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Frazer Arnold

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## CAN NRA BE MADE CONSTITUTIONAL?

*By* FRAZER ARNOLD, ESQ., *of the Denver Bar.*

THE poultry decision handed down recently has caused much comment. The dispatches from Washington are now full of conjectures by various persons upon how the codes and the act can be revamped "to meet the objections of the Supreme Court" and still survive. In my opinion all such conjectures are vain and useless. The act and the codes are impossible. They are incapable of cure. No mere technicalities are available; no devices floating in the air for a "smart" luminary to discover, in order to "satisfy" a court. Whatever the fond hopes or noble motives may have been that inspired the act and codes, they were a lethal rapier-thrust at the heart of our constitutional liberty and government. All that a despotism or a dictatorship is, is a form of government where the three elements are so fused, or confused, in one person or department that the executive is also in effect the legislature, with a judiciary that does not function as a check upon the despot's actions. Where that condition develops, there is regardless of names, an end of liberty both in business and personal affairs, an end of constitutional government, with its indispensable checks and balances.

The doom of the codes was in reality spelled by the Supreme Court, not in the poultry case, but in the oil decision of last January. It was not necessary to wait for the Belcher lumber code case from Alabama, or for this poultry case from Brooklyn which the government imagined was "stronger," in order to foresee the fate of the entire NRA plan. In the oil case, Congress undertook (by Section 9-c) to leave it to the President to say whether it should be legal or illegal for private interests to transport oil in interstate commerce above certain quotas, that is, undertook to delegate to the executive the right to legislate on that subject. And the Supreme Court knocked that out, as an illegal abrogation by Congress of its function and duty. Applying this principle to the codes, what did one find? No code was ever enacted by Congress. Each code was framed by volunteers in the particular trade or industry who had formed a "group," and was then submitted by this group, not to Congress, but to the executive. The executive then decided whether or not he would approve, i. e.,

enact it. If he approved it, then the bill had passed the President, and was supposed to have all the effect of a federal statute that had successfully run the gamut first of approval by a committee of Congress and then of adoption on the floor by both houses of that legislative body. Under the act, the President also was supposed to have power to adopt codes *sua sponte* if he thought particular industries needed them. All this was executive legislation with a vengeance: whole industries and lines of business put under the most minute and rigid hamstringing and regulation, in an infinite variety of details, by presidential ukase. The codes were simply statutes, prescribing a multitude of rules, large and small; and they were enacted by the President. Congress had nothing to do with them, except to say to the President that he might proceed and pass those statutes himself, or not, as he saw fit.

Having decided the oil case as it had, what possible chance was there for the Supreme Court to uphold the *codes*? Obviously none. The codes were the *reductio ad absurdum* of the whole vogue and practice of allowing executive officials to legislate under some general grant of power. That the codes presented a more obvious case than the oil statute is shown by the fact that one justice dissented in the oil case, but even he turned thumbs down against the codes. No court decision was really necessary. The codes and the act clearly flouted the very first section of the first article of our written constitution. Time has been wasted in many courts over the question whether a given activity was interstate or intrastate or whether it affected interstate commerce, upon the tacit though erroneous assumption that Congress can play as it likes with the rights and interests of any business embarked in interstate activity—whereas the basic question was whether there existed the ineradicable vice of a delegation of legislative authority. If so, it was immaterial whether the commerce was interstate, as in the oil case, or intrastate as in the poultry decision.

Now, the essence of the entire NRA conception is this illegal delegation of power. An NRA without it would be emptier than Hamlet with the Immortal Dane left out. Assuming that the particulars of a code would be valid as legislation, it could only be adopted by Congress itself, and Con-

gress could labor from now until doomsday without agreeing upon a small fraction of the 600 codes that were adopted under the late scheme. Congress will never attempt it, and if it did, its committee hearings alone would be endless.

But this, in my opinion, is the smallest part of the objection to any more or further codes.

No doubt one may eliminate from a legal discussion any proposed system of "voluntary codes." In a country like ours, on the grand scale, they would never work, and would perhaps make endless difficulties in the way of monopoly. There remains only the suggestion that codes affecting interstate commerce, duly enacted by Congress itself, not by the President, and limited to a few large industries, would be valid and practicable. The answer to that suggestion is that the staple ingredient of the late codes has been a mass of regulation, e. g., of wages, hours, trade practices, policies and details, with which Congress has no more right to meddle, under the guise or pretended authority of the commerce clause, than a state legislature has authority to meddle with such prerogatives of the citizen under the guise or masquerade of the police power.

By way of summary, it seems that any attempt to pump vitality into the code concept is bound to fail, because that concept is impossible of existence under a constitutional system of the division of powers. The code concept was an exotic, an imported article. It might do in a "corporative state" like the present-day Italy, or in any other despotism, where one person or group absorbs all executive and legislative power, with the judiciary existing only to relieve the dictator of the troublesome details of administering justice. It can never do in a country like ours, where we understand something of how to insure a reasonable freedom of action, and where we still have a constitution, with plenty of vitality, as shown by the unanimous decision of yesterday.

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## NEW BOOKS

Mr. F. D. Stackhouse asks that our readers be advised that the Law Library of the District Court has just received Revised Edition, in two (2) Volumes, by Charles Warren, "The Supreme Court in United States History."