 513.
regulate in this field in the manner of the act has not been
challenged, it apparently being conceded that this act is well within
the authority vested in Congress by the commerce clause and that the
regulating and licensing of warehouses handling commodities intended for
interstate commerce is valid. A summary of the licensing features of
the act will demonstrate its control over the individual and his
business.

"The term "Warehouse" shall be
debemed to mean every building, structure or other
rectangle enclosure, in which any agricultural
product is or may be stored for interstate or
foreign commerce." (sec. 2)

The Secretary of Agriculture is authorized to license any
warehouseman dealing in agricultural products in interstate and foreign
commerce provided the warehouseman,

1. furnish bond to secure faithful performance of
his obligations (sec. 6).

2. agree to abide by the terms of the act and the
rules and regulations promulgated thereunder (sec. 4)

The Secretary is authorized to set up standards for
agricultural products and to license inspectors, classifiers and samplers
of the products, stored (sec. 11, 19).

Grain Standards Act, August 11, 1916, 39 Stat. 482, 7 USC
71-87. This act follows the Cotton Standards Act in principle and authorizes
the Secretary of Agriculture to license inspectors and graders under the
principles outlined in the prior act. The Secretary may suspend or revoke
any license whenever, after opportunity for hearing has been given licensee,
the Secretary shall determine that such licensee is incompetent or has
knowingly or carelessly graded grain improperly. Pending investigation the
Secretary may suspend the license without a hearing. This act is referred
to in Merchants Exchange v. Mo., 248 US 355, (1919); Farmers Grain Co. v.
Langer, 273, F. 635 (1921); and Lemke vs. Farmers Grain Co., 288 U. S. 50 (1922).

The method of storing and mixing products is regulated in detail (sec. 15, 16.)

The form, issuance and information to be shown on warehouse receipts is prescribed and regulated (sec. 18).

The licensee must keep in a place of safety complete and correct records of products stored or withdrawn, of all warehouse receipts issued, of receipts returned and cancelled; and is required to report concerning his warehouse, condition, contents, and operation thereof to the Secretary (sec. 23).

The Secretary, after opportunity for hearing has been afforded, to the licensee, may suspend or revoke any license for any violation of the act or upon the ground that unreasonable or exhorbitant charges have been made for services rendered. Pending an investigation the Secretary may suspend a license temporarily without hearing.¹

Federal Water Power Act.

The power of Congress to control water power development rests upon three definite provisions of the Constitution². Ever since Gibbon v. Ogden³ it has been uniformly held that the power of Congress under the

¹ In the regulations for storing wool issued by the Secretary on March 12, 1931, Reg. #128, the following were made grounds for the revocation of a license; where a warehouseman:
  1. is bankrupt or insolvent;
  2. has parted, in whole or part, with his control over the warehouse;
  3. is in the process of dissolution or has been dissolved;
  4. has ceased to conduct such licensed warehouse; or
  5. has in any other manner become non-existent, incompetent or incapacitated to conduct the business of the warehouse.

² This act is mentioned in Alabama Warehouse Co. v. State, 149 So. 843 Ala. (1935) and Fed. Compress & Warehouse Co. v. McLean, 291 U. S. 17 (1934) in connection with state taxing acts.

³ 2 Art. 4 sec. 3, control of lands and territories of the United States Art. 1 sec. 8, commerce clause; Art. 2 sec. 2, treaty-making power.

² 9 Wheat 1, (1824)
commerce clause comprehends navigation within the confines of every state, in so far as improvement in navigation is in any manner connected with commerce, whether interstate or foreign. Congress may prohibit any structure within or over navigable waters, may abate as nuisances any structures obstructing navigation or erected without its consent, may establish and change harbor lines, limit extensions of structures into the water, may enter upon any system of improvement designed to stabilize or confine the flow, and may forbid diversions of water from any navigable stream.1

Based upon these constitutional powers Congress has from time to time enacted various legislative expressions of its policy toward water power development. These legislative acts have proceeded along two distinct lines, one, with relation to the public lands and reservations of the United States,2 the other, with relation to navigable waters.3

3. Act of July 9, 1870, concerned vested rights in lands of the United States for canals and irrigation ditches.
5. Act of May 14, 1896, 29 Stat. 120 authorized the Secretary of Interior to issue permits (these were construed to be mere licenses revocable at will) for rights of way, stations, grounds and reservations for the generation of electric power on public lands.
6. Act of May 11, 1898, 30 Stat. 404, amended the act of 1891, supra, encouraged the development of electric power in connection with rights of way taken for the primary purpose of irrigation.
7. Act of Feb. 15, 1901, 31 Stat. 790 was designed to supercede all prior legislation on the subject. It applied almost exclusively to water power development and served as practically the sole authority under which public lands and reservations might be acquired for purposes of water power development until the Federal Water Power Act of 1920.
8. 1802 there was an appropriation for the erection of public piers in the Delaware River.
9. 1819 Congress authorized a survey of the tributaries of the Mississippi.
10. 1824 General surveys for canals were made under the direction of Congress.
In 1920 there were two bills present in Congress concerning water-power; the Navigable Water Bill which had a double aspect, the improvement of navigation and the harnessing of surplus water for power purposes, and the Public Land Bill which had for its purposes, the development of streams flowing through public lands to power uses and the impounding of water on public lands for irrigation purposes.

These two bills had one element in common—the development of power—and so were combined into the Federal Water Power Act of June 10, 1920.¹

Beginning with 1884 various acts were passed for the regulation and control of structures in or over navigable streams. These acts were brought together in the act of March 3, 1899, 30 Stat. 1151. Act of July 5, 1884, 23 Stat. 154, was the first specific authorization for the construction of a power project in a navigable stream. This authorization was followed in the succeeding 22 years by a series of over 30 special acts granting permits, perpetual in their term and subject to no restrictions. Act of June 21, 1906, 34 Stat. 386, fixed conditions, which were to attach to each specific authorization for the construction of water power works on navigable waters.

In the 10 years following some 20 special acts were passed, but because President Roosevelt in 1908 and 1909 vetoed the Rainey and James River Bills on the ground that the grants were too broad; Congress passed the Act of June 23, 1910, 36 Stat. 593. This act limited grants to 50 years and authorized certain charges to be made for the purpose of covering costs of investigation.

In 1912 President Taft vetoed the Coosa River bill on the ground that there was provided no method for the collection of the charges made by the government. From 1912 to 1920 the development of water power became stagnated.

¹ 41 Stat.1077, 16 USC 791-823 amended June 23, 1930; 46 Stat. 797, 98 Principle change was to relieve the Secretaries of War, Agriculture, and Interior as the Commission and establish a commission of 5 appointed by the President.
The applicant for a power project may secure a license for a term not to exceed fifty years. The license is a contract between the licensee and the Government and contains all the conditions which the licensees must fulfill. The license except for a breach of conditions cannot be altered during its term by Congress or the President without the consent of the licensee. Where a licensee fails to commence construction under his license, the same may be cancelled by Executive action, but after construction has started only by judicial action.

When a license expires, the United States may take over the properties of the licensee for its own use, permit them to be taken by another, or issue a new license to the old licensee. If the properties are taken away, the licensee must be paid his "net investment" in the properties, an amount equal to the actual investment plus severance damages and less such sums in depreciation and amortization reserves as have been accumulated during the license period after deducting a fair return upon the investment. "Unearned increment" and other intangibles are not recognized in this computation. If the license is renewed, it must be "upon reasonable terms."

The licensee is required to plan his project so that it will conform to a scheme of development providing for the fullest reasonable utilization of the resources of the stream. This plan of development is the work of the commission. He must maintain the plant in good operating

1. Licenses are of five standard forms: (a). Preliminary permit, (b). License for major project on navigable streams, (c). License for major project on public lands or reservations, (d). License for minor project, and (e). License for transmission line. See page 201, Appendix G, first annual report of Federal Power Commission (1921) for examples.
condition, make the necessary replacements, provide out of earnings adequate depreciation reserves for such purpose, and maintain a system of accounting according to the form prescribed by the commission. He must pay a reasonable annual charge to the United States as a reimbursement for a proper share of the cost of administering the act and for recompensing it for the use of its land or other properties.

In addition to the issuance and administration of licenses, the commission is given jurisdiction over the regulation of rates, services and securities in intrastate business wherever the states have not provided agencies for such regulation, and in interstate business where the states have not the power to act.

