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CHAPTER I I

EFFORTS TO REGULATE THE BITUMINOUS COAL INDUSTRY PRIOR TO 1937*

THIS chapter supplies a background for the subsequent discussion of minimum price fixing under the Bituminous Coal Act of 1937. It describes the legislative proposals and programs designed to alleviate the heavy social and economic costs resulting from severe competition. (See Table 2.) It does not deal with the efforts of the federal government to set ceilings on mounting coal prices during World War I or the strike of 1922.¹

A. *Legislative Proposals, Laws, and Operators' Efforts to Stabilize the Industry*

I. RECOMMENDATIONS OF UNITED STATES COAL COMMISSION

The need for some regulation of the coal industry was recognized by the United States Coal Commission in the early twenties. In its report published in 1925 the Commission recommended "the use of the powers of the Federal Government over interstate commerce" for the protection of the public and the promotion of the normal development of the industry, and advocated that a Division be set up in the Interstate Commerce Commission with "direct responsibility for such regulation and supervision as is necessary."²

It further observed that "The most convenient and practicable of the various possible methods of exercising the right of control over interstate commerce in coal would appear to be the licensing of all who desire to ship coal from one State to another or to buy and sell in interstate commerce, whether as operators, wholesalers, or jobbers. Reasonable conditions, logically growing out of the inherent power of the Government and implied in its exercise, would naturally be attached to the granting of the license, and violation of these conditions would be cause for suspending or revoking the license."³ The *Report* was discussed at hearings in 1926, but the reference then was chiefly to the anthracite industry, and the pro-

* The authors are indebted to Dr. Mary Effie Cameron, a Fellow of the Social Science Research Council in 1942-1943, for her assistance in the preparation of this chapter.

¹ The experience with maximum price fixing during World War II is discussed in Appendix A.

² *Report of the United States Coal Commission, 1925, Part I, p. 264.*

³ *Ibid.*, p. 269.

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posal made in the report for a continuing fact-finding commission was the only one that was given much consideration.⁴ No legislation ensued.

2. APPALACHIAN COALS, INC.

In the absence of federal legislation to stabilize the coal industry, some thought was given to the possibility of nongovernmental action. On December 30, 1931, a group of southern coal operators established a "marketing agency" called "Appalachian Coals, Inc." It was not the function of this agency to sell coal—that service was to be performed by subagents—but to announce and attempt to maintain minimum selling prices among the producers who were associated as shareholders in Appalachian Coals. The agency also sought to inaugurate a form of production control by apportioning the available orders among the shareholders. The entire undertaking was halted at once by an injunction of the District Court of the United States for the Western District of Virginia. On appeal, the decision was reversed by the Supreme Court, which held, on March 13, 1933, that the Sherman Antitrust Act does not preclude persons from making "an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce."⁵ It observed that there was "no intent or power to fix prices; abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."⁶ The Court held that serious consequences need not result from the contemplated reduction in competition among the shareholders. The Court left the way open, however, for a reconsideration of the problem if in actual operation Appalachian Coals should come to obstruct fair competitive opportunities and unduly restrain interstate commerce.⁷

Although Appalachian Coals, Inc., began, on the basis of this decision, to operate several months before the National Recovery Administration Coal Code was established, it functioned largely under the NRA and, somewhat later, under the Coal Act of 1937.

⁴ *Coal*, Hearings before U.S. House Committee on Interstate and Foreign Commerce, 69th Cong., 1st sess., March 30-May 14, 1926. On the first day of the hearings Mr. Treadway of Massachusetts, the author of several coal bills, quoted an adage that applies with singular aptness to subsequent efforts at coal legislation, "If at first you don't succeed, try, try again."

⁵ *Appalachian Coals, Inc. et al. v. United States* (1933), 288 U.S. 344, p. 372.

⁶ *Ibid.*, p. 375.

⁷ *Ibid.*, p. 378.

