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SPEECH BY CALVERT MAGRUDER, GENERAL COUNSEL THE WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, SCHEDULED FOR DELIVERY AT 3:30 P.M NOVEMBER 10, AT NEW HAVEN, CONN., BEFORE THE MANUFACTURERS' ASSOCIATION OF CONNECTICUT

SPEECH BY CALVERT MAGRUDER, GENERAL COUNSEL OF WAGE AND HOUR DIVISION
BEFORE MANUFACTURERS' ASSOCIATION OF CONNECTICUT
AT ANNUAL MEETING IN HOTEL TAFT, NEW HAVEN, CONN.
3:30 P. M., NOVEMBER 10, 1938

From the fact that I am not an important enough public official to have a "ghost writer" there results one happy consequence—this speech will be of refreshing brevity. So much remains undone in my job at Washington that I haven't had the conscience to spend much time writing speeches.

I came down there five weeks before the Fair Labor Standards Act was to go into effect, knowing no more about it than could be derived from reading a copy of it on the train. There was no legal staff to greet me, though scores of applicants were on hand to tell me their peculiar qualifications. I found on my desk hundreds of letters and telegrams requesting interpretations of the law, all of which Mr. Andrews had acknowledged with the assurance that "as soon as our General Counsel arrives he will give this matter his prompt attention." I learned also, to my dismay, that another task was expected of me which even the Supreme Court has confessed its inability to undertake: the reporters informed me on my arrival that Mr. Andrews had suggested at a press conference that his General Counsel would promptly issue a definition of interstate commerce which would enable every employer to know at once whether, and to which extent, he was subject to the Act.

The first reading of the Act was not very reassuring. There were numerous intricate regulations, classifications and definitions which had to be formulated by the Administrator before October 24. For example: there was Section 3 (m) defining wage paid to any employee as including the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities—not the reasonable value to the employee, but the reasonable cost to the employer. We had visions of spending the rest of our lives traveling around company towns and lumber camps holding hearings on how much those meals and lodging cost the employer to furnish. And, could we be sure if the meals furnished this week cost 40 cents a day, that the meals furnished the next week would cost the same? No, we should probably have to come back again.

Another puzzle was discovered in Section 13 (a)(10) which exempts from both the Wage and Hour Provisions "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter

or other dairy products." Here, until we studied the matter a bit, we had visions of a second tour of the United States (not to mention Alaska, Puerto Rico, Hawaii and outlying possessions)—this time a map-making tour—drawing lines through towns, counties and States, marking off the respective areas of production of the thousands of agricultural or horticultural commodities.

Now, why do I rehearse this personal tale of woe? Because, probably many of you have had headaches over the Fair Labor Standards Act and have been damning the "New Deal" as the author of your misery. Well, misery loves company, and you are entitled to the comfort of knowing that the Wage and Hour Division is having its headaches, too; and that whereas each of your headaches is fairly localized, our headache is diffused and continent-wide.

We must not lose our sense of perspective, Rome wasn't built in a day. Some uncertainty and dislocation is inevitable at the start of a governmental undertaking of this sort. It is tolerable however, if one recognizes that the Government is building soundly, for the long future. In this instance, fortunately, two things are true: (1) There has been general public acceptance of the basic objectives of the Fair Labor Standards Act, and (2) the statute sets forth a reasonable and moderate approach to those objectives.

First as to the general objectives: It is recognized that some limit must be put to the operation of competitive forces, which in the quest for lower costs, tend to a dangerous debasement of the standard of living of the workers. As the President said in his message to Congress proposing wage and hour legislation:

> "Enlightened business is learning that competition ought not to cause bad social consequences, which inevitably react upon the profits of business itself. All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor."

It is further generally recognized that in the economic setting of 1938, the problem is a national one, which in important aspects requires action by the National legislature.

Second: the response of Congress to the President's message was a reasonable and moderate piece of legislation.

