

Volume 29 | Issue 2

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1979

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## Recommended Citation

John J. Rigby, *The Administration of Economic Controls: The Economic Stabilization Act of 1970*, 29 Case W. Res. L. Rev. 458 (1979)  
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# Notes

## THE ADMINISTRATION OF ECONOMIC CONTROLS: THE ECONOMIC STABILIZATION ACT OF 1970

*The Economic Stabilization Act of 1970 conferred upon the Executive discretionary power to issue orders and regulations to stabilize prices, rents, wages, and salaries. Pursuant to this authority, President Nixon instituted a broad system of mandatory economic controls in the period 1971-74. This Note critiques the administration and enforcement of these controls. The author details the hearing and rulemaking procedures, the organization and staffing of stabilization agencies, the exemption and exceptions processes, and the enforcement and disclosure mechanisms. In light of the possible reimposition of mandatory controls, the author proposes certain procedural and structural changes to effect a more equitable and efficient system for administering these controls.*

### INTRODUCTION

THE ECONOMIC STABILIZATION ACT OF 1970,<sup>1</sup> effective from August 15, 1970 to April 30, 1974, conferred upon the President virtually unrestricted authority to institute and administer a system of economic controls. Under this authority, President Nixon imposed broad mandatory controls over prices, rents, wages, and salaries.<sup>2</sup> Despite the Carter administration's pro-

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1. Pub. L. No. 91-379, 84 Stat. 799, enacted August 15, 1970, authorized the President to issue orders and regulations to stabilize prices, rents, wages, and salaries. The authority to issue such orders and regulations was to expire at midnight, February 28, 1971. The Act of Dec. 17, 1970, Pub. L. No. 91-558, § 201, 84 Stat. 1468, extended the authority through March 31, 1971. The Act of March 31, 1971, Pub. L. No. 92-8, § 2, 85 Stat. 13, extended the authority through May 31, 1971. The Act of May 18, 1971, Pub. L. No. 92-15, § 3, 85 Stat. 38, extended the authority through April 30, 1972, and limited the President's authority to exercise controls selectively with respect to a particular industry or segment of the economy unless prices or wages had increased at a highly disproportionate rate in relation to the general economy. The Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, extended the authority through April 30, 1973, provided some legislative guidance for the administration of the stabilization program, and brought dividends and interest within the scope of the Act. The Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, §§ 2-8, 87 Stat. 27, extended the authority through April 30, 1974, and provided clearer guidance in policy and procedure.

2. The stabilization program was administered in four phases. Phase I, put into effect by Exec. Order No. 11615, 36 Fed. Reg. 15727 (1971), imposed a 90-day general freeze on prices, rents, wages, and salaries effective from August 15, 1971 to November 13, 1971, and established the Cost of Living Council. This Council was charged with primary responsibility for administering the stabilization program and recommending policies and mechanisms to permit an orderly transition from the general freeze to a more flexible and

nouncements of an absolute reluctance to invoke mandatory wage-price controls,<sup>3</sup> the imposition of some system of control remains a realistic possibility.<sup>4</sup> The purpose of this Note, then, is to