The procedure of securing a license is roughly like this, a declaration of intention is filed with the commission. The commission must first establish its jurisdiction by a sufficient investigation. If the project involves public lands or reservations or the commission concludes from the evidence that the stream is "navigable waters", or the project involves a non-navigable part of the stream, headwaters or a non-navigable tributary of a navigable stream and the commission concludes that the interests of foreign or interstate commerce will be affected by the proposed structure, there is jurisdiction. There being jurisdiction and the plans of the project fit into the scheme of the development for the particular waterway a license is offered which the petitioner may or may not accept. A petitioner sometimes finds himself in the following position. He wishes to construct a dam and an electric

power plant upon the non-navigable portion of a stream or on a non-navigable tributary of a navigable stream, if he builds without a license and the structures are detrimental to the navigable part of the stream, the Attorney General will have them removed in a judicial action; if in the first instance he seeks a license and the commission decides it has jurisdiction, he cannot then build without a license. He must submit either way.¹

The provisions of the act are necessarily limited by the constitutional powers of Congress, therefore, the licenses must be so limited. In New Jersey v. Sargent² the act was attacked on the ground that it was in deprivation of the 10th amendment and therefore unconstitutional. The Supreme Court dismissed the action on the ground that as no license had been issued there was no controversy present in the case. The court however took time to point out that it could find nothing on the face of the act that would make it unconstitutional.³

The license amounts to more than a mere permission, it is also a final determination that the structure proposed will affect navigation, and further that the obstruction is legal.⁴

There is no statutory right to appeal from a decision of the commission, but if the commission acts in an arbitrary and capricious manner the courts will lend an ear for the petitioner or licensee will be deprived of due process.⁵

¹ See Appalachian Elec. Power Co. v. Smith, 267 F (2nd) 461 (1933) Certiorari denied by Supreme Court, 291 U. S. 674 (1934)
² 269 U. S. 328 (1926)
³ 15 Georgetown L. J. 201 (1927) reaches the contrary conclusion.
⁵ State of Mo. v. Union Elec. Power Co., 42 Fed. (2nd) 692 (1930) case also discusses the right of licensee to eminent domain.
The Commission is not obliged to license every person who has complied with a set of conditions or is ready to pay a certain sum of money, for their exercise is discretionary, in interest of navigation, and not ministerial.

The constitutionality of the delegation of power to the Commission was upheld in New Jersey vs. Sargent and Alabama Power Co. v. Gulf Power Co. The definition of "navigable waters" in the Act was held a sufficient guide for the administrative officers for their determinations.

In summary, the Power Commission by its license controls the present and future of a development, its services, rates, accounting methods, initial cost, affiliate relations, transmission lines, and roads, bridges, railways and similar means of communication and transportation necessary or appropriate to the maintenance or operation of a power project.

1. 296 U. S. 328 (1926)
It is timely to note in respect with recent excursions of the Federal Government into the power field as a producer, the language of the Court in the Alabama Power Co. case to the effect that Congress has no power to dam up navigable streams for the sole purpose of generating electricity for the sale thereof. See also U. S. v Central Stockholders Corp., 52 Fed. (2nd) 322 (1930).
3. Sec. 3 of Act.
Packers and Stockyards.

Upon the foundation of Swift & Co. v. U. S. and the theory of the "current of commerce", Congress on August 15, 1921 enacted the Packers and Stockholders Act. Facts before the Court in the Swift case and before Congress conclusively proved that the great packers and stockyard owners were by their business methods and practices obstructing commerce and imposing on the public. This act regulates the business of the packers in interstate commerce and forbids them to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or devise in commerce" or to do any of a number of acts to control prices or to set up a monopoly. The Secretary of Agriculture is designated as the tribunal to hear complaints, hold hearings, with notice and opportunity to be heard, make findings thereon and to order the packers to desist or cease any forbidden practice. A right of appeal is given from the decision of the Secretary to the Circuit Courts of Appeal. These orders of the Secretary are to be enforced in the District Courts. The Circuit Court of Appeals may take additional evidence, if necessary, review, affirm, set aside or modify the orders of the secretary. The decree of the Court is final unless the Supreme Court takes the case on certiorari.

1. 196 U. S. 375 (1905)
2. 42 Stat. 159 7 U. S. C. 181-229
4. Sec. 202, c. d. e. f. g.
5. Sec. 240 Judicial Code
Title 3 of the Act deals with stockyards and provides for the supervision and control by the Secretary of Agriculture of stockyard facilities in connection with the receipt, purchase, sale on a commission or straight basis of livestock, its shipment, weighing, handling and its care in interstate commerce. Stockyards are graded according to area, those less than 20,000 square feet are not within the act. Commission men and dealers are licensed or registered. The act requires the filing of a schedule of rates for services and further that all rates, charges and etc. shall be just, reasonable, non-discriminatory, and non-deceptive. No schedule of rates can be changed without 10 days notice to the Secretary of Agriculture and the securing of his permission to so change. The Secretary is authorized to inquire as to the justice, reasonableness and non-discriminatory or non-deceptive character of charges and practices; and to order that such cease where found to offend the act. There are the same provisions for appeal and enforcement as in the case of packers. Further, the Secretary is authorized to make necessary rules and regulations to carry out the Act, to fix rates or limits thereof and to prescribe how packers, stockyard owners, commission men, and dealers shall keep accounts.

The licensing feature of the act concerns itself, as pointed out above, with commission men and dealers in live stock. Their business practices, methods, rates, and systems of keeping books are regulated in detail; an analogy would be a public utility business. There is no choice, one either submits or gets out of interstate business.
The constitutionality of this act was upheld in Stafford v. Wallace, when dealers and commission men maintained that their business was not of an interstate character, but was local, and therefore the attempted regulation and control through licensing or any other method was unconstitutional. The court pointed out that commission men and dealers are in the stream or current of commerce, they are in a position to obstruct a free and untrammelled flow of that commerce. Based upon the facts known concerning the business methods and practices of the industry the court could not see that the regulations were unreasonable.

In Tagg v. U. S., the petitioner was complaining as to rates set by the Secretary for his services. He claimed his capital was small and that therefore the regulation amounted to the fixing of charges for the personal services of brokers. The court pointed out that the business methods and practices of the particular stockyard amply bore out the need for such regulation.

Futures.

The Grain Futures Act of 1922 was an act providing for the prevention and the removal of obstructions and burdens from the interstate commerce movement of grain. The act made it unlawful for any case...

1. 258 U. S. 495 (1922)
2. 280 U. S. 420 (1930)
3. Other cases concerning the act:
4. First act attempting to regulate futures, known as the Future Trading Act of August 24th., 1921, 42 Stat. 187, was held unconstitutional in Hill v. Wallace, 259 U. S. 44 (1922) on the ground that the basis of the statute was regulation and not taxation, the theory upon which it was sought to justify the act, that the regulation was not incidental to the taxation but was paramount and further that there was no distinction made between interstate and intrastate business.
5. 42 Stat. 998, 7 U. S. C. 1-17
person to deliver for transmission through the mails or in interstate commerce by telegraph and etc. any offer or acceptance of any contract to deliver in the future, unless such contract be made through a federal licensed market, designated "contract market", which designation the Secretary of Agriculture upon application is authorized to make, only when, such board of trade complies with and carries out certain requirements or conditions. These conditions are:

1. The keeping of a record, with prescribed details, of every transaction of cash and future sales of grain of the board or its members in permanent form, for three years, open to inspection of the Departments of Agriculture and Justice.

2. The prevention of the circulation of misleading prices by a board or any member thereof.

3. The prevention of manipulation of prices or the cornering of grain by dealers or operators of a board.

4. The board must admit all cooperative associations or their representatives, who comply with the rules of the board applicable to other members, as members and that no rule of the board shall prevent the return of money collected by such association to its members on a pro rata dividend basis.

The Secretaries of Commerce and Agriculture and the Attorney-General are designated as a commission to hear and determine, after due notice, whether any "contract market" has failed or is failing to carry out the prescribed rules of conduct and if found in default, to suspend its functions as a contract market for a period not to exceed 6 months, or to revoke such designation. The commission also has jurisdiction to hear appeals from decisions of the Secretary of Agriculture refusing to designate any board as a "contract market". There is the right to appeal from the
decision of the commission to the circuit courts of appeal.

Chicago Board of Trade v. Olsen\(^1\) upheld the constitutionality of the act on the ground that manipulations on boards of trade in futures had become a constantly and recurring burden and obstruction to interstate and foreign commerce.

