INDEX

295-123—68——1

CITATIONS

Cases:

Cases—Continued

Constitution and Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL., APPELLANTS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinions of the three-judge district court (App. 1a) are reported at 269 F. Supp. 826.

JURISDICTION

This action to enjoin the enforcement of the Fair Labor Standards Act, 29 U.S.C. 201, on the grounds that the provisions of the Act extending its coverage to State employees are unconstitutional, was heard by a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2284. That court denied all injunctive relief and dismissed the action on June 26, 1967 (App. 51a).

Notice of appeal to this Court was filed on August 24, 1967, and probable jurisdiction was noted on Jan-

uary 15, 1968 (389 U.S. 1031). The jurisdiction of the Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether a schedule of minimum wages and maximum hours prescribed by Congress in the 1966 Amendments to the Fair Labor Standards Act may be consitutionally applied to employees of the States (or political subdivisions) engaged in the operation of hospitals, schools and related institutions.

STATUTES INVOLVED

The relevant provisions of the Constitution and of the Fair Labor Standards Act are set forth in the Appendix to this Brief, infra, pp. 35–46.

STATEMENT

The Fair Labor Standards Act, as originally enacted in 1938, required employers covered by the Act to pay those of their employees who were engaged in commerce or in the production of goods for commerce a minimum wage, as well as one and one-half times their normal rate of pay for hours worked in excess of 40 hours per week. 29 U.S.C. (1940 ed.) 206(a), 207(a). The States and their political subdivisions were excluded from the Act's coverage. 29 U.S.C. (1940 ed.) 203(d).

In 1961 Congress extended the coverage of the Act beyond employees personally engaged in commerce or in the production of goods for commerce, to all the employees of certain "enterprises" which had some employees so engaged. Pub. L. 87–30, 75 Stat. 65; 29 U.S.C. (1964 ed.) 203(r), 203(s), 206(b), 207(a)(2).

The States and their political subdivisions remained among the employers excluded from the Act's coverage, 29 U.S.C. (1964 ed.) 203(d).

In the 1966 Amendments to the Act, Pub. L. 89–601, 80 Stat. 830, Congress extended the Act's coverage to enterprises operating "a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education," 29 U.S.C. (1964 ed., Supp. II) 203(s)(4), and also amended the definition of covered employers to include the States and their political subdivisions with respect to employees employed in such institutions, 29 U.S.C. (1964 ed., Supp. II) 203(d). Thus, for the first time, the minimum wage and overtime provisions of the Act were made applicable to the States and their political subdivisions. The relevant schedules are as follows:

Effective Date	*Minimum Wages*	*Maximum Hours* [1]
Feb. 1, 1967	$1.00 per hour	44 hours
Feb. 1, 1968	$1.15 per hour	42 hours
Feb. 1, 1969	$1.30 per hour	40 hours
Feb. 1, 1970	$1.45 per hour	40 hours
Feb. 1, 1971	$1.60 per hour	40 hours

The State of Maryland, subsequently joined by twenty-seven other States and one school district, brought this action to enjoin, as unconstitutional, enforcement of the Act insofar as it applied to the oper-

[1] The Maximum Hours specified are per workweek. Overtime, at the rate of time and one-half, must be paid under the Act for work each week in excess of those maximum hours. 29 U.S.C. 207(a)(2).

295–123—68——2

ation of public hospitals, schools and similar institutions.[2] On the basis of stipulated facts, a three-judge district court dismissed the action. 269 F. Supp. 826 (D. Md.). Each judge, however, wrote a separate opinion. Judge Winter concluded that the application of both the minimum wage and the overtime provisions of the Act to the States and their political subvisions was constitutional. Judge Thomsen joined Judge Winter in upholding the minimum wage provisions, in denying all injunctive relief and in ordering the action dismissed; but he expressed the view that the "denial of relief in this case should be without prejudice" to the right of the States to assert "in future cases" that the overtime provisions of the Act unduly interfered with indispensable state functions.[3] Judge Northrop dissented. 269 F. Supp. at 852, App. 45a.

ARGUMENT

INTRODUCTION AND SUMMARY

The Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, was first enacted in 1938 (52 Stat. 1060) as a

[2] While the 1966 Amendments also extended the minimum wage and overtime coverage to State employees engaged in the operation of various transportation facilities such as railways, buses and trolleys, appellants do not challenge that aspect of the Act.

[3] Judge Thomsen's view requires that the "extent of the interference with an indispensable state function," alleged by appellants to be brought about by application of the Act's overtime provisions, be balanced against the "effect, if any, which the State's overtime practices have on interstate commerce." In his view, this balancing could be properly done only in "future cases presenting specific situations" concerning those overtime practices. 269 F. Supp. at 852, App. 36a, 44a–45a.

result of Congressional findings, set forth in Section 2(a) of the Act, that:

> the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

As part of the comprehensive legislative plan to eliminate harmful labor conditions and their effects, the Act requires that covered employers pay to their employees at least a minimum wage for all hours worked and a premium for all hours worked in excess of maximum limitations.

The original Act was upheld as a valid regulation of commerce in *United States* v. *Darby,* 312 U.S. 100. We submit that the extension of the Act's coverage to employees of State operated schools and hospitals is also constitutional.