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selective system of control. Phase II, implemented by Exec. Order No. 11627, 36 Fed. Reg. 20139 (1971), was a more flexible system of controls effective from November 13, 1971 to January 11, 1973. The order perpetuated the Cost of Living Council and delineated further its powers and responsibilities. A seven-member Price Commission, composed of public representatives appointed by the Executive, was established to formulate and to administer price and rent controls. Wage and salary controls were to be administered by the Pay Board, composed of 15 business, labor, and public representatives appointed by the President. The order further established Committees on Interest and Dividends, on the Health Service Industry, and on State and Local Government Cooperation. Phase III, promulgated in Exec. Order No. 11695, 38 Fed. Reg. 1473 (1973), consisted of a set of vague, self-administered standards which became effective on January 11, 1973. The order created a full-time position of Director of the Cost of Living Council, reaffirmed the broad discretion of the Council, authorized the continued existence of the Construction Industry Stabilization Committee, and established the Cost of Living Council Committees on Health and Food, and the Labor-Management Advisory Committee. The previously established Pay Board and Price Commission were merged into the Cost of Living Council. On June 13, 1971, a 60-day general price freeze was imposed by Exec. Order No. 11723, 38 Fed. Reg. 15763 (1973). This order followed the amendments to the Economic Stabilization Act of 1970, extending until April 30, 1974, the legislative authority to implement the program. The President stressed the successful impact which labor and management efforts had provided the program but imposed the freeze on prices for commodities and services, excluding raw agricultural services, because the effect of the program on pricing behavior had proved insufficient. The freeze period was intended to be used for the creation of new controls, operative after its expiration. Phase IV, put into effect by Exec. Order No. 11730, 38 Fed. Reg. 19345 (1973), was a system of gradual decontrol carried out on a sector-by-sector basis governing the period from August 13, 1973 to April 30, 1974, when the authority for wage and price controls expired. Phase IV modified the control program within the food industry; it removed the freeze on all products except beef and instituted a two-stage process for control, the first stage commencing on July 18, 1973. The freeze in other sectors of the economy was continued through August 12, 1973. In addition, the Cost of Living Council was directed to publish for comment its Phase IV proposals for alternative controls in these latter sectors. See OFFICE OF ECONOMIC STABILIZATION OF THE TREASURY, HISTORICAL WORKING PAPERS ON THE ECONOMIC STABILIZATION PROGRAM, AUGUST 15, 1971 TO APRIL 30, 1974, at 9-91 (1974) [hereinafter cited as HISTORICAL WORKING PAPERS]; W. TONGUE, HOW WE CAN HALT INFLATION AND STILL KEEP OUR JOBS 173-204 (1974); Jones, *The Lessons of Wage and Price Controls*, in WAGE AND PRICE CONTROLS: THE U.S. EXPERIENCE 1-3 (J. Kraft & B. Roberts eds. 1975) [hereinafter cited as WAGE AND PRICE CONTROLS]; Note, *Sector by Sector Anti-Inflation Legislation: Proposed Amendments to the Council on Wage and Price Stability Act*, 13 HARV. J. LEGIS. 363, 367-78 (1976).

3. President Carter has stated, "I am not going to impose mandatory wage and price controls in this country." N.Y. Times, Mar. 30, 1979, §A, at 1, col. 5. However, the Nixon administration also was in principle opposed to wage and price controls, and had made promises similar to those of the Carter administration prior to the imposition of controls in 1971. Friedman, *History Repeats*, NEWSWEEK, Nov. 20, 1978, at 94.

4. See Silk, *The Troubled Guidelines*, N.Y. Times, Mar. 16, 1979, §D, at 2, col. 1; Walker, *The Voluntary Guidelines Will Be Mandatory*, N.Y. Times, Nov. 19, 1978, §F, at 16, col. 3; Will, *Down the Path of Economic Controls*, Washington Post, Oct. 29, 1978, §C, at 7, col. 1; Wicker, *Carter Now Has the Clout to Test Controls*, Washington Star, Oct. 15, 1978, §D, at 3, col. 2; Greer & Kandel, *White House Starts Leaning Toward Pay, Price Controls*, *id.*, Sept. 25, 1978, §B, at 6, col. 1; Rowen, *Is It Time for Wage-Price Controls?*,

examine the Nixon-era stabilization program to determine whether it was administered fairly and effectively, and to offer structural and procedural suggestions for a more equitable and efficient system of mandatory controls.