As to cash sales, the court pointed out that such were within the current of interstate commerce and were indispensable to the continuity of the flow of grain, citing Stafford v. Wallace\(^2\) and the Swift Co. cases.\(^2\)

This Act being based upon interstate commerce, the "contract markets" could maintain two system of rules as to future trading, one, for interstate business, and the other, for intrastate commerce. From a practical standpoint, however, this is not expedient and therefore the federal government's rules and regulations are applied alike to intra and inter state business.\(^3\)

Federal Radio Commission---

The Radio Act of 1927\(^4\) was a direct result of the ineffectiveness of the Act, "To Regulate Radio Communication," of 1912.\(^5\) It was a general

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1. 282 U. S. 1 (1923)
2. 258 U. S. 495 (1922); 196 U. S. 375 (1905)
3. Bartlett Frazier Co. v. Hyde, 65 Fed. (2nd) 350 (1933) held constitutional the requirements as to reports and the inspection of books and records. Chicago Board of Trade v. Wallace, 67 Fed. (2nd) (1933) upheld the power of the commission to suspend "contract market" designation for violation of the provisions of the Act.
act, proposing "to regulate all forms of interstate and foreign radio transmission and communication within the United States, its territories and possessions" \(^1\) excepting the Canal Zone and the Philippine Islands.

As amended in 1930 the Act established a commission to administer the provisions of the act and to make the necessary rules and regulations consistent with the principles and standards laid down by Congress.

All licenses issued in accordance to prior law were automatically terminated by the Act.

The act directs that no broadcasting station shall be used in Radio communication except in accordance with the provisions of the act and under a license granted for that purpose. The commission is authorized to grant station licenses, renewals, regulate broadcasting periods, increase or decrease station power as "public convenience, interest or necessity" \(^2\) demands. The commission is authorized to determine the question of public convenience, interest or necessity, their decisions being final, subject to the right of review by the United States Court of Appeals for the District of Columbia.

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5. The Secretary of Commerce undertook by the 1912 Act to license and to refuse to license broadcasting stations and further, to assign wave lengths, limit power and to regulate hours of broadcasting. The Attorney General on July 8, 1928, rendered an opinion, to the effect, that the Secretary of Commerce did not possess the power that he was exercising. This breakdown of Departmental regulations opened wide the door and a chaotic condition resulted. This focused the mind of the public and the eyes of Congress upon the need and desire for some sort of suitable regulation.

1. Preamble
2. This idea of public convenience, interest or necessity was a new principle in Radio Law and had little precedent for its adoption in the regulation of interstate commerce. For a discussion as to the meaning of this phrase see Colorado v. U. S., 271 U. S. 153 (1926) where the court discusses the Transportation Act of 1920. Also 105 I. C. C. 13
In the act of 1927, on appeal from a decision of the Commission to the United States Court of Appeals for the District of Columbia, a review de novo was had. In Federal Radio Commission v. General Electric Co. the Supreme Court said,

"This function assigned to the Court of Appeals of the District of Columbia was not judicial, but was legislative and advisory, because it was that of instructing and aiding the Commission in the exercise of power which was essentially legislative. Therefore this court has no jurisdiction for it is not a case or controversy within the meaning of the Constitution."

In the face of this declaration by the Supreme Court, Congress amended the Radio Act as to appeals, limiting the review in the United States Court of Appeals for the District of Columbia to questions of law and provided that findings of fact by the Commission shall be conclusive, if supported by substantial evidence, unless it appear that the findings of the Commission are arbitrary or capricious.

1. 281 U. S. 464 (1930)
2. 1930, 46 Stat. 844
3. This Court has therefore ruled that upon application for a license, or license renewal that the burden is upon the applicant to establish that such a license or renewal will be in the public interest, convenience, or necessity and that the findings of the commission will be sustained unless clearly against the evidence. Ansley v. Federal Radio Commission, 60 App. D. C. 19, 46 Fed. (2nd) (1930).
The constitutionality of the Radio Act, the delegation of power, and the appellate procedure (1930 amendment) were before the Supreme Court in Federal Radio Commission v. Nelson Bro. Bond and Mortgage Co.\(^1\)

The Court held the act constitutional as a legitimate regulation under the commerce clause; the delegation of power valid, as the standard of "public convenience, interest or necessity" as defined by the context and subject matter of the act was a definite guide for administrative action; and that the method of appeal was limited to judicial questions, that is questions of law.

Practically every phase of the licensing power, under varied conditions and facts, has received the scrutiny and sanction of the

United States Court of Appeals for the District of Columbia.\(^2\)

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1. 289 U. S. 256 (1933)


Refusal to renew broadcasting license is not a denial of freedom of speech (amendment 1) Trinity Methodist Church South v. Fed. Radio Comm., 62 Fed. (2nd) 850 (1932)

Refusal to renew license is not a taking of property in violation of 5th. amendment. Trinity Church case, supra, Court cited Chicago R. R. Co. v. Illinois, 200 U. S. 561 (1906).

Refusal of Commission after granting particular frequency to hear protest of other applicants for same frequency held in error. Symons Broadcasting Co. v. Fed. Radio Comm., 64 Fed. (2nd) 381 (1933).


Perishable Agricultural Commodities.

The Perishable Agricultural Commodities Act, is an act, "to suppress unfair and fraudulent practices in the marketing of perishable commodities", that is, fresh fruits and fresh vegetables whether or not frozen or packed in ice. The act apparently contemplates that in the beginning the whole industry will be licensed as a matter of course and that the desired regulation and weeding out of undesirables will be accomplished through a system of yearly renewal of licenses.

The act provides:

1. That no person shall engage in the business of a "commission merchant, dealer, or broker" without a license, under certain penalties. Such licenses to be issued under the rules and regulations of the Secretary of Agriculture. (Sec. 3)

2. That the Secretary after notice and opportunity for hearing may suspend or revoke a license:
   (a). Where a licensee employs in a responsible position one whose license has been revoked within a year (sec. 4c)
   (b). Where a licensee has violated any of the provisions of the code of unfair conduct. Suspension for a period not to exceed 90 days, and revocation where violations are repeated or flagrant. (Sec. 8a)
   (c). When the licensee does not keep such "accounts", "records", and "Memoranda" as are required. (Sec. 9)

3. That the Secretary may revoke a license if he finds that it was obtained through false and misleading information upon 30 days notice and a hearing. (Sec. 4e).

2. Preamble
3. Sec. 4
4. Sec. 5, 6, 7 defines "Commission merchant", "dealer", and "broker".
(4). That the Secretary may withhold a license for a period not exceeding 30 days, pending an investigation of the information contained in the application and if he believes that the license should be refused, the applicant shall be given a hearing within 60 days of the filing of the application, to show cause why license should not be refused. The Secretary then may refuse or grant the license. (Sec. 4 d).

(5). The Secretary may refuse to issue a license to an applicant: (Sec. 3b)

(a). Where applicant has within two years previous to the application violated the code of unfair conduct for which his license or the license of any association, partnership or corporation in which the applicant held any office, was revoked.

(b). Where, after notice and hearing, he finds that the applicant within the two years past has been responsible in whole or in part for flagrant or repeated violations of the code of unfair conduct.

(c). If the applicant is a partnership, association or corporation and one of its officers, or in case of partnership, one having an interest, has been guilty of (a) or (b), supra.

(d). Where applicant has failed to pay a reparation order which has been issued against him.

(6). No method of appeal from the orders and decisions of the Secretary, but makes them final unless set aside, modified, or suspended by a court of competent jurisdiction. This does not include reparation orders.

1. Sec. 2 lists unfair practices.
(7). For an elaborate system of reparation orders directed against licensees where their conduct, after notice and hearing, has been found to be in violation of the Code of unfair conduct and has caused damage to another licensee. Either party adversely affected by a reparation order has a right of appeal to the district courts of the United States from the decision of the Secretary. In the district court there is a trial de novo, like any other civil suit for damages, except that the findings of the Secretary are prima facie evidence.

(8). That the Secretary license inspectors, to inspect and certify, when requested, the class, condition or quality of any perishable commodities offered for interstate or foreign commerce. (sec. 14).

(9). That all licensees shall keep such "accounts, records, and memoranda" as fully and correctly disclose their business transactions, including the true ownership of the business by stock or otherwise (sec. 9).