The facts of record in this case clearly establish that Congress could reasonably have determined that the operation of schools and hospitals has a substantial impact on interstate commerce. The stipulated

facts show that in one year over 38 billion dollars is spent in the operation of public educational institutions and 3.9 billion dollars is spent for operating public hospitals. In almost all cases, major portions of the supplies purchased for these institutions move in interstate commerce. Congress was, no doubt, aware of the increase in the number of strikes by public employees which have occurred in recent years. Thus Congress could reasonably have concluded that it was appropriate to regulate wages and hours of employees of these institutions to prevent labor disputes which could affect the flow of goods in commerce. In addition, in determining to extend the Act's coverage to schools and hospitals it was not inappropriate for Congress to conclude that it would be unfair to extend the Act's coverage to private schools and hospitals but not to similar public institutions.

There is no adequate basis for appellants' contention that considerations of federalism prohibit Congress from extending the coverage of the Act to State employees. This Court has consistently held that "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution", and that considerations of state sovereignty afford "no * * * limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." *United States* v. *California,* 297 U.S. 175, 184–185. Nothing in the decided cases, or in the history of the adoption of either the Commerce Clause or the Tenth Amendment, supports the view that the States are

in any way immune from regulations adopted by Congress to regulate commerce.

Nor was it unconstitutional for Congress to extend the minimum wage and overtime provisions of the Act to all employees of an enterprise which has some employees engaged in commerce or in the production of goods for commerce. It was not unreasonable for Congress to conclude that labor unrest among those employees whose jobs do not directly affect commerce could have a substantial impact on the work of those employees whose work does directly affect commerce. Thus, in order to insure that commerce was not disrupted, it was appropriate for Congress to extend the Act's coverage to all the employees of such an enterprise.

Appellants' contention that the Eleventh Amendment renders the 1966 Amendments unconstitutional is patently without merit. The argument wholly ignores the fact that in addition to authorizing suit by the individual employee, the Act authorizes the Secretary of Labor, who speaks for the United States, to bring an action to enjoin violations, and also to recover back pay due employees. Thus, even if the Eleventh Amendment precluded suit by the individual employee, it could still be enforced against the States through suit brought for the United States by the Secretary of Labor. See *United States* v. *Texas,* 143 U.S. 621.

Finally, appellants' claim that the Act by its own terms is not applicable to hospital and school employees because these institutions are the ultimate consumers of the goods which they purchase, is both

factually and legally unsound. First, it does not appear that the appellants are the ultimate consumers of all of the supplies which they purchase. But even if they were the ultimate consumers, their employees would nonetheless be engaged in commerce or in the production of goods for commerce and would thus be within the Act's coverage under its plain language.

I. THE OPERATION OF STATE HOSPITALS, SCHOOLS AND RELATED INSTITUTIONS HAS A SUBSTANTIAL EFFECT UPON INTERSTATE COMMERCE, AND CONGRESSIONAL REGULATION OF THE WAGES AND HOURS OF EMPLOYEES OF SUCH INSTITUTIONS IS A VALID EXERCISE OF THE COMMERCE POWER

Appellants first contend that the attempt to extend the Act's coverage to State schools and hospitals is unconstitutional because the operation of these facilities does not have a sufficient effect on commerce to subject them to federal regulation under the commerce clause. They make two points: (1) that the legislative history of the Act does not establish a sufficient predicate for extending coverage to such institutions, and (2) that, in fact, the Act's regulation of the wages and hours of the employees of such institutions is not necessary to the protection of commerce.

Insofar as the complaint rests on an alleged inadequacy of legislative findings, it is plainly without merit. Since the amending statute merely extended the basic coverage of the original Act, it is not surprising that it contained no formal findings or statement of policy. As the committee report accompanying the new legislation expressly recognizes, "The bill seeks to implement the policy of the Act by * * * ex-

tending the benefits and protection of the Act to an estimated 7,243,000 workers engaged in commerce or in the production of goods for commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce * * *." H. Rep. No. 1366, 89th Cong., 2d Sess., p. 2. Moreover, the report recites the original congressional findings, emphasizing their continuing relevance. Two of them, especially, may be noticed: (1) that the practice of some employers of underpaying and overworking their employees constitutes an unfair method of competition in interstate commerce; and (2) that the existence of such conditions leads to labor disputes burdening and obstructing the free flow of goods in commerce. These findings are fully sufficient to sustain the challenged legislation.

It remains only to inquire whether the congressional assumption has been shown to have been unfounded in fact. Certainly, there can be no dispute about the impact of public school and hospital operations on interstate commerce. Judge Winter summarized the stipulations as follows, 269 F. Supp. at 833–834, App. 11a–12a:

> In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. * * *
>
> For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year 1965

represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases. With respect to seven other state hospitals which spent $875,000 on such items during the comparable period, the parties have stipulated that all or "the most part" of such items were manufactured outside of Maryland.

In Ohio, also stipulated to be typical of all of the plaintiff States, there are 708 school districts, 3 of which (stipulated to be typical of the other school districts) purchased a total of $323,000 in supplies in the fiscal year 1966. Approximately 50% of these purchases were directly from outside of the state. Ohio's six state universities spent $9 million on certain specified supplies in that year, over 42% of which were purchased directly from out-of-state, with an undetermined portion of the remainder being manufactured outside the state.