Consider the provisions as to wages. No general attempt was made to fix wages all along the scale from the lowest to the highest paid workers. Congress

merely provided that employees covered by the Act should be paid by the employers at a rate not less than 25 cents an hour—that would be $11 a week for a 44-hour week — a wage hardly affording the barest subsistence. The highest estimate of the number of employees whose wages would be increased by this requirement, so far as I have seen, is 750,000. Judging by reports that have come to us since October 24, industries generally have been adjusting themselves to this minimum wage without extreme dislocations. Within a year the statute will raise the minimum to 30 cents, and ultimately to 40 cents seven years after the effective date of the Act. One can observe here a Congress, not impatient to make over the country in a day, but affording to industry a liberal period of adjustment to a moderate minimum standard.

But what about the power of the Administrator under Section 8 to raise the minimum wage to 40 cents an hour in industry by industry, by means of a wage order. Here, again, the caution and moderation of Congress is evident. No government official, in his unrestrained discretion, is given authority to raise the minimum wage by edict. Indeed, the Administrator has no power at all in this direction until another important procedure is pursued. If the Administrator thinks the minimum wage for a given industry should be increased beyond that fixed by the self-executing provisions of Section 6, he must first appoint and convene an industry committee composed of a number of disinterested persons representing the public, of whom one shall be designated as chairman, and a like number of persons representing employees in an industry and a like number of persons representing employers in an industry. The statute defines in considerable detail the economic factors which an industry committee must consider as the basis of recommending a minimum wage rate. If this committee, representing the three great interests involved does not after a requisite study, recommend an increase of the minimum wage in the industry, the Administrator cannot proceed to issue a wage order. The Administrator, representing the authority of the Government, is thus not empowered to act until in the judgment of the industry committee, so constituted, the economic conditions in industry warrant an increase of the minimum wage. Even if an industry committee recommends an increase of the minimum wage, still a further procedure is required by statute. The Administrator, before putting the recommendation into effect by a wage order, must hold a public hearing and give interested persons an opportunity to be heard, and must find that the industry committee's recommendations are made in accordance with the law, are supported by the evidence produced at the hearing, and taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes

of the statute. Even after this, persons aggrieved by a wage order issued by the Administrator may obtain a review of the same in a Circuit Court of Appeals of the United States.

The Conference Committee of the Senate and House, reporting on these provisions of the statute, said:

> "This carefully devised procedure has a double advantage. It ensures on the one hand that no minimum wage rate will be put into effect by administrative action that has not been carefully worked out by a committee drawn principally from the industry itself and on the other hand that no minimum wage rate will be put into effect by administrative action which has not been found by an administrative official of the Government, exercising an independent judgment on the evidence, and responsible to Congress for his acts, to be in accordance with law."

From the foregoing, it is apparent that it is quite inaccurate to describe the industry committees as being the "puppets" of the Administrator. It is true that the Administrator may disapprove the recommendations of the industry committee and refuse to put them into effect; but it is equally true that the Administrator cannot make a wage order except in pursuance of a recommendation by an industry committee. Since it takes the concurrence of the two to produce a wage order, it is beside the point to belittle the functions of either.

In enacting these provisions as to wage orders, Congress erred, if at all, on the side of caution. It illustrates, again, the point I am making that Congress inaugurated a very moderate program of experimentation in this field of legislation, with every apparent intention to keep the economic shocks and dislocations at a minimum.

This is evident, again, in the provisions of Section 7 as to maximum hours. Congress did not, as has been done in some State legislation, put an absolute maximum to the workweek. It prescribed a normal workweek of 44 hours for the first year and 42 hours for the second year, and 40 hours for the third year, and thereafter. This is a standard workweek which important American industries have already arrived at without legislation. It certainly cannot be regarded, therefore, as a drastic innovation. But, instead of forbidding altogether work in excess of the standard workweek, Congress merely provided that hours worked in excess of the standard workweek should be compensated at a rate not less than one and one-half times the regular rate. Even this requirement of time and one-half for overtime is subject to some dispensation in the case of industries of a seasonal nature, and in pursuance of certain collective agreements.

No doubt, the Fair Labor Standards Act will be subject to amendment by future Congresses as experience points the need. The modest beginning in the present text of the Fair Labor Standards Act is assurance that there will be no need to retreat from any major blunder.