### I. DELEGATION OF POWER

The Stabilization Act represented a virtually unprecedented peacetime congressional delegation of power to the executive branch.<sup>5</sup> Within the executive branch, this authority to make decisions affecting all facets of the national economy was in turn

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Washington Post, Aug. 3, 1978, § A, at 23, col. 1. *But see* Kraft, *No Mandatory Controls*, *id.*, Nov. 28, 1978, § A, at 15, col. 1. The area of energy is already under extensive government control. *E.g.*, Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (establishing ceiling prices on natural gas and authorizing executive power to implement price controls in a national emergency); Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (establishing federal standards governing ratemaking for electric utilities). President Carter has also proposed controls on the health industry. President's Message to Congress Proposing Enactment of the Hospital Cost Containment Act of 1977 and the Child Health Assessment Act of 1977, 13 WEEKLY COMP. OF PRES. DOC. 603-05 (May 2, 1977). This proposal has been cited as an example of creeping wage and price controls applied to individual sectors rather than pursuant to a comprehensive plan. *Proposed Amendments to the Council on Wage and Price Stability Act: Hearings on H.R. 3184, H.R. 2100, H.R. 3810, and H.R. 2094 Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 267-68 (1977) (statement of Jack Carlson, Vice President and Chief Economist, United States Chamber of Commerce).

Recent Harris polls have shown significant public support for economic controls. Harris, *Anti-Inflation Plan Will Take Time, Public Agrees*, Washington Post, Nov. 20, 1978, §A, at 8, col. 1.

5. *Economic Stabilization: Oversight Hearings on the Operation of the Economic Stabilization Act of 1970 Before the House Comm. on Banking and Currency*, 92d Cong., 1st Sess. 63 (1971) (statement of David Ginsburg, former General Counsel, Office of Price Administration) [hereinafter cited as *1971 House Oversight Hearings*] ("No legislative body of any democratic country . . . comparable to our own, has ever given its Chief Executive the freedom to act on dollars-and-cents economic life and death matters that this Congress gave the President on August 15, 1970."). *See Controls or Competition: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 244 (1972) (statement of Sen. Harris) ("Many prominent observers at the time argued that the imposition of such sweeping controls in peacetime could, over the long run, radically alter the nature of our political and economic system . . . . Nonetheless, the Congress acted as though it was considering some routine piece of legislation.").

The Act was also criticized as giving virtually dictatorial powers to the President. *The 1971 Economic Report of the President: Hearings Before the Joint Economic Comm.*, 92d Cong., 1st Sess. 256 (1971) (statement of Arthur F. Burns, Chairman, Board of Governors of the Federal Reserve System) [hereinafter cited as *1971 Economic Report Hearings*]; *Selective Credit Policies and Wage-Price Stabilization: Hearings on S. 1201 and H.R. 4246 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1st Sess. 33 (1971) (statement of Arthur F. Burns). *See* 116 Cong. Rec. 26, 797 (1970) (remarks of Rep. Gross) (noting the failure of the bill to require the President to declare either a war or a domestic emergency prior to invoking the power

delegated to semi-autonomous agencies, such as the Cost of Living Council, which were created to administer the stabilization program.<sup>6</sup> These agencies, largely exempt from the Administrative Procedure Act (APA),<sup>7</sup> were subject to ambiguous statutory standards that permitted administration and enforcement in an unchecked manner and that afforded only a limited right of appeal.<sup>8</sup>

In delegating to the Executive the standby authority to institute economic controls with few restrictions on their application, Congress manifested the belief that imposition of these controls at the discretion of the President was the superior means of imple-

to exercise controls). The Act was also referred to as an economic Gulf of Tonkin Resolution. *1971 Economic Report Hearings, supra* at 431 (statement of Prof. Arthur S. Miller).

6. During Phase II, in accordance with general policies formulated by the Cost of Living Council, the Pay Board prescribed regulations and standards and promulgated rulings and decisions governing wage increases. The Price Commission engaged in similar actions in regard to price increases. Later, these two agencies were merged into the Cost of Living Council, which assumed their functions. *See note 2 supra*.