In Texas, all text books originate outside the state, and it is stipulated that "the major portion" of drugs and hospital equipment is either purchased directly from out of the state or is at least manufactured in other states.

The interstate flow of school and hospital supplies and equipment is, in large part, inevitable because of the nondiffusion of manufacturing supplies. For example, there are no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment. Even larger States, such as Ohio and Texas, have no producers, or very few pro-

ducers, of text books, science equipment and physical education equipment.

These facts alone suggest that the operation of schools and hospitals has a sufficient impact on interstate commerce to bring them within the power of Congress under the Commerce Clause.[4] For as this Court recognized in *Wickard* v. *Filburn,* 317 U.S. 111, 125, even though "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." See also, *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119; *United States* v. *Darby,* 312 U.S. 100, 119–120; *United States* v. *Ohio,* 385 U.S. 9. Appellants argue, however, that the regulation of minimum wages and hours is not necessary to the protection of commerce.

1. Despite the general congressional finding to the contrary, appellants assert that the wages and hours of covered employees of the public schools and hospitals will not affect the volume of interstate purchases made by the institutions because the commitments of the States to furnish the services involved is unre-

[4] The court below seemed to be in complete agreement on this point. Judge Winter concluded that, "[l]eaving aside for the moment the question of state sovereignty, * * * these activities are clearly within the power of Congress to regulate commerce." 269 F. Supp. at 834. Judge Thomsen agreed that "the operation of schools and hospitals by the several States and their subdivisions affects interstate commerce to a substantial degree, whether or not such operations themselves constitute interstate commerce." 269 F. Supp. at 847, App. 36a. Even Judge Northrop, in dissenting from the holding, did not question that the regulated activities of the States were, apart from state sovereignty, within the Congressional power to regulate commerce.

295–123—68——3

lated to employer-employee relations. That assumption does not bear scrutiny.

Congress must certainly have been aware of the increasing frequency of labor disputes and strikes of public employees. See University of California Institute of Governmental Studies, *Strikes by Public Employees, Professional Personnel, and Social Workers: A Bibliography.*[5] And it is common knowledge and experience that labor disputes and strikes, particularly those of long duration, have some effect on the continuation and extent of the services provided by public institutions, and a corresponding effect on the volume of their interstate purchases. Indeed, a strike of even a small group of employees often has an effect far beyond the withheld services of these employees, for other organized laborers, both within and without the employ of the affected employer, may support and respect the efforts of the strikers. Appellants stray from reality in their assertion that labor disputes involving their employees in these institutions and arising from low wages and excessive hours would have no effect upon their interstate purchases.

2. There is, moreover, an additional reason for extending coverage to public schools and hospitals. Con-

[5] In 1966, according to data collected by the Bureau of Labor Statistics on work stoppages by employees of state and local governments, there were 54 work stoppages in "public schools and libraries", resulting in 78,300 man days of work lost, and 17 work stoppages in "hospitals and other health services", resulting in 23,400 man days of work lost. Among all other categories of state and local government employees there were a total of 71 work stoppages, resulting in a loss of 353,140 man-days of work. (Summary Release, Work Stoppages Involving Government Employees, 1966, U.S. Dept. of Labor).

gress expressly found that such public and non-profit institutions are "engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose," and that "[f]ailure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" H. Rep. 1366, 89th Cong., 2d Sess., 16–17.

Appellants have failed to show that the prevention of competition which would be unfair to regulated enterprises did not furnish a rational basis for Congressional regulation of public institutions in order to protect commerce. Imposition of wage and hour requirements on one segment of an industry clearly gives the remaining segment of the industry a competitive advantage and imposes upon the regulated segment corresponding difficulties in maintaining its competitive position. Indeed, appellants do not appear to dispute that fairness in competition ordinarily precludes regulation of only a portion of an industry. Their objection to the application of principles of competitive fairness to them stems from their belief that where the segment of the industry initially proposed to be regulated is small compared to the remaining segment, the justification for the application of those principles somehow disappears.[6]

[6] The Court should note that the appellants are incorrect in arguing that the segment initially proposed to be "legitimately regulable" represented only ½ to 1% of the industry. Brief of Appellants, p. 20. Admittedly certain types of medical care may be available only in public institutions. But the stipula-

However, it was not unreasonable for Congress to assume that the relative smallness of the private segments of the industry does not detract from the desirability of competitive fairness. In short, the appellants have presented no compelling reason for this Court to find that considerations of competitive fairness did not constitute a rational basis for Congressional extension of the coverage of the Fair Labor Standards Act to public institutions, particularly where the operation of such institutions has a substantial impact on the flow of goods in commerce.

---

tions of fact reveal that as to hospitals generally in the three States concerned, roughly half of the beds in all hospitals are found in private institutions, and further that only 15 to 25% of the total admissions to all hospitals are to public institutions. App. 114a, 118a, 120a. For the United States as a whole, almost three-quarters of all admissions are to private hospitals, Stipulation Between Plaintiffs and Defendants, Exhibit A–4 (Hospitals—United States), Attachment A. Private hospitals account for almost 60% of the total expenditures for all hospitals, *id.*, Attachment B; App. 122a.