TABLE 2
Outline of Bituminous Coal Legislative Proposals and Legislation, 1928-1937

	<i>Watson Bill^a</i>	<i>Lewis Bill^b</i>	<i>NRA Coal Code^c</i>	<i>S. 1417^d</i> <i>H.R. 4661</i>
Organization	Bituminous Coal Commission of 5 members appointed by President	Coal Commission (in Interior Department) of 5 members appointed by President Under it a Coal Operators National Council elected by Operators' Boards of the districts	National Bituminous Coal Industrial Board Under it 5 divisional code authorities, one in each of 5 geographical areas	National Bituminous Coal Commission (in Interior Department) of 5 members appointed by President Under it a National Coal Producers Board appointed by 24 district boards
Minimum Prices	To be set by marketing pools of producers engaged in interstate commerce and licensed by Commission	To be set by Operators' Boards in districts, based on district cost, plus 25 cents profit per ton, for bituminous coal, subject to review by Council	To be established by marketing agency representing % of area tonnage, subject to Code Authority approval; no cost basis	In each district to equal average cost of producing coal in that district, as determined by Commission (excluding depreciation and depletion)
Maximum Prices	Table proposed by pools, fixed by Commission	To be set by Commission, when such prices are needed		To be set by district boards, subject to Commission approval
Unfair Practices			Twelve specified commercial practices prohibited	

TABLE 2 (continued)

	<i>H.R. 8479e</i>	<i>Act of 1935f</i>	<i>S. 4668g</i> <i>H.R. 12800</i>	<i>Act of 1937h</i>
Organization	National Bituminous Coal Commission (in Interior Department) of 9 members appointed by President	National Bituminous Coal Commission (in Interior Department) of 5 members appointed by President	National Bituminous Coal Commission (in Interior Department) of 7 members appointed by President	(No change)
Minimum Prices	22 District boards To be established by district boards subject to approval by Commission	23 District boards (No change)	Reports to be made to Secretary of the Interior for transmission to Congress (No change) To be proposed and coordinated by district boards and established by Commission (No change)	Reports to be made directly to Congress (No change) (No change)
Maximum Prices	Based on costs in Minimum Price Areas To be set at a uniform amount above minima when deemed necessary by Commission	(No change)	(No change)	(No change)
Unfair Practices	(Same as under NRA Code)	(No change)	(No change)	Thirteen specified commercial practices prohibited
Consumers' Counsel		Appointed by President	(No change)	(No change)

TABLE 2 (continued)

	<i>Watson Bills^a</i>	<i>Lewis Bill^b</i>	<i>NRA Coal Code^c</i>	<i>S. 1417^d</i> <i>H. R. 4661</i>
Production Control	New sidings must be approved by Commission	Quotas set by National Council		Quotas set by National Board
Coal Reserve		Mine quotas set by district Operators' Boards		Mine quotas set by district boards
Penalties	Fines Revocation of licenses	Fines Revocation of membership	Revocation of Code membership	\$300,000,000 to be appropriated to buy marginal mines Revocation of Code membership
Labor Provisions (See also Table 3)	Collective bargaining for primary licensees	Collective bargaining	Collective bargaining	Collective bargaining
		Full exposure to a tax of 20% on coal sales	Hours and wages stated in the code	Full exposure to a tax of 25% on coal sales
			Labor boards	Labor boards
			Hours and wages	Hours and wages

^a S. 4490, 70th Cong., 2d sess. (1928), and S. 2888, 71st Cong., 2d sess. (1930).

^b H. R. 9924, 72d Cong., 1st sess. (1932), revised versions: H. R. 12916, same session; H. R. 6040 and S. 1875, 73d Cong., 1st sess. (1933).

^c *Codes of Fair Competition*, National Recovery Administration, 1, 323 (Code) and 702 (Revision); ix, 665 (Amend. 1); x, 431 (Amend. 2); xi, 391 (Amend. 3); xviii, 509 (Amend. 4); xx, 175 (Amend. 5); xxi, 169 (Amend. 6); xxii, 147 and 267 (Amends. 7 and 8); (1933-1935).

^d Guffey-Snyder bill, 74th Cong., 1st sess. (1935); revised version S. 2481, same session.

TABLE 2 (concluded)

	H.R. 8479 ^e	Act of 1935 ^f	S. 4668 ^g H.R. 12800	Act of 1937 ^h
Coal Reserve	(No change)			
Penalties	(No change)	Revocation of Code membership	(No change in the bill as first drawn)	Revocation of Code membership
		Full exposure to a tax of 15% on coal sales		Exposure to a tax of 19½% on coal sales
Labor Provisions (See also Table 3)	Collective bargaining	(No change)	Statement that collective bargaining is public policy of United States	(No change)
	Labor boards	(No change)		Government agencies forbidden to buy coal not produced under collective bargaining
	Hours and wages	(No change)		

^e A further revision of d, same session.

^f A further revision of d (H. R. 9100) was enacted. (49 U.S. Stat. at L. [1935], 991)

^g 74th Cong., 2d sess. (1935).

^h Introduced as S. 1 and H. R. 4985, 75th Cong., 1st sess. (1937) and enacted. (50 U.S. Stat. at L. [1937], 72)

Whether it would have achieved its aims in other circumstances it is not possible to say.