No cases have arisen under the act, therefore, its provisions have not been the subject of judicial scrutiny and inquiry. This act, in so far as it provides no method of appeal from decisions of the Secretary with respect to the issuance, refusal, suspension, or revocation of a license, is an about face of policy, for Congress. Compare with the Radio Commission Act which act in point of time immediately preceded the act under discussion.

This act sets forth a new development in that licensees whose licenses are revoked, are further penalized by being unable to hold responsible positions as employees in the industry for a period of two years, one year if employer will furnish bond.

1. The amendment of 1934 recognized the practice of the Secretary in not holding hearings where small sums were involved and provided that hearings need not be held for claims involving less than $500. The Secretary provides in his rules and regulations issued on Aug. 4, 1934 that the parties may agree to waive a hearing and consent to submission of the case upon sworn statements where the sum involved does not exceed $2000.00.
National Industrial Recovery.

The National Industrial Recovery Act\textsuperscript{1} (1933) is an act, "to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes," and provides in section 4(b) that:

"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 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."

This power was never used by the President except as a moral club to bring industries in line with other executive policies and expired, as provided, one year after its enactment.\textsuperscript{2} Query, why was this power never used?

2. Preamble
3. This section of the N. I. R. A. has been the subject of widespread discussion among the legal profession and is the basis of many legal periodical discussions (see bibliography). Compare with the Adamson Law, 39 Stat. 721 (1916) and Wilson v. New, 243, U. S. 532 (1917). For a further discussion of the power of Congress to legislate in emergencies, see Block v. Hirsh, 256 U. S. 135 (1921);--Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924), and 22 Georgetown Law Journal 207, "Some constitutional aspects of the N. I. R. A. and the A.A.A."
Was this provision unconstitutional or did the President believe that the power was not needed? Certainly it could have been used to an advantage, for history shows that after the initial rush industry lagged not seeming so keen for some of the regulatory provisions which the government insisted on. This gave rise to the use of the licensing power as a moral club to bring dilatory industries into line.

Does the federal regulatory power extend over industry to the extent that the normal provisions of codes, covering wages, hours of employment, retail prices, and competition practices, could be enforced or imposed upon industry? In normal times the answer would be no. The federal power, in this instance, is based upon the fact that distressed economic conditions had given rise to certain abuses and practices in trades and industries which were burdening and obstructing interstate commerce to the detriment of the public interest. That is, that the emergency condition existing in the land was a factual situation the basis of which justified an enlargement of the federal regulatory power. The theory of emergency legislation has not been discussed by the Supreme Court with such frequency that its boundaries are definite. In Wilson v. New and the D. C. Rent Law cases the Supreme Court sanctioned an enlargement of the federal regulatory field on the basis that the regulations were valid as temporary expedients in times of national stress, but in both instances the national stress was war. During the World War, the President was given a similar grant of power to license industries producing necessaries. This grant of power was held valid by several lower courts,

1. 243 U. S. 332 (1917)
2. Block v. Hirsh, 286 US 135 (1921); Chastleton Corp. v. Sinclair, 264 US 543 (1924)
3. 40 Stat. 276 (1917) see page 61 of this study.
but the question did not come before the Supreme Court. The question really becomes one of fact, that is, does there exist a national emergency which is of such extent that Congress may enlarge its regulatory field?

In discussing emergency legislation, the language of Chief Justice White in Wilson v. New to the effect, that an emergency may afford a reason for the exercise in enlargement of a power that already exists, but an emergency can not give birth to a power which has never lived, should be borne in mind. In summation then, the question of whether or not the exercise of the power granted to the President by this provision was constitutional or not, from a federal regulatory approach, in the fields of interstate and foreign commerce depends entirely upon the factual existence of a sufficient emergency to so justify.

An equally interesting question is presented in an approach to the constitutionality of this grant from the angle of delegation of legislative power. The principle is well established that it is not an unconstitutional delegation of legislative power where the legislature lays down an intelligible principle, rule of conduct, or primary standard as a guide to the administrative discretion in filling in the details of the statute by rules and regulations with reference to the subject matter of the statute. This licensing power of the President was to be used to enforce the provisions of voluntary codes when certain factual conditions existed or to "otherwise effectuate the policy of this title." This gives no clue as to the legislative policy. What is the limit of this licensing power? What subjects are to be covered in the license? What provisions are to be included? The title gives several broad grounds of legislative policy,

1. See page 62 of this study.
2. 243 US 332 (1917)
but there is a difference between policy, especially when the policy is all inclusive, and a definite standard of conduct or intelligible rule of conduct. In the "Hot Oil" cases¹ the Supreme Court refused to read in the Declaration of Policy any declaration of legislative policy which could support a delegation of legislative power even though it were possible for the Supreme Court to take judicial notice of the existence of an emergency. The President apparently was to use his own discretion and conception of the means necessary to effectuate the policy of the act. There is no doctrine that in times of emergency the courts will let down the barriers as to the principles of delegation of legislative power and permit Congress to delegate its powers to administrative officers. The effect of such a doctrine would be to limit the constitutional safeguards to periods of tranquillity. Uncontrollable discretion granted by Congress to an administrative officer is unconstitutional.

The Agricultural Adjustment Act² (1933)—is an act "to relieve the existing national emergency by increasing agricultural purchasing power..... and for other purposes."³ In Section 2, Congress declares that the policy of the act is:

"(1). To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefore, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco, shall be the prewar period, August 1909-July, 1914. In the case of tobacco, the base period shall be the post-war period, August 1919-July 1929.

1. Panama Refinery Co. v. Ryan & Amazon Petroleum Corp. v. Ryan, 293 US-(1936)
3. Preamble.
(2). To approach such equality of purchasing power by gradual correction of the present inequalities therein as rapidly as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3). To protect the consumers' interest by readjusting farm production at such levels as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914."

To effectuate this policy the Secretary of Agriculture is authorized to enter into marketing agreements\(^1\) (voluntary) or to issue licenses\(^2\) (coercive) with the limitation that the processors, associations of processors and others engaged in the handling of the agricultural commodities\(^3\) or products thereof be in the current of interstate or foreign commerce.

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1. Title 1, Part. 2, sec. 8, 2 (1933) "To enter into marketing agreements with processors, associations of producers, and others engaged in the handling in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice, and opportunity for hearing to interested parties. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act."

2. Title 1, Part. 2, Sec. 8, 3 (1933) "To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture 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 Secretary suspending or revoking any such license shall be final if in accordance with law.

3. Title 1, Part. 2, Sec. 11, defines basic agricultural commodities as "wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products." By the amendment of 1934 the following commodities were added, rye, flax, barley, grain sorghum, cattle, sugar beets, sugarcane, and peanuts.
The 1934 amendment while designated as an act to clarify the existing A. A. A. was in truth an expansion of the delegation of power to the Secretary of Agriculture. The language of the amendment as to marketing agreements was broadened so as to include producers, but the language of the licensing power was not so changed.

The general plan was to enter into marketing agreements, the use of the license was to be restricted to particular cases where the unfair practices and charges could not be eliminated by the marketing agreement. The legislative history stresses the point that the license was to be incidental, except that a few Senators could not see how this would be possible.

From a practical standpoint, however, marketing agreements had to be supplemented or supported by licenses in order that the unsigned minority would not gain an advantage. Therefore, the practice of the Secretary has been to issue licenses in two situations, first, to supplement marketing agreements for any industry where there was an unsigned minority, and second, where marketing agreements for the industry have not been entered into, as a coercive means of carrying out the policy of the act.

1. Title 1, Part 2, sec. 8, 2 (1934) "After due notice and opportunity for hearing to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce."

2. See Hearings before the Committee on Agriculture and Forestry, U. S. Senate 73rd. Congress first session, H. R. 3835 pages 11-12

3. Ibid
The subjects of control, by license, are limited to those engaged in handling agricultural commodities "in the current of interstate and foreign commerce." The terms and conditions of a license are limited to those "not in conflict with existing Acts of Congress"¹ and "necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such (agricultural) commodities or products."² These limitations are very broad, but yet do offer some guide to the administrative discretion.

The marketing agreements and hence the license usually covers such subjects as:³

1. The fixing of wholesale or retail prices.
2. Definition and rules of fair practice. Usually lists those which are considered unfair.
3. A method of administration.
4. A somewhat elaborate and involved system for controlling production.

The question as to the constitutionality of these licensing powers has not as yet been determined one way or the other by the Supreme Court. The question as to the scope of this licensing power has however been before the several district courts of the United States.