With respect to schools in the three States, public elementary and secondary schools account for between 80 and 94 percent of the total enrollment, App. 112a, 117a, 119a, while public institutions of higher education attract between two-thirds and three-fourths of all pupils. App. 113, 117a, 119a. For the United States as a whole, over one-eighth of the elementary and secondary school pupils attend private schools, Stipulation Between Plaintiffs and Defendants, Exhibit A–4, (Schools—United States) Attachment A, while over one-third of the enrollment in higher education is in private institutions, *id.*, Attachment B. Expenditures by private schools accounted for similar proportions of the expenditures for all schools, *id.*, Attachment C.

II. THE STATES ENJOY NO CONSTITUTIONAL IMMUNITY FROM THE FAIR LABOR STANDARDS ACT

The appellants claim, in effect, that an unconstitutional interference with the operations of state government will result from the application of the $1.00–$1.60 per hour minimum wage and time and one-half for overtime provisions to certain employees of public hospitals, schools and related institutions. They argue that the fundamental structure of our constitutional form of government precludes Congress from imposing the minimum wage and overtime schedule on the "essential" and "purely governmental" functions of the States.

However, the uniform decisions of this Court make it plain that Congress may regulate State activities which have a substantial effect upon commerce. And this Court has made it equally clear that the fact that the State activity may be "purely governmental" or "an essential State function" does not immunize it from regulation under the Commerce power.

1. In *Sanitary District* v. *United States,* 266 U.S. 405, the Sanitary District diverted water from Lake Michigan to dispose of sewage from the City of Chicago. This action was taken to protect the health of the residents of the City and was undoubtedly an essential State function.[7] The United States sued to enjoin the diversion of water, claiming that it conflicted with

[7] This State activity also appears to have had all the characteristics which the States claim for activities now covered by the Fair Labor Standards Act. It was non-profit, purely governmental, and economically not replaceable by a non-governmental system. We note that the public institutions sought to be regulated here have private counterparts, so that the description

the power of the United States to regulate interstate commerce. Mr. Justice Holmes, speaking for a unanimous Court, stated, 266 U.S. at 426, that the power and authority of the United States to remove obstructions to interstate and foreign commerce was, without question, "superior to that of the States to provide for the welfare or necessities of their inhabitants."

The Court's implicit rejection in *Sanitary District* of the "governmental function" test was expressly articulated in *United States* v. *California,* 297 U.S. 175. There, the State argued, 297 U.S. at 183, that in operating a harbor railroad "without profit, for the purpose of facilitating the commerce of the port * * * it is engaged in performing a public function in its sovereign capacity" and thus could not be constitutionally subjected to Congressional regulation under the Safety Appliance Act.[8] The Court deemed it "unimportant to say whether the state conducts its rail-

"purely governmental" is not particularly appropriate. That the activities are "non-profit" is, of course, not significant, *National Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852 (C.A.D.C.), certiorari denied, 324 U.S. 847.

[8] The State's argument was identical to the argument reasserted by appellants here. The State pointed out, at page 11 of its brief (No. 33, Oct. Term, 1935), that:

> "It is of the utmost concern to a state that its ports and harbors be properly managed, controlled and regulated in order to promote the general benefit of the body politic, and when a state manages and controls its ports and harbors with that end in view and not activated by a desire for profit, the state is acting in its sovereign capacity."

The State then argued, at page 14 of its brief, that:

> "If it may be said that the State of California in the operation of the State Belt Railroad is subject to the provisions of the Federal Safety Appliance Act, it follows that the State of California, in the exercise of its govern-

road in its 'sovereign' or in its 'private' capacity." The only question the Court found it necessary to consider was "whether the exercise of that [State] power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297 U.S. at 183–184. The answer, of course, was that it must be.

In *California* v. *Taylor,* 353 U.S. 553, 568, it was argued that Congressional regulation of commerce, through the Railway Labor Act, would interfere with and control the employment relationship existing between the State and its employees. But the Court found (*ibid.*), that the principle enunciated in *United States* v. *California* was fully applicable, for the State, by engaging in interstate commerce, had "subjected itself to [the commerce] power so that Congress can regulate its employment relationships."

In *Board of Trustees of the University of Illinois* v. *United States,* 289 U.S. 48, the University protested the requirement that it pay duty on scientific apparatus which it imported for use in one of its educational departments.[9] This Court unanimously stated, 289 U.S. at 56–57, that it was an essential

---

mental function in facilitating the commerce of its principal port, may exist only by leave of the federal government, and that the power lies with that government to prevent the State from discharging its sovereign functions for the general welfare of the people of California."

[9] There again the argument of state immunity was heard, this time with particular relevance to the case at hand, for the State function involved was that of providing an education for its citizens. The State pointed out, at page 13 of its brief (No. 538, Oct. Term, 1932), that the education of its citizens

attribute of the power to regulate foreign commerce that it is exclusive and plenary and could not be "limited qualified, or impeded to any extent by state action." Explaining further, the Court stated, 289 U.S. at 59, that the "fact that the States in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress." Similarly, where, as here, the States, in performing their functions, engage in activities which affect commerce, those activities must be subject to the federal power to insure that they do not burden or restrict commerce.