3. LEGISLATIVE PROPOSALS, 1928-1933

In May 1928 Senator James E. Watson, of Indiana, introduced a bill, the principal elements of which were the proposals for stabilizing the industry with the aid of marketing pools of producers.⁸ (See the first column of Table 2.) The idea of licensing producers engaged in interstate commerce, which had been advanced by the Coal Commission, was made a basic part of the plan. The bill also borrowed from the same source the suggestion that the total number of mines shipping coal by rail should be brought under public control to forestall further overdevelopment of the industry.⁹ Bills bearing the same title were introduced in the House on May 18 by Mr. Rathbone (H.R. 13880) and on December 3 by Mr. Casey (H.R. 14453). Hearings were held on the Watson bill¹⁰ but no further action was taken. Senator Watson introduced S. 2888 in the second session of the 71st Congress on January 6, 1930, but met with no success.

On January 12, 1932, a bill known as S. 2935 and H.R. 7536 was introduced by Senator James J. Davis, of Pennsylvania, and Representative Clyde Kelly, of Pennsylvania. This proposal was similar to the Watson bill; the only notable departures lay in substituting for the maximum price provision a clause directing the Commission to "hear complaints from any person, firm or corporation as to the reasonableness of the price schedules approved by it," and in abolishing the distinction between primary and secondary licensees with regard to certain labor provisions. Extensive hearings

⁸ About three months earlier, a Joint Resolution had been introduced for an investigation of conditions in the coal fields of central and western Pennsylvania, West Virginia, and Ohio. Pursuant to this resolution, hearings were held by the Committee on Interstate Commerce under the chairmanship of Senator Watson between February 10 and May 17, 1928. (*Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio*, Hearings on S. Res. 105, U.S. Senate Committee on Interstate Commerce, 70th Cong., 1st sess., February 10-May 17, 1928.)

⁹ *Report of the United States Coal Commission, 1925, Part I, p. 268.* "It is by means of the granting and withholding of transportation service through supervision that an equilibrium can be established between demand and output. The Interstate Commerce Commission under the existing law already has the responsibility for authorizing a railroad to put in sidings and to furnish cars and transportation."

¹⁰ *Bituminous Coal Commission, Hearings on S. 4490, U.S. Senate Committee on Interstate Commerce, 70th Cong., 2d sess., December 14 and 17, 1928 and January 14-19, 21, and 23, 1929.*

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were held on the Davis-Kelly bill,¹¹ but it did not progress beyond the Committee.

On February 29, 1932, Representative David J. Lewis of Maryland introduced H.R. 9924, which had been modeled on the British Coal Mines Act of 1930. The Lewis bill provided for a Coal Commission of Presidential appointees and, under it, a Coal Operators' National Council of about 50 members elected by the Operators' Boards in the districts. In each of the 30 districts (27 bituminous and 3 anthracite) the Operators' Board, elected by the mine operators, was to be responsible for determining mine quotas within the district quota handed down to it, and for fixing minimum prices—on a specified cost basis—subject to review by the Council. Each Operators' Board was to create a Sales Agency to handle the entire output of the district, except "captive" coal.¹² As revised (H.R. 12916), this bill was introduced later in the session, on July 6, 1932. Nearly a year later, on June 10, in the first session of the 73d Congress, a further revision was introduced as H.R. 6040 by Representative Lewis and S. 1875 by Senator Hayden of Arizona. By this time, however, the NRA had entered the scene, and these bills received no consideration.

4. BITUMINOUS COAL CODE

On September 18, 1933, President Roosevelt approved the Code of Fair Competition for the Bituminous Coal Industry. Under the NRA Administrator (as ex-officio chairman) was placed the National Bituminous Coal Industrial Board of fourteen to seventeen members that was to meet at the call of the Administrator to make recommendations to the Divisional Code Authorities and to the President, and for other purposes.¹³ The five Divisional Code Authorities were composed of men chosen by coal operators' committees that were "truly representative of the industry therein"; an additional member was appointed to each of these Authorities by the President of the United States. Subject to the approval of the Code Authorities, the producers' voluntary associations—called "marketing agencies"—representing at least two-thirds of the com-

¹¹ *To Create a Bituminous Coal Commission*, Hearings on S. 2935, U.S. Senate subcommittee of the Committee on Mines and Mining, 72d Cong., 1st sess., March-June 1932.

¹² *Ibid.*, Part I, pp. 209-47.