Throughout this Note, where the matter discussed is one of general applicability to the various agencies which administered the stabilization program, the terms "stabilization agency" or "agency" are used.

7. 5 U.S.C. §§ 551-559, 701-706 (1976). *See notes 25-34 infra* and accompanying text.

8. *Congressional Oversight of Administrative Agencies (Cost of Living Council): Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 1* (statement of Sen. Mathias) [hereinafter cited as *1973 Senate Judiciary Hearings*]. The only limitation contained in the original Act was that prices, rents, wages, and salaries could not be stabilized at levels lower than those prevailing on May 25, 1970. Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 202, 84 Stat. 799 (expired 1971).

The centralization of power in the designated semi-autonomous agencies was subject to sharp criticism. *Economic Stabilization Hearings to Extend and Amend the Economic Stabilization Act of 1970 Before the House Comm. on Banking and Currency, 92d Cong., 1st Sess. 506* (1971) (statement of Ralph Nader) [hereinafter cited as *1971 Extension Hearings*]; *1972 Economic Report of the President: Hearings Before the Joint Economic Comm., 92d Cong., 2d Sess. 873* (1972) (statement of Profs. Howard Sherman & E.K. Hunt); *Controls or Competition: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 39* (statement of Frank Bond, Chairman of the Board, Holiday Universal) (characterizing controls as having the inherent power to lead the United States into a centrally-controlled, fascist state); *Economic Stabilization Legislation: Hearings on S. 2712 Before the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 1st Sess. 122, 125* (1971) [hereinafter cited as *1971 Senate Hearings*] (statement of David Ginsburg) ("[There is] a major question of legality here, where legislative power is proposed to be delegated to a private group. This brings to mind visions of corporate statism and a syndicalist philosophy."); *The President's New Economic Program: Hearings Before the Joint Economic Comm., 92d Cong., 1st Sess. 429-30* (1971) (statement of Prof. Arthur S. Miller) [hereinafter cited as *New Economic Program Hearings*] ("If, indeed, post-freeze economic policy is worked out in conjunction with business and labor leaders, the obvious result is the American version of the corporate state.").

mentation.<sup>9</sup> Congress apparently determined that the Executive was best equipped to decide the appropriate time to institute and remove controls and to devise the rules and regulations necessary to implement a stabilization program.<sup>10</sup> Supporters of this view cited the possibility that controls might have to be removed totally or partially prior to the legislatively prescribed termination date, and the prospective inability of Congress to act speedily toward this end.<sup>11</sup> Moreover, administration and enforcement of mandatory economic controls without the active and full cooperation of the Executive would have posed practical difficulties.<sup>12</sup>

Although Congress imposed only minimal limitations upon the Executive in the Economic Stabilization Act, this delegation of power survived constitutional challenges in the courts. In *Meat Cutters and Butcher Workmen v. Connally*,<sup>13</sup> a three-judge district court denied injunctive relief against enforcement of an Executive order freezing wages and prices issued pursuant to the Act. The

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9. COMM. ON BANKING AND CURRENCY, REPORT ON DEFENSE PRODUCTION ACT EXTENSION AND ECONOMIC STABILIZATION ACT, H.R. REP. NO. 1330, 91st Cong., 2d Sess. 11 (1970). Senator Proxmire suggested that Congress' delegation of power to the Executive was a political ploy, CONG. Q. 3217 (Dec. 8, 1973), since Congress gave the authority to institute economic controls to a President who was opposed to such power being vested in the Executive and had pledged never to use it. See HISTORICAL WORKING PAPERS, *supra* note 2, at 11. Two months before enactment of the Stabilization Act, the President stated, "I will not take this Nation down the road of wage and price controls, however politically expedient that may seem . . . . The Congress knows I will not impose controls because they would do more harm than good." President's Message to Congress on Economic Policy and Productivity, 6 WEEKLY COMP. OF PRES. DOC. 778 (June 22, 1970). At the signing of the Defense Production Act Extension which contained the Stabilization Act, President Nixon stated, "I have previously indicated that I did not intend to exercise such authority if it were given to me." 6 WEEKLY COMP. OF PRES. DOC. 1078 (Aug. 24, 1970). President Nixon later stated, "I do not intend to impose wage and price controls which would substitute new, growing and more vexatious problems for the problems of inflation. Neither do I intend to rely upon an elaborate facade that seems to be wage and price controls but is not. . . . This is a policy of action, but not a policy of action for action's sake." ECONOMIC REPORT OF THE PRESIDENT 7 (Feb. 1971).