The result has been the same where the war power was concerned. In *Case* v. *Bowles,* 327 U.S. 92, the State of Washington sold timber from lands held for the support of its schools at a price exceeding that prescribed under the Emergency Price Control Act. The Price Administrator sued to enjoin the completion of the transaction. The State argued, 327 U.S. at 101, that this sale could not be constitutionally sub-

---

was one of those "certain services which, through long experience and by common consent, have come to be looked on as peculiarly within the province of government, and which, although private corporations may, to a limited degree, perform some of them, are, nevertheless, such that the public interest is deemed better served by having the activities either under the control of, or performed by the government itself."

The State then argued, page 22 of its brief, that a limitation on the power to regulate foreign commerce was that it should not be "exerted by Congress as directly and substantially to burden or embarrass the States in the exercise of strictly governmental activities."

ject to the Act because it was "for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens." [10] The contention that the extent of the Congressional power depended on whether the State functions being regulated were "essential" to the State government was again rejected.

The appellants would distinguish all these cases on the grounds either that the State activities involved were ordinary commercial activities or that the impact of the federal regulation on the States was small and did not interfere with the essential sovereignty of the States. To some degree, these differences exist. But the important consideration is that the Court's decisions in these cases in no way turn on the nature of the activities involved or the extent of the impact upon the States.

Although the State activities in the two California railroad cases were of a "commercial" nature, the Court deemed it "unimportant to say whether the state

[10] The State's argument was as follows, at pages 68–69 of its brief (No. 261, Oct. Term, 1945):

> "In selling the state school sections, the state is engaged in a governmental function. * * * It has long been a recognized principle of our jurisprudence that the Federal Constitution impliedly prohibits the Federal Government from passing any laws which obstruct or unreasonably threaten to obstruct any function essential to the continued existence of state government. * * * Where the court has upheld the power of Congress to impose burdens on the activities of the states, it has been in that field where the function involved was not essential to the maintenance of the state government. * * * In the instant case, the state has not sought to compete in a field usually reserved for private business."

295-123—68——4

conducts its railroad in its 'sovereign' or in its 'private' capacity," *United States* v. *California,* 297 U.S. 175, 183. In *Sanitary District,* the disposal of the sewage from the City of Chicago was not a "commercial" function, but was a measure directly concerned with the health of the State's citizens. And the State function involved in *Case* v. *Bowles, supra,* 327 U.S. 92, and *Board of Trustees of the University of Illinois* v. *United States, supra,* 289 U.S. 48, was the education of its citizens. Thus, the very function here asserted by the States to be immune from federal regulation has been held by this Court not to have that immunity. See also *United States* v. *Ohio, supra,* 385 U.S. 9. Further, the nature of the regulation is not invalid for in *California* v. *Taylor, supra,* 353 U.S. at 568, the argument was unavailing that the regulation "interfere[d] with the 'sovereign right' of a State to control its employment relationships."

The fact that the States may have to levy additional taxes or curtail necessary services has also been rejected as a basis for invalidating an otherwise valid Congressional regulation. In *Sanitary District* v. *United States, supra,* 266 U.S. at 432, the Court noted that, even though the dangers to which the City of Chicago would be subjected by a ruling in favor of the United States—including a claim that it was faced with the loss of one hundred million dollars—were probably exaggerated, "in any event we are not at liberty to consider them here as against the edict of a paramount power."

In all the cases cited, the Congressional regulation presumably imposed additional costs upon the State functions. The principle developed was not that the

amount of those costs was small, and therefore did not really interfere with State government. Rather, the principle was simply that the fact of interference was not to be considered. In *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, it was alleged that federal activity, under the commerce power, in constructing a dam would, by flooding certain areas of Oklahoma, diminish the States' property tax revenues and destroy school buildings. This Court stated, 313 U.S. at 534, that

> The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the Federal Government of its power of eminent domain is no barrier to the exercise of that power. * * *[11]

It necessarily follows that any balancing of the need for, and benefit to commerce derived from a federal regulatory scheme against the impact it has on the States and the interference with State func-

[11] The appellants' reliance on the opinions rendered in *New York* v. *United States*, 326 U.S. 572, to support immunity of essential State functions from federal regulation under the commerce power is misplaced. Whatever the import of those various opinions with respect to limitations on the levying of federal taxes on organs or instrumentalities of the States, any analogy attempting to limit the exercise of the commerce power is inappropriate.

The nature of the commerce power is, like the war power, *Case* v. *Bowles*, *supra*, 327 U.S. 92, such that its exercise cannot be limited if the ends for which it was designed are to be accomplished. If the essential activities of the States burden commerce, the paramount nature of the federal power would be frustrated if it could not require that the burden be removed. The taxing power, on the other hand, does not have ends which would be comparably frustrated if a particular manner of its exercise were proscribed.

tions which it creates is for Congress alone. In *Oklahoma* v. *Guy F. Atkinson Co., supra,* 313 U.S. at 527–528, this Court stated that the questions, similar to those raised here, of impact upon the government of the States,

> * * * raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. * * *
>
> Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking * * *

See, also, *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 650; *Gibbons* v. *Ogden,* 9 Wheat. 1, 197.