¹³ Four were named by the Code Authority of Division I, two by that of Division II, and one each by Divisions III, IV, and V. Five were the "presidential members" of the Divisions, and an additional three could be named by the President.

mercial tonnage in each area, determined "fair market prices" which were, in effect, minimum prices for coal.¹⁴ No provision was made in the Code for maximum prices, and no direct production control was contemplated. Twelve unfair commercial practices (secret rebates, intentional misrepresentation of coal offered for sale, special treatment of some customers, etc.) were listed, and were prohibited to code members.

Collective bargaining was guaranteed in the Code, and specified minimum wages and maximum hours were set forth.¹⁵ In each Division a Bituminous Coal Labor Board was set up and, at the call of the Administrator, the National Bituminous Coal Labor Board could be convened. Violation of any of the provisions of the Code subjected the violator to deprivation of Code membership.¹⁶

Under the Code the United Mine Workers of America quickly rose to a position of power in the industry. The administration of minimum prices was a task rendered difficult at the outset by the vagueness of the Code provisions regarding them,¹⁷ and aggravated by the necessity of coordinating the work of largely autonomous Divisional Code Authorities. At the close of 1934, violations of the minimum price structure were occurring widely and frequently, and by the early months of 1935 the structure had all but collapsed. The decision of the Supreme Court in the Schechter Case,

¹⁴ In areas where there were no marketing agencies the fair prices were to be established by the Code Authorities.

¹⁵ Maximum hours of labor were set at 40 for each calendar week, and at 8 for any day. Minimum rates of pay were set forth in two columns of a schedule attached to the Code, one column applying to "inside skilled labor" and the other to "outside common labor." Minimum rates of pay were stated in both daily and hourly terms. They varied between districts (or parts of districts) and ranged from \$3.40 to \$5.63 for inside skilled labor, and from \$2.40 to \$4.82 for outside common labor. It was provided that the foregoing could be changed at a conference of representatives of employers and employees operating under the Code, together with representatives of the National Recovery Administration, scheduled to meet on January 5, 1934.

¹⁶ *Codes of Fair Competition*, National Recovery Administration, I, 323 (Code) and 702 (Revision); IX, 665 (Amend. 1); X, 431 (Amend. 2); XI, 391 (Amend. 3); XVIII, 509 (Amend. 4); XX, 175 (Amend. 5); XXI, 169 (Amend. 6); XXII, 147 and 267 (Amends. 7 and 8).

¹⁷ On January 25, 1935, further guidance was offered in Amendment No. 6 (*ibid.*, XXI, 173) which stated that price-fixing bodies must take into consideration employment opportunities, minimum wage rates, competition with other coals and fuels, and the "customs, requirements and needs" of coal buyers and consumers. In carrying out these duties the marketing agencies and Code Authorities were instructed to "classify all coals, applying all factors usually considered in connection with physical structure and chemical analysis and their effect upon the salability and use value of such coals. . . ." No reference was made to costs of producing coal.

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on May 27, 1935, invalidated the National Industrial Recovery Act,¹⁸ and so the operation of the first general program for controlling the bituminous coal industry came to an end.

5. LEGISLATIVE PROPOSALS CULMINATING IN BITUMINOUS COAL CONSERVATION ACT OF 1935

Legislation to replace the NRA coal code was proposed early in 1935, when the original Guffey-Snyder bill (S. 1417, H.R. 4661) was introduced in the first session of the 74th Congress, on January 24th.¹⁹ The major provisions were as follows:

There was to be set up, in the Department of the Interior, a National Bituminous Coal Commission, of five members appointed by the President, by and with the advice and consent of the Senate.

There was to be a National Coal Producers' Board, appointed by the 24 district boards of the bituminous coal industry.

A single minimum price was to be established for each district by the Commission. This price was to be an f.o.b. mine price equal to the average cost of production of all mines in each district (exclusive of depreciation and depletion), as determined by the Commission.

When necessary, maximum prices could be established by the district boards, subject to the approval of the Commission.

Price control was to be supplemented by production control. The National Coal Producers' Board would establish quotas for the districts. Each district board would then assign quotas to the mines of the district.

A sum of \$300,000,000 was to be appropriated, under this bill, for the purpose of buying marginal coal mines and generally holding them out of operation.

Operators who failed to abide by the Code could be deprived of code membership. Without such membership they would have to pay the full amount of a 25 per cent tax on every ton of coal that they sold.

Collective bargaining was guaranteed to the coal miners. Also they could refuse to join a company-dominated union, and could assemble peaceably to hear unionism discussed. They could not be required to live in company-owned houses or to trade at company-

¹⁸ *Schechter Corporation v. United States* (1935), 295 U.S. 495.