The direction which future amendments of the Act may take is likely to be affected profoundly by the spirit in which the present Act is accepted by industry. After this gesture of moderation by Congress, is industry going to meet it half way, or is it going to say to its lawyers, "study the Act with a microscope and inform us of the very least we have to do in order not to run afoul of the law." Important associations of manufacturers, such as your own, exercise a profound effect through your official attitudes and pronouncements. You can make "chiseling" unfashionable. You may frown upon various devices for taking certain groups of employees out from under the coverage of the Act. You may discourage petitions to the Administrator asking for an undue enlargement of the category of learners who may, by administrative action, be paid less than the normal minimum rate. You may discourage efforts which some employers have made to avoid the 25-cent-and-hour minimum rate by asking to have large blocks of their employees classified as "handicapped workers."

Above all, it seems to me tremendously important that associations such as yours should take the lead in urging compliance in letter and spirit with the overtime provisions of Section 7.

As I have said, Congress did not take the extreme measure of forbidding employment in excess of 44 hours a week. But, it sought to establish a trend in that direction, in industries which have not yet tapered off to this reasonable workweek, by making it more costly for an employer to work his employees more than 44 hours. It is manifest from the legislative history, and from a reading of Section 7 as a whole, that Congress in enacting these overtime provisions was not thinking merely of the relatively small number of employees who are compensated only at the rate of the basic minimum of 25 cents an hour, and who therefore, must be paid at a higher rate when employed for more than 44 hours. If this is all that Congress had meant, it would simply have provided that no employee subject to the Act shall be employed in excess of 44 hours a week unless he receives minimum compensation for the week's work at the rate of 25 cents an hour for the first 44 hours, and 37½ cents for the hours in excess of 44. The purpose of Congress was broader than this. It was aiming at a general shortening of the workweek, with a resulting spread of employment, not only in the case of employees receiving the beggarly minimum wage, but also in the case of better paid employees as well. The provision is that an employee working excess hours shall be compensated therefor at a rate not less than one and one-half

times the regular rate at which he is employed. Much misplaced ingenuity has been expended in devising bookkeeping schemes for juggling the purported regular rate by which it is hoped an employer may be able to work his men in excess of 44 hours without increasing his weekly wage bill. Some of these schemes, as we have stated in our official releases, we believe to be clear violations of the law; others, we believe to be of such doubtful legality that the statesmanlike course should be to avoid making the experiment.

What would be accomplished if these devices should succeed? A standard 44-hour workweek is reasonable, and it is reasonable that employees required to work in excess of 44 hours should be compensated at a higher rate for such overtime. If the effort to make a huge joke of the overtime provisions of Section 7 succeeds, the matter will simply be dumped again in the lap of Congress with the likelihood that more far-reaching proposals will find favor there.

The Administrator feels that the general response of the employers to the Act has been helpful and encouraging. We have been, and are, understaffed, with the result that we have been swamped by a flood of inquiries, of sometimes as many as eleven hundred a day, pouring into our central office in Washington. Ultimately, when we get the funds, we hope to have adequate regional offices with a view to decentralizing administration. Employers have been very patient in putting up with our unavoidable delay in answering inquiries.

Our legal staff have been impressed with the importance of not issuing hasty ill-considered interpretations, even at the cost of enduring a mounting stack of unanswered mail. In large part, these inquiries ask for rulings as to whether a particular employer is within, or without, the Act. The Administrator has no power to make any conclusive ruling in this respect. A hastily considered reply, based upon an inadequate statement of facts, might lead a trusting employer into heavy liabilities to his employees. I am the Legal Adviser to the Administrator—not to the world in general.

The Act does not enable employers to dispense with consulting their own counsel. Nevertheless, it is the purpose of the Wage and Hour Division to issue interpretative bulletins of a general nature, from time to time, for such help as they may afford, and we are engaged in answering individual letters of inquiry, to limit of our capacity.

We are doing our best, and we hope you will help us. We are striving to lay a sound administrative foundation for what we believe to be a hopeful piece of legislation. The Congress of a free people has sought in this law to exercise a rational control over our economic destiny.

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