¹ Title 1, Part 2, Sec. 8, 3
² Ibid
³ See 23 Georgetown L. J. No. 2, 196 (1935) by F. R. Black, Chief Attorney A. A. A. as to price fixing and proration devises in licenses.
No marketing agreements were entered into for the Fluid-milk Industry but the different milkshed area markets were licensed. These licenses covered all milk dealers in a given area whether engaged in interstate or intrastate commerce. The government in its defense of actions brought against the Secretary has generally stood on two grounds; First, that the milk dealers within the given area were handling commodities in the current of interstate commerce; Second, that the business in question was a burden upon interstate commerce and hence subject to regulation.

The cases are divided into two classes: First, those in which the factual situations showed only an intrastate character of business. Second, those in which the intrastate and interstate business was so intermingled that the interstate business could only be effectively

1. See Hearings before the Committee on Agriculture and Forestry, U. S. Senate 73rd. Congress, Second Session on 5. 3326 pages 123-125, covering the history of fluid-milk market regulation under the A. A. A. It seems that some marketing agreements were entered into, but were subsequently cancelled or made ineffective and licenses substituted therefor.

2. The licensing provision (sec. 3) makes no mention as to the regulation of those businesses which are a burden on interstate commerce but provides only for those "in the current of interstate and foreign commerce." Sec. 2, covering marketing agreements was by the amendment of 1934 enlarged to include those processors, producers, associations of producers, and others whose business are a burden or an obstruction to interstate or foreign commerce. Sec. 3 was sought to be amended in the same manner, but apparently due to the storm of objection, see Hearings before The Committee on Agriculture and Forestry U. S. Senate, 73rd. Congress, Second Session on S. 3326 pages 23, 57, 209, 210, this was abandoned. The result is that the licensing limitations are stricter than those for marketing agreements.

regulated by regulation of both the inter and intra state business. The first class, regulation unconstitutional, the second class, constitutional.

The right of Congress to fix prices by license or other regulation was present in United States v. Schissler and was upheld. The court stressed the emergency aspect of this act and pointed with authority to Nebbia v. People of the State of N. Y., concluding that such regulation was not unreasonable in the light of the existing emergency.

This difference in opinion of the District Courts will in the near future be settled by the Supreme Court, for the Government has in several instances taken an appeal.

If the lower courts' views are indicative of the final result, it may be said that price fixing and other regulation by licenses are a reasonable exercise of the commerce power when the factual situation clearly shows that the commodities in question are a part of, in the current of, interstate commerce.

2. 291 U. S. 502 (1934)
3. Compare Douglas v. Wallace, 8 Fed. Sup. 379 (1934), where the court said: "Counsel for the government in their brief emphasize the necessity for the enactment of the Agricultural Adjustment Act because of an existing emergency, and contend that the act is justified because of the emergency and in support of their theory cite the recent cases of Home Bldg. & Assn. v. Blaisdell, 290 U. S. 398, and Nebbia v. New York, 291 U. S. 502. But as this court stated in the Eason Oil Case, supra, both of these cases had to do with state statutes, and there is a wide distinction between the power of Congress, under the commerce clause of the Constitution and the power of the state under the powers reserved to the state and recognized by the Constitution, known as police power. The Supreme Court in both cases above cited held that under the police power of the state the state legislation involved in those two cases was justified as a proper exercise of the police power. Congress has no power except that which is specifically designated to it by the constitution. Therefore the holding of the court in the Blaisdell and Nebbia cases is of no assistance to the government in the case at bar."
Securities Exchange Act--1934. 1

In order to understand the nature of the act and the reason for its enactment, an approach by the way of the organization and functions of a stock exchange, the evils which have arisen from their existence, and some of the previous regulatory attempts to cure such evils, must be made. 2

A stock exchange is a general market where prospective buyers and sellers of stocks and bonds meet for the purpose of trading. The best market is the broadest market, that is where the greatest number of buyers and sellers get together. This has resulted in our present system of a few organized exchanges in the metropolitan cities.

2. Brief history of Stock Exchange Reg.

The subject-short selling, has been the basis of stock laws, but with little success.

In 1812 New York passed such a statute, but in 1858 repealed the same and expressly made the practice legal. See Emery H. C., "Speculation on Stock & Produce Exchanges of the United States." pages 194-199. In those states where the laws have not been repealed, no real attempt at enforcement is made and the laws are merely on the book id at pages 219-223.

The panic or depression of 1907 aroused Charles E. Hughes, then governor of New York, to appoint a Committee for the purpose of investigating speculation, protection of investors, and the instrumentalities used in security and commodity exchanges. Hughes Report, June 7, 1909. The net result was not legislation, but an improvement of the organization of exchanges from within.

In 1913 a committee of the House took extensive testimony on the practices of the New York stock exchange and made definite recommendations for legislation. Pujo Investigation, Report of House Committee on the Concentration of Control of Money and Credit (1913) page 32. On page 114 the committee concluded that trading in securities was a national matter requiring national action to regulate its diverse ramifications.

In 1933 Congress enacted the Securities Act, 48 Stat. 74, U. S. C. Supp. 7 (1933) which had for its purpose the protection of investors from fraud in the sale of securities, as to representations concerning the security and the character and financial status of the issuer. The use of the mails in interstate and foreign commerce was prohibited unless a registration statement was filed with and accepted by the Fed. Trade Commission. In 1934 three reports or recommendations were made to Congress for the purpose of regulating stock exchanges:

3. Fletcher--Bayburn Bill
Thus, the greater part of the trading of securities is carried on through persons who make it a profession to act as brokers on such exchanges. The theory of exchange organizations is that such brokers must be men of standing, of character, and who must conduct their business with fairness and efficiency not only between themselves but also in their relations with the public. In practice, however, such stock exchange abuses as, speculation, manipulation, short selling, and marginal trading have earned for brokers the designation, "Wolves of Wall Street."

With these developments, history, contemporary reports, and recommendations before them, Congress enacted the "Securities Exchange Act," of 1934,—to "provide for the regulation of securities, exchanges and over-the-counter-markets operating in interstate and foreign commerce and through the mails; to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes."¹

The act created a new commission consisting of 5 commissioners which is to be known as the Securities and Exchange Commission with the jurisdiction of administering not only the exchange regulation, but also the sale and registration of securities which under the 1933 act had been administered by the Federal Trade Commission.

From a licensing viewpoint the act has followed the Packers and Stockyards Act, supra, in that the form of licensing is that of designation.

¹. Preamble
Section 5 makes it unlawful for any broker, dealer, or exchange to use the mails or any instrumentality of interstate commerce or to use any exchange or facility thereof unless such exchange:

(1). is registered as a "National Securities Exchange," or

(2). is exempt from registration by the Commission.

Sec. 6 provides for the designation as a "National Securities Exchange" any exchange which agrees:

(1). To comply and enforce compliance by its members with the act and any amendments thereto, and rules or regulations made thereunder.

(2). To furnish complete information and data as to organization, membership, rules and amendments thereto.

(3). To provide rules for suspension, expulsion, or disciplining of members for conduct inconsistent with just and equitable principles of trade or wilful violations of the act or any rule or regulation thereunder.

and makes application for registration; if the Commission is of the opinion that the exchange is so organized as to be able to comply with the act, rules, and regulations and has such rules as to insure protection and fair dealing to investors.

The Commission within 30 days of the filing of an application must either designate the applicant as a "National Securities Exchange" or after appropriate notice and opportunity for hearing refuse to so designate.
Section 19 authorizes the commission for the protection of investors,

(a). After notice and opportunity for hearing:

(1). To suspend for a period not to exceed 19 months or to withdraw the designation, "National Securities Exchange", of any exchange which has violated the Act or rules and regulations thereunder or has failed to enforce compliance therewith by any member or issuer.

(2). To suspend for a period not to exceed 12 months, or to withdraw the registration of a security the issuer of which has failed to comply with the Act or rules and regulations thereunder.

(3). To suspend for a period not to exceed 12 months or to expel from a "National Securities Exchange" any member or officer thereof who is guilty of violating or aiding in effecting transactions for third parties whom he has reason to believe are violating the Act or rules and regulations thereunder.

(b). Summarily where public interest requires (emergencies):

(1). To suspend all trading in any registered security on any "National Security Exchange" for a period not to exceed 10 days.