2. Nor is there merit to appellants' argument that the history of the adoption of the Commerce Clause and the Tenth Amendment shows that the commerce power cannot extend to the regulation of activities of a governmental nature carried on by the States. This contention overlooks the fact that a primary purpose of the Fair Labor Standards Act is the removal of obstructions to interstate commerce, the very problem that led to the adoption of the Commerce Clause.

The Constitutional Convention met chiefly because the Articles of Confederation had failed to give the federal government power to regulate commerce.[12]

[12] See 1 Elliot, *Debates on the Federal Constitution* (2d ed. 1836), 92, 106–119; 1 Bancroft, *History of the Formation of the Constitution of the United States* (1882), 250; Warren, *The Making of the Constitution* (1928), 85.

The resolution of the Convention which formed the basis for the drafting of the Commerce Clause read as follows:[13]

> VI. Resolved, That the national legislature ought to possess the legislative rights vested in Congress by the confederation; And moreover, to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

That this intended a broad grant of power to the federal Congress is clear when we contrast the language of an earlier resolution, which was defeated:[14]

> to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such states only, and wherein the general welfare of the U. States is not concerned.

The inference the appellants attempt to draw from the lack of objection to the eventual form of the Commerce Clause is thus unjustified. The Framers recognized the need for national power to eliminate the obtructions to commerce which had plagued the country under the Articles of Confederation. But that power obviously cannot be limited to eliminating only

---

[13] Madison's *Debates*, as reported in H. Doc. No. 398, 69th Cong., 1st Sess. (1927), entitled "Documents Illustrative of the Formation of the Union of the American States," 389, 466.

[14] *Id.*, at 388–89.

those obstructions then existing. The Framers did not use language which would restrict the federal power to the method of regulation immediately necessary. They were acutely conscious that they were preparing an instrument for ages to come, not a document adapted only for the exigencies of the time:

> * * * we must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity. * * * Nothing therefore can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a *Capacity* to provide for future contingencies, as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. * * *

Hamilton, *The Federalist,* No. XXXIV, p. 147. See also Warren, *The Making of the Constitution,* at 82.

Nor is there any support for the view that the Tenth Amendment reduced the power given to the national government. This is clear from the language of the Amendment, which reserves to the States only the "powers not delegated to the United States." It was also made clear by its sponsor, James Madison, who, while the Amendment was pending, explained its effect in the course of the debate concerning the national bank:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might ex-

> ercise it, although it should interfere with the laws, or even the Constitution of the States.[15]

As this Court recognized in *United States* v. *Darby, supra,* 312 U.S. at 124:

> The amendment states but a truism that all is retained which has not been surrendered. * * *
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. * * *

Thus, nothing in the history of the adoption of the Commerce Clause or the Tenth Amendment detracts from the consistent recognition which this Court has given to the fact that States and their subdivisions may be required to comply with legislation adopted by Congress pursuant to its power to regulate and protect commerce. Nor need the Court be concerned with the possibilities, which appellants have conjured up, of the federal government using the commerce power to regulate the wages and hours of all State officials. "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." *New York* v. *United States,* 326 U.S. 572, 583 (opinion of Frankfurter, J.). Here the Congress has determined only that the minimum wage and overtime provisions of the Fair Labor Standards

[15] Annals of Cong. (1791), 1897. This principle, of course, is declared in the Supremacy Clause of the Constitution, under which state law must yield to federal law.

Act, which apply to more than 75% of the non-supervisory employees of private enterprise, should also be applied to employees of schools and hospitals regardless of whether those institutions are privately or publicly operated. In light of the substantial impact which the operation of such institutions have on commerce, there is no reason to find that Congress has exceeded its constitutional power "to regulate Commerce."

III. FAIR LABOR STANDARDS ACT COVERAGE OF ALL THE EMPLOYEES OF AN "ENTERPRISE ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" IS CONSTITUTIONAL.

The appellants contend that the Act's use of the "enterprise" concept to bring within its coverage all employees of an activity which has some employees engaged in commerce constitutes an unconstitutional extension of the Commerce power (App. Br. 68–73). Although the coverage of the Act was originally limited to those employees personally engaged in commerce or the production of goods for commerce, this Court recognized that such coverage was "not coextensive with the limits of the power of Congress over commerce" and that "Congress chose not to enter areas which it might have occupied." *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, 522–523.

It cannot be doubted that labor unrest among employees whose jobs do not directly affect commerce may have a substantial impact on commerce since it can disrupt the work of other employees of the same enterprise whose jobs do directly affect commerce. Indeed, this fact was recognized by Congress in ex-

tending the coverage of the National Labor Relations Act to all representation questions or unfair labor practices "affecting commerce." 29 U.S.C. 159(c), 160. This Court has consistently upheld this broad grant of jurisdiction to the National Labor Relations Board. See, *e.g., National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1; *National Labor Relations Board* v. *Reliance Fuel Oil Corporation,* 371 U.S. 224.