10. COMM. ON BANKING AND CURRENCY, REPORT ON DEFENSE PRODUCTION ACT EXTENSION AND ECONOMIC STABILIZATION ACT, H.R. REP. NO. 1330, 91st Cong., 2d Sess. 11 (1970).

11. *Id.* Congress might not have been in session when immediate action was needed to revise or terminate economic controls, or its cumbersome legislative procedures might have hindered the achievement of a sufficiently rapid response to national economic needs. *Id.*

12. The work of the Price Commission was hampered seriously by the lack of support given to it by the Nixon administration. Askin, *Wage-Price Controls in Administrative and Political Perspective: The Case of the Price Commission During Phase II*, in WAGE AND PRICE CONTROLS, *supra* note 2, at 29-31.

13. 337 F. Supp. 737 (D.D.C. 1971); *accord*, *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). See note 58 *infra*.

court found that the legislative description of the task assigned to the Executive "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."<sup>14</sup> Thus, the delegation of legislative power did not contravene article I of the Constitution which vested all legislative powers in Congress.<sup>15</sup> However, the courts never ruled upon the validity of the delegation of authority to administrative bodies, such as the Pay Board and the Price Commission. It had been argued that this was an unconstitutional delegation of power to private groups since these agencies were not comprised of full-time government officials.<sup>16</sup>

In enacting stabilization legislation, Congress rejected efforts to limit Executive authority. In 1970, an amendment that would have imposed a wage-price freeze directly, instead of granting standby control authority to the President, was defeated by the House of Representatives.<sup>17</sup> Other amendments requiring some positive approval of Executive orders by Congress were rejected by both Houses.<sup>18</sup> After controls were instituted, however, Con-

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14. 337 F. Supp. at 746 (quoting *Yakus v. United States*, 321 U.S. 414, 424-25 (1944)). The court further stated that the Act was not unconstitutional under the "intelligible principle" rule of *J.W. Hampton, Jr. & Co. v. United States*: "There is no forbidden delegation of legislative power if Congress shall lay down by legislative act an intelligible principle to which the official or agency must conform." 337 F. Supp. at 746 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

In holding that the power granted to the President was sufficiently limited, the court identified the following factors: (1) that the authority to stabilize prices and wages was limited to levels not less than those prevailing on May 25, 1970; (2) that, pursuant to a 1971 amendment, the President was precluded from singling out particular industries or economic sectors upon which to impose controls unless there was a finding of a disproportionate increase in wages or prices; (3) that the controls instituted by the Executive were constrained by a standard of fairness and equity and were subject to judicial review; and (4) that, although not dispositive of the constitutional issue, the stabilization authority delegated to the President was limited in time. 337 F. Supp. at 747-48, 754-58.

Some contended that the Act did not contain an intelligible principle. See *New Economic Program Hearings*, *supra* note 8, at 431 (statement of Prof. Arthur S. Miller). For an analysis of the "intelligible principle" rule, see Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 561, 564 (1947).

15. U.S. CONST. art. I, § 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

16. See *1971 Extension Hearings*, *supra* note 8, at 505 (statement of Ralph Nader) ("[I]f the Pay Board and the Price Commission are Federal agencies then why isn't Congress creating them explicitly? If they are not Federal agencies, what are they—advisory committees with a full-time Government chairman? What legal no man's land is being developed here?").