(2). With the approval of the President to suspend all trading on any "National Security Exchange" for a period not to exceed 90 days.
Section 19, sub-section (b), authorizes the Commission for protection to investors or to insure fair dealing or administration of the exchange, after notice and opportunity for hearing, to amend the exchange rules, in those cases where the exchange has not complied with a written request of the Commission to so change, in respect of such matters as:

(1). Safeguards of financial responsibility of members;

(2). Limitation or prohibition of registering or trading in newly issued stock;

(3). Listing or striking from listing any security;

(4). Hours of trading;

(5). Manner, method, and place of soliciting business;

(6). Fictitious or numbered accounts;

(7). Time and method of making settlements, payments, deliveries, and closing of accounts;

(8). Reporting of transactions including short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving special circumstances;

(9). Fixing of commission rates, interest, listing and other charges:

(10). Minimum units of trading;

(11). Odd-lot purchases and sales;

(12). Minimum deposits on margin accounts.
In addition to those provisions already summarized, an exchange by becoming a "National Securities Exchange" agrees to comply with the provisions of the Act and rules or regulations made thereunder with respect to:—

(1). Marginal requirements (sec. 7)

(2). Restrictions as to borrowing by members, brokers and dealers (sec. 8)

(3). Manipulation of security prices

(4). Manipulation and deceptive devises such as "wash sales", "matched" orders and etc. (sec. 10).

(5). Segregation of functions of members, brokers, and dealers (Sec. 11)

(6). Accounts, records, reports and examination of such by the Commission or a representative thereof. (Sec. 17).

Section 25 provides that any person aggrieved by any order of the Commission may within 60 days after the entry of the order file a petition in the Circuit Court of Appeals (or the Court of Appeals of the District of Columbia) to modify or set aside in whole or in part the said order. A copy of the petition must be filed with the commission. Only objections urged before the Commission shall be considered and the findings of fact are conclusive if supported by substantial evidence. Either party may, however, upon reasonable grounds apply for leave to adduce new or further evidence; the same to be taken before the Commission under supervision of the Court. The Commission may then modify its conclusions of fact to conform to the new evidence. This method in substance prevents the review of the original findings of facts where the same are subsequently modified.
The judgment or decree of the Court, approving, modifying, enforcing or setting aside the order of the Commission is final, subject to review by the Supreme Court on certiorari or certification of questions, as provided for in sections 346 and 347 of the Judicial Code as amended.¹

The chief question with which the courts will be concerned when the act comes before them will be whether the commerce clause of the Constitution is to be extended by interpretation to cover the stock exchange transactions and other matters with which the act deals.²

2. In this connection see the principle as to the "current or flow of commerce" enunciated in the Swift case and followed in Board of Trade v. Olsen and Stafford v. Wallace. See Pages 29, 31, 33 of this paper. Also Federal Regulation of Stock Exchanges, 4 So. Cal. L. Rev. (1931); Congress Power to Prohibit Commerce, 18 Corn. L. Q. 477 (1933)
INDIANS

Congress under the commerce clause of the Constitution is given power "to regulate commerce with the Indian tribes." This power is co-extensive with the power to regulate commerce among the several states and with foreign nations. Congress therefore has prohibited such commerce except under a license. No other class of ordinary federal legislation is so full of pains, penalties and forfeitures as is that which regulates trade and intercourse with the Indians. This power over the commercial intercourse with the Indians is becoming less important with the passage of years and the extermination of the Indians as separate entities or nations within the confines of the United States.

1. Art. 1, Section 8, par. 3
   U. S. v. Jonathan Cisna, 1 McLean 254 (1881), upheld the power of Congress to prohibit commerce with the Indians except under a license; U. S. v. Holliday, 3 Wall. 407 (1865), the Supreme Court held that the regulation of commerce among the Indians extended to commerce with the tribes, though the Indians with whom it is carried on and the traffic be wholly within the territorial limits of a state. U. S. v. Buffalo Robes, 1 Montano 489 (1872) the license issued under the Acts of Congress regulating commerce with the Indians was held to be a personal privilege and not transferable. U. S. v. Taylor, 33 Fed. (2nd) 608 (1929). The United States, against the objection that the system of licenses to trade with the Indians created a monopoly, was granted an injunction against the defendant which prevented his trading with the Indians without a license. The court pointed out that this system of licenses may tend to create a monopoly and suppress free competition and trade, but that this could not be a defense to trading without such license. There are no constitutional provisions limiting the right of Congress to so regulate.
The United States as a proprietor has the same control over its lands as does any private owner of land. Congress, therefore, under the Constitution is given power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."\(^1\)

Congress under the Forest Reserve Act of 1891 delegated power to the Secretary of Agriculture to make rules and regulations concerning the use of forest reserves. The Secretary established a licensing system to control sheep grazing on forest reserves, and provided that no one could graze sheep on such reserves without a license. The constitutionality of this delegation of power and the rules and regulations promulgated thereunder by the Secretary were upheld in United States v. Grimaud.\(^2\)

In 1920,\(^3\) Congress provided for the disposition of public lands containing deposits of coal, phosphate, sodium, oil, oil shale, or gas. The Secretary of Interior was authorized under such necessary and proper rules and regulations to grant prospecting permits and leases for the exclusive right to prospect for the enumerated substances.

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1. Art. 4 Sec. 3 Par. 2.
2. 220 U. S. 506 (1911)
On June 28, 1934\(^1\) Congress approved an Act "To stop injury to public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes."

The Secretary of the Interior was authorized to issue permits (licenses) to graze livestock, on such grazing districts established under the provisions of the Act and under such rules and regulations as might be necessary.

No licensee complying with the rules and regulations is to be denied a renewal of his license unless a denial will benefit the value of the grazing unit.

The licenses are for a period not to exceed 10 years.

For a discussion of other acts concerning the use of public lands see the footnotes in connection with the development of federal water power.

\(^1\) Public No. 482, 73rd. Congress (1934).
WAR POWER

A state of war may affect with a public interest articles which, under normal conditions are free to commerce in its usual channels and thus result in regulation by the federal government of that which otherwise would be unobstructed and unhindered by the law. A state of war creates a period of emergency, sometimes a struggle for self preservation. When lawfully called into being by Congress, the federal government is possessed with the greatest of police powers, the "implied war power". However, even in such circumstances the exercise of this power is subject to some constitutional limitations, such as the fifth amendment and just compensation must be made for private property taken.¹

In 1861, based upon the principle of public law that unlicensed business intercourse with an enemy during war is not permitted, Congress on July the 13th.² enacted that whenever the President by proclamation declared that the inhabitants of any state or part of a state were in a status of insurrection "that thereupon all commercial intercourse by and between the same and citizens thereof and citizens of the rest of the United States should cease and be unlawful." The President was given the power to license such intercourse as he should deem in the public interest.³

In 1917⁴ Congress provided that it should be unlawful during a state of war "to manufacture, distribute, store, use, or possess powder, explosives, blasting supplies, or ingredients thereof, in such a manner as to be detrimental to public safety". The Director of the Bureau of Mines was authorized to issue licenses as follows:

¹ In U. S. v. Cohen Grocery Co.,255 U. S. 81 (1920) the court said:-- "The decisions of this Court undisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power
(1). "Manufacturer's license, authorizing the manufacture, possession, and sale of explosives and ingredients.

(2). Vendor's license, authorizing the purchase, possession, and sale of explosives or ingredients.

(3). Purchaser's license, authorizing the purchase and possession of explosives and ingredients.

(4). Foreman's license, authorizing the purchase and possession of explosives and ingredients, and sale and issuance of explosives and ingredients to workmen.

(5). Exporter's license, authorizing the license to export explosives.

(6). Importer's license, authorizing the licenses to import explosives.

(7). Analyst's, educator's, inventor's and investigator's licenses authorizing the purchase, manufacture, possession, testing, and disposal of explosives and ingredients."

These licenses may only issue to citizens of the United States and may be revoked after notice and opportunity for hearing for the violation of the provisions of the Act.

By an amendment in 1918 platinum, iridium, palladium and compounds thereof were made subject to the same limitations and conditions as to sale, possession and use.

of Congress of the guarantees and limitations of the 5th and 6th amendments."

2. 12 Stat. 257--A similar statute has been enacted as a part of the permanent law under the heading of "Insurrection" R. S. 5300-5306, 50 U. S. C. 205-210.