Appellants contend, however, that, as applied here, the enterprise concept extends the coverage of the Fair Labor Standards Act to employees who have no effect on commerce (App. Br. p. 73). But this contention ignores the fundamental requirement of enterprise coverage, 29 U.S.C. 203(s), that some of the employees be personally engaged in commerce or in the production of goods for commerce. Where some employees are so engaged, it necessarily follows that the activities of their employer affect commerce.[16] This being so, it is clearly within the power of Congress to regulate the wages and hours of all the employees of that employer, even though some of the employees are engaged in purely local activities. See *Wickard* v. *Filburn,* 317 U.S. 111; *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119; *National Labor Relations Board* v. *Reliance Fuel, supra.*

Nor is there merit to appellants' contention that the enterprise concept is unconstitutional because it

[16] As pointed out by the Senate Report in commenting on this test, "It is settled that an employer is engaged in commerce or in the production of goods for commerce where he has employees so engaged (*Kirschbaum* v. *Walling*, 316 U.S. 517; and see *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178)." S. Rep. No. 145, 87th Cong., 1st Sess., p. 43.

would extend coverage to an entire enterprise even though only a small proportion of the employees are engaged in commerce. In determining the constitutional significance of the impact of the activities of such an enterprise on interstate commerce it is appropriate to consider "the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 648; see *Katzenbach* v. *McClung,* 379 U.S. 294.

IV. ELEVENTH AMENDMENT—CONSTRUCTION OF STATUTE

Appellants' remaining contentions—that the Act is unconstitutional because it conflicts with the Eleventh Amendment, and that the Act should be construed as inapplicable to the operation of hospitals, schools and related institutions—completely ignore relevant provisions of the Act.

1. The Fair Labor Standards Act contains both criminal penalties for its violation, 29 U.S.C 216(a), and civil remedies under which the Act's provisions may be enforced. Essentially, there are three civil remedies: (1) suits by covered employees to recover unpaid minimum wages or overtime compensation, 29 U.S.C. 216(b); (2) suits by the Secretary of Labor [17] to recover the amount of employee claims for such unpaid sums where no unsettled issue of law is in-

[17] Under Reorganization Plan No. 6 of 1950, 64 Stat. 1263, the Secretary succeeded to the functions of all other officers, agencies and employees in the Department.

volved, 29 U.S.C. 216(c); (3) injunctive actions by the Secretary of Labor to restrain violations of the Act, including the restraint of the withholding of sums due employees, 29 U.S.C. 217, see 29 U.S.C. 211(a).

Significantly, the appellants' Eleventh Amendment argument totally ignores the injunctive remedy available to the Secretary of Labor under Section 217. The appellants make no claim here, and made none below, that the Eleventh Amendment bars a suit by the Secretary seeking to enjoin non-compliance with the Act. The courts have recognized that the Secretary brings such actions "not in his individual, but in his official capacity. The suit [is] for the benefit of the United States * * *. It is perfectly clear, therefore, that it [is] in effect a suit by the United States." *Walling* v. *Norfolk Southern Ry. Co.,* 162 F. 2d 95, 96 (C.A. 4). Other courts have pointed out that the Secretary in such suits "properly and exclusively represents the public interest," *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137, 138 (C.A. 2), and that his purpose in seeking to restrain the withholding of wages due "is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest," *Wirtz* v. *Jones,* 340 F. 2d 901, 904 (C.A. 5). Section 217 suits by the Secretary are then, in effect, suits by the United States, and there is, of course, no Eleventh Amendment or sovereign immunity bar to such suits. *United States* v. *Texas,* 143 U.S. 621; *United States* v. *California,* 297 U.S. 175.

Thus the Fair Labor Standards Act may be enforced against the States through the medium of Section 217 actions. Section 216(c) actions by the Secretary are in much the same posture. The courts have regularly recognized that in Section 216(c) actions, as well as those under Section 217, the government's interest is not merely derivative from that of the employee, and its standing is not the same as that of the employee. See *Wirtz* v. *C & P Shoe Corp.,* 336 F. 2d 21, 30 (C.A. 5); *Mitchell* v. *Richey,* 164 F. Supp. 419, 420 (W.D.S.C.); *Mitchell* v. *Floyd Pappin & Son,* 122 F. Supp. 755, 756–758 (D. Mont.); *Tobin* v. *Wilson,* 98 F. Supp. 131, 134 (N.D. Ill.).

In short, even if the Eleventh Amendment were held to bar employee suits against the States, the Act could be enforced through the remaining provisions, especially in view of the Act's separability provision, 29 U.S.C. 219.[18]

2. Appellants' remaining contention that the hospitals and schools are not within the coverage of the act because their employees do not "handle goods for resale" is both factually and legally without support.

The Act applies to all employees of "an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. (1964 ed., Supp. II) 206(b), 207(a)(2), which, insofar as relevant here, is defined as an enterprise "which has employees engaged in

[18] The question of the validity of employee actions under Section 216(b) should not be considered at this time, but should await an attempt by a State employee to sue his employer. At that time, the question whether, under *Parden* v. *Terminal R. Co.,* 377 U.S. 184, the appellants will be deemed to have consented to employee suits may be fully examined. See the opinion of Judge Winter, below, 269 F. Supp. at 831, App. 8a, n. 12.

commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *." 29 U.S.C. (1964 ed., Supp. II) 203(s).