¹⁹ This bill was obviously indebted to the old Lewis and Hayden proposals of 1932 and 1933. Senator Hayden and Representative Lewis thereupon returned the compliment by borrowing the "coal reserve" idea from the Guffey-Snyder bill and introducing their new plan (S. 1922 and H.R. 5856) on February 18, 1935.

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owned stores. They were to have the right to select their check-weighman. Bituminous Coal Labor Boards were to be established. Maximum hours and minimum wages agreed to by certain parts and proportions of the industry were to be binding upon other parts and proportions of the industry. (See Table 3, note c.)

Hearings were held in February and March,²⁰ and the bill then went to the Committee on Interstate Commerce, whence it emerged under the designation S. 2481.²¹ A further revision (see the fifth column of Table 2), identified as H.R. 8479, was the subject of hearings in June.²² The chief revisions provided for 22 district boards, required that the Commission approve the minimum prices proposed by the boards, provided that maximum prices be set at uniform distances above the minimum, declared 12 specific commercial practices to be unfair under the Code, and modified the procedures for establishing maximum hours and minimum wages (see Table 3, note e). In this bill numerous minimum prices, rather than one, were to be established for each district. They were now to be based on the weighted average cost of a "minimum price area," which was not necessarily close to the average cost of any given district; it was now required that the minimum prices should *yield a return* for a minimum price area approximately equal to the weighted average cost of that area.

A still further revision (H.R. 9100) was introduced in the House on August 13 and passed six days later.²³ After amendment it was passed by the Senate on the 22d. A conference report on the bill was passed the next day.²⁴ The bill was signed by President Roosevelt on August 30, 1935.²⁵ The Bituminous Coal Act of 1935 provided for a National Bituminous Coal Commission in the Interior Department, 23 district boards in the industry, minimum and (when necessary) maximum prices, a Counsel to protect the con-

²⁰ *Stabilization of the Bituminous Coal Mining Industry*, Hearings on S. 1417, U.S. Senate subcommittee of the Committee on Interstate Commerce, 74th Cong., 1st sess., February and March 1935.

²¹ *To Stabilize the Bituminous-Coal-Mining Industry*, U.S. 74th Cong., 1st sess., S. Report No. 470 to accompany S. 2481 (1935).

²² *Stabilization of the Bituminous Coal Mining Industry*, Hearings on H.R. 8479, U.S. House subcommittee of the Committee on Ways and Means, 74th Cong., 1st sess., June 17-21 and 25-28, 1935.

²³ *Bituminous Coal Conservation Bill of 1935*, U.S. 74th Cong., 1st sess., H. Report No. 1800 to accompany H.R. 9100 (1935).

²⁴ *To Stabilize the Bituminous-Coal-Mining Industry*, U.S. 74th Cong., 1st sess., S. Report No. 1895 to accompany H.R. 9100 (1935).

²⁵ 49 U.S. Stat. at L. (1935), 991.

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sumers of coal, penalties for violations of the Code, and the same labor provisions as those in H.R. 8479.

The Act resembled the earlier Guffey bills in many respects, but exhibited several modifications:

- The National Coal Producers' Board was eliminated.
- The cost of producing coal in specified "minimum price areas" replaced the cost of producing coal in the districts (S. 1417) as the basis for setting minimum prices, and numerous minimum prices were to be established in each district.
- Maximum prices were to be raised uniformly above established minimum prices, thus limiting the action of the Commission in determining such prices.
- Twelve commercial practices (first set forth under the NRA Code) were designated as "unfair."
- The office of the Consumers' Counsel was created.
- The quota provisions were eliminated.
- The Coal Reserve program was abandoned.
- The tax on sales outside the Code was reduced from 25 per cent to 15 per cent.

The National Bituminous Coal Commission was appointed and started to carry out its duties under the Act. Almost immediately, however, the program was contested in the courts, at first by the President of the Carter Coal Company and then by many others. On May 18, 1936, the Supreme Court held²⁶ that the labor provisions of the Act were constitutionally invalid, and expressed the opinion that the price-fixing provisions were so closely related to the labor provisions that they must fall as well. The Coal Act of 1935 thus became invalid before the Coal Commission had begun to operate fully.

6. BITUMINOUS COAL ACT OF 1937

In spite of the Supreme Court's doubt, expressed in the Carter decision, whether the price-fixing provisions "if separately enacted, could be sustained," Senator Guffey introduced, two days later, a new bill (S. 4668 and H.R. 12800, 74th Cong., 2d sess.) which largely reproduced the Act of 1935 except for the labor provisions that had been declared invalid. Another important change related to the locus of minimum-price-fixing responsibility: formerly, the Commission merely expressed its approval or disapproval; under

²⁶ *Carter v. Carter Coal Company* (1936), 298 U.S. 238.