3. See McKee v. U. S., 8 Wall. 163 (1868) and cases cited, wherein this enactment was held valid.


1. 40 Stat. 671, 50 U. S.C. 144
Under the Act of Aug. 29, 1916\(^1\) there was established a Council of National Defense with authority to create subordinate agencies and boards for the purpose of coordinating industries and resources for the national security and welfare. One of these boards so created, the War Industries Board, by a system of licenses sought to control the purchase, disposition and profits of certain of the basic industries. It was contended that the board lacked authority to prescribe such regulations or to exact the licenses granted.

Congress, however, put an end to such contentions in 1917\(^2\) by authorizing the President, whenever he should find it essential "to license the importation, manufacture, storage, mining, or distribution of necessaries" to so publicly announce and that thereafter, no person should carry on any such business specified in the announcement, unless he first secure a license pursuant to the Act.

Necessaries were defined as "foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery and equipment for the actual production of foods, feeds and fuel."

The President was authorized to prescribe rules and regulations concerning the system and auditing of accounts of licensees, and the entry and inspection of their places of business.

Further, when the President found that, "any storage charge, commission, profit, or practice of any licensee" was "unjust, or unreasonable or discriminatory and unfair, or wasteful", he could order such practice to be discontinued within a reasonable time and if the order was not obeyed, to suspend or revoke such license. This gave the President power to determine what constituted reasonable charges and prices.

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2. 40 Stat. 276 (Aug. 10, 1917)
All excess profits were taken over by the Federal Government under the terms of the licenses.

The Act carried with it a penalty, of $5000.00 fine or two years imprisonment or both, for violation thereof.

In U. S. v. Gordon the validity of this Act as to its licensing features was upheld as a valid exercise of the war power of the federal government. The court commented that such power in the federal government was at least as extensive as the police power of the states.

The War Industries Board in U. S. v. Smith was held not to have acted unreasonably, arbitrarily, or in bad faith when as the representative of the President it undertook to control the wool market by a system of permits or licenses which required dealers to pay to the government all profits in excess of fixed percentage.

To the same conclusion was the case of Enid Milling Co. v. U. S. The President on Aug. 14, 1917 announced it to be essential to license the storage and distribution of wheat and the manufacture of products therefrom. Millers whose daily capacity exceeded 100 barrels were required to secure licenses which as an item of regulation required that all excess profits be turned over to the government. The plaintiff paid his excess profits to the government and was suing to recover the same.

The court in upholding the United States, said, that the right during war to control the profits of the miller, so far as wheat was concerned, could well be sustained as an exercise of the war power of the federal government.

1. 287 Fed. 565 (1922)
2. 285 Fed. 751 (1922)
3. 64 Ct. Cl. 396 (1928)
4. 40 Stat. 1689
The contemporary investigations of Congress and the experience of the last war indicate that regulation by license during future periods of war will be far more extensive than that which was experienced under the acts herein discussed.
MISCELLANEOUS ACTS

The Federal Alcohol Control Administration was established by the President on December 4, 1933, by Executive Order, under authority of the National Industrial Recovery Act.

Its principal duty is to administer, in cooperation with industry, the codes of fair competition promulgated under the National Industrial Act (except labor provisions which are covered in separate codes administered by the National Industrial Recovery Administration). These codes cover the production, importation, and sale of alcoholic beverages, except at retail.

The Administration is authorized to investigate and study the coordination of the activities of the federal government pertaining to taxation, control, and regulation of alcohol and alcohol beverages, and to prescribe rules and regulations with respect to codes of fair competition, marketing agreements and license.

The Board of the Administration is composed of six members appointed by the President.

The six industries under the jurisdiction of this Administration are: wine, rectifiers, importers, wholesalers, brewers, and distillers.

A summary of the Code of Fair Competition for the Alcoholic Beverages Importing Industry, promulgated under this Administration, will provide a sufficient survey to bring out the licensing activities.

1. Order No. 6576 and amended orders: No. 6576, Jan. 25, 1934; No. 6663, April 19, 1934; No. 6788, June 30, 1934; No. 6829, Aug. 21, 1934. The Administration will terminate on June 16, 1935, unless there is additional legislation to prolong its life.

2. Public No. 67, 73rd. Congress. 48 Stat. 195 (1933)

Based upon the declared policy of Congress in Section 1 of Title 1 of the National Industrial Recovery Act; the fact that Congress has had no opportunity to legislate as to liquor control since the repeal of the 18th Amendment; the fact that the 21st Amendment provided "that the transportation or importation into any state, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited;" and the best interests of the public, all persons are forbidden to engage in the business of importing alcoholic beverages except pursuant to a license issued by the Director of the Administration.

The issuance of a license is conditioned on the agreement of the licensee to observe all the provisions of the Code and rules and regulations issued thereunder. The license according to its terms gives the licensee no vested right to a standard of profits, or volume of business, or a right to engage in the importation or distribution of any class of alcoholic beverage after the expiration of the license.

Licenses are issued only upon application, stating the facts as to the personnel, previous experience, trade connections, and etc., and investigation of the same.

---

1. "To remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increase in purchasing power, to reduce and relieve unemployment, to improve standards of labor and otherwise to rehabilitate industry and to conserve natural resources."
The licensee must permit his books to be inspected, keep such books and records as the Administration prescribes, and make such reports as are required from time to time.

The licensee must post with the Code Authority a price list setting forth the classes, types and brands offered for sale, the sale prices thereof, and the discounts and sale terms of his beverages. These lists must be approved by the Administration and any sale contrary to the same, after approval, is forbidden. If the Administration determines after notice and hearing that any price or term posted is oppressive to the consumer or so low as to be destructive (price cutting) or to constitute dumping, such price or term is declared ineffective and a new list must be substituted therefor.

Licensees are forbidden to engage in the following practices: false advertising, misbranding, violate the standards of fill, identity, quality, and label standards and requirements of the Administration, commercial bribery, consignment practices other than those authorized, make allowances and rebates for advertising and distributing purposes, offer prizes and premiums to consumers and make sales to unauthorized vendors.

Any license after due notice and opportunity for hearing may be suspended or revoked for violation of the provisions of the code or rules and regulations issued thereunder.¹

¹. Brewer's licenses are not subject to suspension or revocation.
fact that the alcoholic industry in general has always been heavily licensed under state laws and federal license taxes.

**Submarine Cables:**

Licenses for Submarine Cables—By the Act of May 27, 1921\(^1\) it is made unlawful for any person to land or operate a submarine cable connecting directly or indirectly the United States with any foreign country or "any portion of the United States with any other portion thereof" unless the President has issued a license therefor.

The term United States includes all territorial or insular possessions. The Act expressly excepts those cables both terminals of which lie wholly within the continental United States.

The President after notice and hearing may withhold or revoke a license when he is satisfied that such action will be for the best of the United States or its citizens thereof.

The President is authorized to grant licenses upon such terms "as shall be necessary to assure just and reasonable rates and services in the operation and use of the cables so licensed."

The district courts are given jurisdiction to enforce this act by injunction upon petition of the federal government.

\(^{1}\) 42 Stat. 8, 47 USC 34-39 (1921)
CONCLUSION
The federal license is not always called such, but is of varied nomenclature. It includes license taxes, permits\(^1\), designations\(^2\), agreements\(^3\), and impositions\(^4\).

The mode of acquisition, in general, is by request coupled with a promise to obey the particular act, rules and regulations promulgated thereunder; with the right to notice and opportunity for hearing in those instances where the license is refused.

Revocation and suspension are generally preceded by notice and opportunity for hearing is afforded.

There is no general development or standard in the several acts concerning the rights of judicial review, as a matter of right, from the decisions of the administrator or administrative body charged with administering the license acts. Several of the acts contain minute provisions granting judicial review as a matter of right. In others, Congress has proceeded on the theory that the courts will review these instances of cases where the administrative action is arbitrary or capricious and therefore has made no provision in the act for a judicial review. The Radio Act, supra, is perhaps the most carefully drawn with respect to this right of judicial review and certainly if the number of appeals which have been noted from the Commission's decisions is a criterion of or indicative of anything; it is, that the individuals and the courts do not always see eye to eye with administrative boards or officers.

\(^1\) Pilots, engineers, mates, and etc.,; Grain Standards Act.
\(^2\) "National Securities Exchange"; "Contract Market."
\(^3\) Federal Water Power Licenses
\(^4\) This is called a license, but under A.A.A. it is different in that groups are licensed without their consent.
Therefore, it seems that all licensing statutes should provide for judicial reviews as a matter of right.