Drawing on the fact that the term "goods" is defined in the Act to exclude goods in the possession of the ultimate consumer, appellants allege that the schools and hospitals are ultimate consumers of the supplies which they receive, so that the employees of these institutions cannot be said to handle or work on "goods" in commerce. They contend, therefore, that none of the employees of these institutions come within the coverage of the act. There are two answers to this argument.

First, it is obvious that the covered institutions are not the ultimate consumers of all the goods they purchase, particularly food and drugs. Second and more important, even if the institutions are the ultimate consumers of all such goods so that they would not have any "employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person" they do have "employees engaged in commerce or in the production of goods for commerce." Regardless of the limitation on the definition of "goods,"[19] the employees receiving purchases shipped interstate are "engaged in com-

[19] In addition, that limitation on the definition of goods does not apply to an ultimate consumer who is a "producer" of the goods. 29 U.S.C. 203(i). For the purposes of the Act, "produced" means "produced, manufactured, mined, handled, or in any other manner worked on," while "an employee shall be deemed to have engaged in the production of goods if such em-

merce''.[20] In addition, employees engaged in the ordering of such purchases and in other interstate communications are "engaged in commerce or in the production of goods for commerce." [21]

Thus, the assertion made by appellants on page 81 of their brief that "In order to assert coverage successfully, appellees must show that the public schools and hospitals have employees who handle goods which are for resale (or of which their employer is not the ultimate consumer) and which were produced for or have moved in commerce" is totally without founda-

---

ployee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation essential to the production thereof." 29 U.S.C. 203(j). Thus, even if the public institutions "consume" all their purchases, they would nonetheless be "producers" of the goods if they were handled or worked on, the limitation on the definition of "goods" would be inapplicable, and the requirements for enterprise coverage would be met in an additional manner.

[20] See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McComb* v. *Herlihy*, 161 F. 2d 568 (C.A. 4); *Sucrs. de A. Mayol & Co.* v. *Mitchell*, 280 F. 2d 477 (C.A. 1), certiorari denied, 364 U.S. 902 *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645 (C.A. 5).

[21] The Act's definition of "goods" applies to "ideas, wishes, orders and intelligence," *Western Union* v. *Lenroot*, 323 U.S. 490, 502–503. The preparation of written documents and other materials for out-of-state transmission, as well as the actual interstate transmission of funds, documents and other communications, are all activities in commerce, on the basis of which individual employees have regularly been held to come within the Act's original coverage provisions. See, *e.g.*, *Public Building Authority of Birmingham* v. *Goldberg*, 298 F. 2d 367 (C.A. 5) *Beneficial Finance Co.* v. *Wirtz*, 346 F. 2d 340 (C.A. 7); *Willmark Service System* v. *Wirtz*, 317 F. 2d 486 (C.A. 8), certiorari denied, 375 U.S. 897; *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C.A. 1); *Mitchell* v. *Kroger Company*, 248 F. 2d 935 (C.A. 8).

tion in the Act. Although that showing might well be made, it is not a necessary one, for employees may be "engaged in commerce" or in the "production of goods for commerce" in the absence of that showing. The plain language of the Act thus calls for rejection of the argument of the appellants on this point.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
JOHN S. MARTIN, JR.,
Assistants to the Solicitor General.

MORTON HOLLANDER,
MICHAEL C. FARRAR,
Attorneys.

MARCH 1968.

APPENDIX

1. The Constitution of the United States provides in pertinent part:

> Article I, Section 8:
>
> The Congress shall have Power * * *;
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> Article VI
>
> * * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.
>
> * * * * *
>
> Amendment X:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
>
> Amendment XI:
>
> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The Fair Labor Standards Act of 1938, as amended, provides in pertinent part (Title 29, United States Code, 1964 ed. and Supp. II):

> § 201. Short title.
>
> This chapter may be cited as the "Fair Labor Standards Act of 1938".

§ 202. Congressional finding and declaration of policy.

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. Definitions.

As used in this chapter—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not

include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more

corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit),

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level

which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

* * * * *

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

* * * * *

§ 206. Minimum wage.

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section;

* * * * *

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

* * * * *

§ 207. Maximum hours.

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of

the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966.

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(j) No employer engaged in the operation of a hospital shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at

a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

§ 211. Investigations, inspections, records, and homework regulations.

(a) * * * Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

* * * * *

§ 213. Exemptions.

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) * * *

* * * * *

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title * * *

* * * * *

(b) The provisions of section 207 of this title shall not apply with respect to—

* * * * *

(8) any employee * * * who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed * * *

* * * * *

§ 215. Prohibited acts; prima facie evidence.

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title * * * except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

(2) to violate any of the provisions of section 206 or section 207 of this title * * *

* * * * *

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision.

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected

in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed

by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the sub-

sequent date on which his name is added as a party plaintiff in such action.

* * * * *

§ 217. Injunction proceedings.

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

* * * * *

§ 219. Separability of provisions.

If any provision of this chapter or the application of such provision to any person or circumstances is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

U.S. GOVERNMENT PRINTING OFFICE: 1968