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Notes to Table 3

x Designated provision included in proposal or law.

^a *Primary licenses* were to be issued to persons, firms, and corporations engaged in the production of and interstate or foreign commerce in bituminous coal. Such licenses were intended to permit the formation of marketing pools and cooperative selling associations for the purpose of agreeing on the market prices of their coals. Such persons, firms, and corporations were to be required to accept all the provisions set forth in the bill. *Secondary licenses* were to be granted by the commission to corporations engaged in the mining or shipping of bituminous coal in interstate or foreign commerce that did not wish to accept all the provisions of the bill. Secondary licenses were to be granted only on the condition that the corporations applying for them should agree to abide by certain specified labor provisions of the bill.

^b "It is hereby declared to be the public policy of the United States that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint or coercion of employers, or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and that no employee and no one seeking employment shall be required as a condition of employment to join any company union. . . ." The Act of 1937 contains substantially the same provisions. It was also provided, in the Act of 1937, that "No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or agency thereof, produced at any mine where the producer has failed at the time of the production of such coal to accord to his or its employees the rights set forth" above.

^c ". . . employees shall be free to terminate their employment and join a labor union at will, and no contract of employment which is intended to impair this right shall be lawful."

^d "Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than one-half the annual national tonnage and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the Code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts between representatives of producers of the majority of its annual tonnage production and representatives of the majority of the mine workers therein belonging to a recognized national association of mine workers, shall be filed with the Labor Board and shall be accepted as the minimum wages for all such classifications of labor by Code members operating in such district or group of districts."

^e This provision is the same as that proposed in note d, except that *two-thirds* is substituted for *one-half* with regard to tonnage. The period during which these relationships are to be measured is the "preceding calendar year."

^f Applies only to sales of coal to United States agencies.

Source: For the legislative references, see the notes to Table 2.

the new bill the District Boards simply *proposed* and *coordinated* the minimum prices and the Commission then *established* them.²⁷

²⁷ Under the sixth heading in the majority opinion in the Carter case the Supreme Court made the following comments upon the labor provisions: "the difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may

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Hearings were held on the bill in May²⁸ and in June.²⁹ Both committees reported the bill favorably. The House passed it, but in the Senate a threatened filibuster prevented action at the end of the session.

The bill was introduced in the first session of the 75th Congress, on January 6, under the designations S.1 and H.R. 4985. It was recommended by the Committee on Ways and Means.³⁰ Hearings were held in March,³¹ and the bill passed in the House. The bill went to the Committee on Interstate Commerce which recommended its passage.³² On April 5 the Senate passed the bill, and within a week the conference report was issued.³³ The Bituminous Coal Act of 1937 was approved by the President on April 26, 1937.³⁴

B. Trend of Congressional Thinking as Reflected in Legislative Proposals and Laws Seeking to Stabilize the Industry

It may be of interest to trace the topical threads that run through Table 2 for the evolution of Congressional thinking on the basic approach to be followed in stabilizing this problem-ridden industry.

1. ORGANIZATIONAL STRUCTURE

Early legislative proposals offered a rather simple organizational structure by which regulation was to be achieved. Most of the work evidently was to be accomplished by marketing pools, and that which could not be so handled was to be lodged with a Bituminous

not be intrusted with the power to regulate the business of another, and especially of a competitor." It denounced the arrangement as a clearly arbitrary delegation of a governmental function. Although applied to the labor provisions in the Carter case, it might easily have been applied to price-fixing provisions such as those in the Act of 1935. (*Carter v. Carter Coal Company* [1936], 298 U.S. 238.)

²⁸ *Bituminous Coal Act of 1936*, U.S. 74th Cong., 2d sess., H. Report No. 2832 to accompany H.R. 12800 (1936).

²⁹ *To Regulate Interstate Commerce in Bituminous Coal*, Hearings on S. 4668, U.S. Senate Committee on Interstate Commerce, 74th Cong., 2d sess., June 3, 12, and 13, 1936. See also *Bituminous Coal Act of 1936*, 74th Cong., 2d sess., S. Report No. 2370 to accompany S. 4668 (1936).

³⁰ *Bituminous Coal Act of 1937*, U.S. 75th Cong., 1st sess., H. Report No. 294 to accompany H.R. 4985 (1937).