The future will see a standardization of this phase of licensing acts, either by the establishment of a legislative tribunal, such as the Court of Custom and Patent Appeals or by a system of designated courts, as in the Radio Act.

The question arises as to the limits of this tremendous and rapid growth of regulation, by licenses, of the individual and his business—whether he may so engage and, if so, in what manner and mode the business must be carried on. Is this power all embracing or are there limits?

In those cases discussed, where the Supreme Court has held the regulation accomplished through the medium of a license valid—there are no cases where regulation by license has been held invalid—the court has not discussed the federal right to license. This has not been because of any difficulty involved, but rather because the propriety of using a license as the method of accomplishing the regulation has been of minor importance as compared to the question of the right to regulate by the federal government in the particular field in question. This has led to the conclusion that the right to regulate, is the right to license, it being a reasonable means of regulation for the particular field. That is, the legislature, having the power to regulate, may use its discretion, in determining by what means or method the desired regulation can be best accomplished. The question then resolves itself into one as to the limits of the power of Congress to regulate. This is equivalent to saying, that Congress in the exercise of its delegated powers may license as a proper means of securing the desired regulation.
As a matter of fact the use of the license, thus far, has been limited to the fields, as to power, of taxation, war, control, and disposition of public lands, and commerce with the Indians, foreign nations and between the several states.

The license as a means of regulation by the federal government is more or less in the infant stage, having received its baptism, the future will see a more extensive use, particularly in those other regulatory fields, of Congress.

In the fields of foreign commerce, public land control, and intercourse with the Indians the power of Congress to regulate is plenary. There have been laid down no limitations. As a sovereign (in the sense of one of the family of nations) and as a proprietor the federal government through Congress may regulate at will within these fields.

In the taxing field Congress has all power, but where it combines regulation with this power, the regulation must be incident and subordinate to the tax. The Doremus case,\(^1\) supra, represents the present extremity of regulation through licenses under the guise of the revenue power. It seems, in view of the cases discussed, that the limits of this regulatory field have been reached. Yet, in view of the liberal and enlarged construction given to the powers of the federal government, in the last 25 years, coupled with the tendency of courts to regard all legislation as prima facie constitutional that in those cases where there is a strong moral purpose coupled with a proper developing of a statute, this regulatory field incident to the taxing power may be constitutionally extended.

\(^1\) Page 13, Note 1
In the exercise of the "implied war power" of the federal
government the right of Congress to regulate reaches its broadest limits.
The World War and the present depression or emergency period demonstrate
that the need in times of stress for a unified system of control has been
recognized by Congress and the Courts. There is a tendency toward the
view that, in such periods of national stress, licensing is the only means
of securing the proper coordination of national facilities in order that
the nation might survive.

This war power is the greatest of police powers. The
existence of our government has never been so seriously threatened that
a clear conception of the limits of this power can be traced. It is true
that the Supreme Court in the Cohen Grocery Co. case, supra,¹ said that
the constitutional limitations of the 5th and 6th amendments must be
observed in times of war as well as in times of peace. It is not out of
place to point to the recent "Hot Oil Cases"² as indicative of the opinion
of the Supreme Court to regard constitutional limitations, upon the power
of Congress, to be just as binding in times of national stress as in times
of tranquility. On the other hand in Block v. Hirsh and Wilson v. New,
supra³, the court sanctioned regulation, beyond the normally conceded
power of the federal government, as a temporary expedient in a time of
national stress.

1. Note 1, Page 59
2. Panama Refinery Co. v. Ryan and Amazon Petroleum Corp. v. Ryan, 293
3. Note 1, Page 41
In conclusion, as to the power of Congress during periods of war or national stress, it may be said that the right to enlarge the regulatory fields of the federal government varies directly with the exigencies and the emergency nature of the period in question. Further, that any such theory must be read together with the principle that constitutional limitations were made for all times, both for periods of national stress and tranquility.

The power to control and regulate the commerce among the several states is the constitutional source of practically all of the great federal licensing acts. These few words molded into the constitution is the well from which Congress has drawn heavily in the past. As to this development, Donald Richburg has said,1 "The power to regulate interstate commerce, originally, designed to promote economic unity of the nation, has become an essential political power to preserve the economic health and the very existence" of the nation. This expression is cited because its author is one of the leaders in the movement for the expansion of federal power.

Is there a right to engage in interstate commerce? Obviously the contention that there is a right to engage in interstate commerce either goes the whole way and prohibits all regulation of such commerce (this of course is contrary to the actual facts presented herein) or permits only that regulation which is regarded by Congress and the courts as in the public interest and not contrary to some constitutional provision or limitation. Then the question of whether or not a particular regulation of

1. 39 Commercial L. J. 182 (1934)
interstate commerce is within the commerce power depends upon the reasonableness of the regulation, of which the courts are to judge.

Of course if all interstate movement is commerce, and there is in Congress the absolute power to prohibit interstate movement or to permit it subject only to certain prescribed rules and conditions, then a universal, all embracing, licensing system may be set up by Congress and no one may ship goods across state lines without first having obtained a license. Thus, under the guise of regulating commerce Congress would control the life of an individual. Our country is at present passing through such a tendency along with the rest of the world. That is to say, certain of our leaders maintain that the federal government is a more effective instrument for making the plans and wills of those who are in control effective, than are the governments of the several states.

The Supreme Court, however, has held long ago that the power of Congress to regulate interstate commerce is not absolute and that where regulation is contrary to the fifth amendment, it is invalid as an invasion of personal liberty and property rights.\(^1\)

Liberty in its broad sense as understood in this country means not only freedom from servitude, imprisonment, or restraint, but includes the right of every person to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or vocation.\(^2\) It is a general principle

\(^2\) Butchers' Union Co. v. Crescent City Co., 111 U. S. 746 (1884)
of law that it is within the province of the legislature to determine
whether conditions exist which warrant the exercise of regulatory power,
but the question as to what are proper subjects of its exercise is clearly
a judicial one. Congress has plenary power to regulate interstate
commerce, yet this power, as has been pointed out, does not go all the
way. The individual has certain unalienable rights among which is
liberty—the right to engage in a lawful occupation. When these two
principles conflict, the question becomes one of inquiry as to
reasonableness in view of the public interest involved.

The right to license "includes to some extent the power to
make illegal or to prohibit". Congress cannot merely because of its
whim demand a license for the privilege of engaging in the ordinary
trades and pursuits because there happens to be an interstate movement
involved. There must be some abuse, some practice within the trade or
occupation, or the individual must be in such position as to burden or
obstruct the flow of commerce. In other words, before Congress may hedge
a particular business or calling with regulations and require a license
there must be present abuses and practices which obstruct or burden
the interstate commerce so as to furnish adequate factual reasons for
such regulation. This is a real limitation upon the power of Congress to
regulate and hence to license.

The past 20 years has been the proving period for the license
as a method of regulation by the federal government. This period shows a
steady growth in the use of the license in those fields where the right
of regulation is admitted to exist. Consequently the courts have not been
called on to decide border line cases with respect to the reasonableness
of a license as a means of regulation in a particular field.
Courts are proceeding on the principle that the right to regulate is the right to license, but this is because of the nature of the subject matter regulated. It has been pointed out that the right to license may be unreasonable as an invasion of individual liberty in those ordinary trades and occupations which are of themselves innocent and which are not surrounded by abusive practices which tend to obstruct or burden interstate commerce. In other words in some fields of interstate movement there may be the right to regulate, but not the right to license the individuals engaged in the industry or trade regulated.

This study shows a tremendous growth in the use of the license, and because licensing lends itself better to a grant of wide discretion and is a stricter method of control; in that it substitutes administrative supervision for the case to case method of regulation under legislative rules and provisions; the future looks toward a greater use of the license in all federal regulatory fields. Whatever the future of the federal license may be, the history of its growth is important, in that, "a page of history is worth a book of logic."

1. Mr. Justice Holmes
INDIVIDUALS AND BUSINESSES UNDER FEDERAL LICENSES

LICENSE TAXES
Businesses and Occupations
which at various times have been subject to licenses under the taxing power

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<th>Proprietors of</th>
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<td>Mixed flour</td>
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FOREIGN COMMERCE

| Vessels, masters, mates, pilots, engrs. | Customhouse Brokers | Exporting of Apples & Pears | Importing of Nursery Stock |

INTERSTATE COMMERCE

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### DURING STATE OF WAR

(INCLUDING THOSE LICENSED DURING WORLD WAR)

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| Traders with Insurrectionary States |

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