³¹ *To Regulate Interstate Commerce in Bituminous Coal*, Hearings on S. 1, U.S. Senate subcommittee of the Committee on Interstate Commerce, 75th Cong., 1st sess., March 1, 2, 8, and 15, 1937.

³² *Bituminous Coal Act of 1937*, U.S. 75th Cong., 1st sess., S. Report No. 252 to accompany H.R. 4985 (1937).

³³ *Regulating Interstate Commerce in Bituminous Coal*, U.S. 75th Cong., 1st sess., H. Report No. 578 to accompany H.R. 4985 (1937).

³⁴ 50 U.S. Stat. at L. (1937), 72.

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Coal Commission. At the second stage, the Lewis bill proposed a much stronger and more realistic structure consisting of district boards and a national council of coal operators. The fragmentation of control, represented by the five Divisional Code Authorities, constituted a serious weakness in the NRA code.³⁵ The first Guffey bill resembled the Lewis bill very closely. Subsequent revisions of the Guffey bill, however, omitted the National Coal Producers' Board, probably because, with the dropping of production control, such a Board became superfluous.

The Interior Department has been the location proposed for a Coal Commission from the time of the Lewis bill onward, except under the NRA. This arrangement was unique: "No other independent regulatory commission was thus located inside one of the regular executive departments."³⁶ Yet the Department had no administrative control over the Commission. The Secretary of the Interior was to receive the Commission's annual report and transmit it to Congress (S. 4668), but under the Act of 1937 he was deprived of that responsibility. Secretary Ickes asserted in 1938, "I do not know of anything going on in the Coal Commission, except what I read in the newspapers."³⁷

2. DETERMINATION OF MINIMUM PRICES

Under the Watson bill prices were to be set by marketing pools. The Lewis bill not only provided Operators' Boards to perform this task but specified the cost formula to be used in arriving at minimum prices. The NRA Code failed to provide a cost basis or, indeed, until Amendment No. 6 was issued, any meaningful procedural guidance. The first Guffey bill restored a cost basis to minimum-price fixing and kept it wholly within a district framework. The second and subsequent Guffey bills introduced the flexibility that inheres in using the cost in a group of districts called a "minimum price area," and permitted more than one minimum price to be established within a district.

3. PROTECTION OF CONSUMERS

How were consumers of coal to be protected? The Davis-Kelly

³⁵ These five Authorities were so nearly autonomous that a National Coal Board of Arbitration eventually had to be set up (by Amendment No. 6, January 25, 1935) to settle administrative disputes arising between Divisional Code Authorities or their Subdivisions.

³⁶ Robert E. Cushman, *The Independent Regulatory Commissions* (Oxford University Press, 1941), p. 379.

³⁷ Quoted in Cushman, *op.cit.*, p. 380.

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bill provided that the Commission was to hear complaints as to the reasonableness of the prices fixed. The NRA Code made no reference to the question. All other bills provided for the setting of maximum prices when necessary, either by marketing pools (Watson bill) or the district boards (S. 1417) subject to the approval of the Commission, or (beginning with H.R. 8479) by the Commission itself.

Consumers and producers of coal were protected from twelve unfair commercial practices under the NRA Code and, beginning with H.R. 8479, thereafter. A thirteenth prohibition was added on April 9, 1937.³⁸

An additional protection for consumers was included in the Act of 1935 and subsequent bills. This was the appointment of a Consumers' Counsel, who was given broad powers to represent the consuming public in all proceedings before the National Bituminous Coal Commission, and to get from the Commission any information in its possession or obtainable by investigation.

4. REGULATION OF MINING CAPACITY

Because of the generally held opinion that the bituminous coal industry was overdeveloped, it was to be expected that Congress would concern itself with measures (a) to prevent further overdevelopment, and (b) to close high-cost mines. The U.S. Coal Commission of 1922 offered an answer to the first part of this problem. It would require new mines to get the approval of the Interstate Commerce Commission before making any railroad connections. This suggestion was adopted in the Watson bill which called for the approval of such connections by the Bituminous Coal Commission before permission could be granted by the ICC. The provision was continued in the Davis-Kelly bill, but was omitted from all subsequent plans. The same result was obtainable, however, under the quota plan that was advanced in the Lewis bill and in S. 1417. Under these bills a new mine not considered necessary presumably could be denied a production quota.

The second part of the question received consideration in the early Guffey bills, S. 1417 and H.R. 8479. A Bituminous Coal

³⁸ *Regulating Interstate Commerce in Bituminous Coal*, U.S. 75th Cong., 1st sess., H. Report No. 578 to accompany H.R. 4985 (1937), p. 7. This forbids the employment of any person or the appointment of any sales agent, at a compensation obviously disproportionate to the ordinary value of the service or services rendered, and whose employment or appointment is made with the primary intention and purpose of securing preferment with a purchaser or purchasers of coal.

Reserve was to be created, and the Secretary of the Interior was authorized (after approval by the Commission) "to purchase or acquire by condemnation proceedings, in the several States, coal mines, coal properties, coal lands, mining rights, lease-holds, royalties, and any interest in coal and lands containing bituminous coal deposits suitable for mining. . . ." In each case the Commission was to advise the Secretary of the Interior, and this advice was to be based upon considerations of conservation, employment opportunities, cost of coal to the consumer, fair competitive relations, and elimination of overcapacity for coal production in the industry. No coal mining was to be permitted in the acquired lands except upon order of the Commission (after hearing and finding that the operation was in the public interest) or, in time of war, by the President. This plan did not appear in any subsequent bills.

The quota arrangements in the Lewis bill and in S. 1417 were, however, only incidentally concerned with the question whether the industry was to be prevented from further overdevelopment. The chief purpose of these arrangements was to supplement and facilitate the stabilizing efforts involved in minimum price fixing. In later bills the whole burden was borne by the minimum-price provisions alone.³⁹

5. PENALTIES FOR VIOLATIONS

Framers of coal legislation have been unanimous in providing penalties, of one sort or another, for violations of the prescribed code. The Lewis bill introduced the arrangement whereby a large tax was imposed (20 per cent) and a drawback was allowed to producers complying with the code (99 per cent of the tax). The NRA Code had no provision of that kind: violators were simply dropped from code membership and were thus denied the privilege of operating under the Blue Eagle. The earliest Guffey bill adopted the tax idea advanced in the Lewis bill, but changed the tax to 25 per cent, and reduced the drawback to 90 per cent. The next version, H.R. 8479, raised the drawback to 99 per cent. The 1935

³⁹ It should be noted, perhaps, that an unofficial "form of tonnage allocation" actually operated under the NRA, in some of the subdivisions of Division I, between July 12, 1934 and the end of the year. This tonnage arrangement, called the "Adams Plan," was used as an adjunct to price fixing: if tonnage percentages changed under a schedule of prices, it was taken as an indication that the prices should be revised. (See F. E. Berquist and Associates, *Economic Survey of the Bituminous Coal Industry under Free Competition and Code Regulation* [National Recovery Administration, March 1936], pp. 524-25.)

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Act retained this device, but lowered the tax to 15 per cent and the drawback to 90 per cent. This arrangement was continued in the first draft of S. 4668, but the Senate Committee on Interstate Commerce struck it out and substituted two taxes: a tax of 1½ per cent on *all* coal sold in interstate commerce, and a tax of 13½ per cent on coal sold in interstate commerce by producers who were not members of the code.⁴⁰ The Act of 1937 changed the smaller tax to 1 cent a ton, and the larger to 19½ per cent of the value of coal sales by noncode members.

6. LABOR PROVISIONS

It will be seen in Table 2 that the right to bargain collectively has been prescribed from the beginning. Under the NRA and in the first three Guffey bills Labor Boards were provided. Maximum hours and minimum wages were introduced by the NRA Code, and the first three Guffey bills attempted to write a formula for establishing such maxima and minima. It was this latter attempt that brought forth the condemnation by the Supreme Court in the Carter case.⁴¹ After the Carter decision the succeeding drafts of the Guffey bills omitted nearly all efforts to prescribe labor relationships in the industry and contained only a statement that collective bargaining and protection against company-dominated unions represent the public policy of the United States. In the Act of 1937 an additional provision prevented the purchase of coal by United States agencies from producers who did not accept the Code.

Table 3 will permit the reader to trace, in greater detail, the labor provisions that have been incorporated in the successive bills. It should be recalled, of course, that most of the protective clauses shown here did not continue after 1936. This omission may be attributed in part to the passage of the Wagner Act, in part to the invalidation of the Guffey Act of 1935 because of its labor provisions, and in part to the fact that the United Mine Workers had by that time gained so much strength that legislative protection of this sort appeared to be unnecessary.

⁴⁰ *Bituminous Coal Act of 1936*, 74th Cong., 2d sess., S. Report No. 2370 to accompany S. 4668 (1936), pp. 1, 2, and 5.

⁴¹ "The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority. . . . This is legislative delegation in its most obnoxious form. . . ." (*Carter v. Carter Coal Company*, [1936], 298 U.S. 238.)