17. 116 CONG. REC. 26,830 (1970) (amendment offered by Rep. Blackburn).

18. 117 CONG. REC. 13,235 (1971) (amendment conditioning Executive authority to impose general controls on a concurrent resolution of Congress defeated in the Senate); 116

gress did adopt some legislation limiting Executive discretion in administering such controls.<sup>19</sup> Furthermore, numerous bills designed to reverse administratively determined policies or otherwise curtail Executive discretion were introduced by individual members of Congress.<sup>20</sup>

In 1974, in considering a proposal to extend the Executive's control authority, the Senate adopted an amendment providing for a one-house congressional veto of any imposition of controls by the Executive.<sup>21</sup> Another proposal advanced to facilitate prompt congressional vetoes in a stabilization program administered by the Executive provided that control authority would expire a short time after any controls were instituted, thus affording Congress an opportunity to halt any stabilization program by refusing to extend the control authority.<sup>22</sup> The latter proposal avoids the constitutional uncertainties raised by congressional vetoes,<sup>23</sup> but presents a serious drawback since control authority

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CONG. REC. 26,838 (1970) (amendment requiring approval by a joint congressional committee defeated in the House of Representatives).

19. In a reversal of administration policy, Congress enacted a provision requiring retroactive payment of wage increases in certain instances. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 203(c), 85 Stat. 743 (expired 1973). Congress exempted any individual from wage controls whose earnings were substandard or who was a member of the working poor. *Id.* Not satisfied with administrative implementation of this provision, Congress later defined "substandard earnings" as a wage or salary rate yielding \$3.50 per hour or less. Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 3, 87 Stat. 27 (expired 1974). Congress excluded employer contributions to certain pension, profit-sharing, annuity, and savings plans, and any group insurance or disability and health plan from the scope of wage control authority. *Id.* § 5.

20. For a catalog of bills, see Index of Legislative Activity, May 1, 1973 to April 30, 1974, reprinted in HISTORICAL WORKING PAPERS, *supra* note 2, at 221-40.

21. 120 CONG. REC. 12,628-29 (1974) (amendment of Sens. Humphrey & Roth). In considering whether to veto proposed orders or regulations, Congress was to consider, among other factors, whether a proposed order or regulation would seriously impair production in a manner which would create shortages or economic distortions, stimulate foreign demand and encourage excessive exports of scarce commodities, or fail to moderate effectively the rate of inflation. *Id.* This amendment was never enacted because the provision that it amended was tabled. 120 CONG. REC. 12,641 (1974). Senator Proxmire had earlier expressed opposition to a congressional veto of stabilization regulations, fearing that Congress would be so swamped with complex and detailed regulations that it would be unable to evaluate them properly. *New Economic Program Hearings, supra* note 8, at 437 (statement of Sen. Proxmire). This argument has been made in opposition to congressional veto authority in general. See H.R. REP. NO. 1014, pt. 1, 94th Cong., 2d Sess. 57-58 (1976) (dissenting views of Rep. Seiberling).

22. *Selective Credit Policies and Wage-Price Stabilization: Hearings on S. 1201 and H.R. 4246 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 1st Sess. 23, 33 (1971)* (statement of Arthur F. Burns). Chairman Burns proposed having stabilization authority expire 30 to 60 days after the institution of controls. *Id.*

23. The constitutionality of a congressional veto is uncertain because it allows a single



could expire because of Congress' inability to enact legislation quickly. This problem, however, could be alleviated by according a bill extending stabilization authority privileged status, requiring consideration on the floor either immediately or shortly after introduction.<sup>24</sup> Such a scheme would allow Congress a role in the institution of any program of controls while avoiding the practical drawbacks and the constitutional problems inherent in any congressional veto over the institution of controls or over individual regulations implementing a stabilization program.

## II. ADMINISTRATIVE PROCEDURE

The agencies created by the President to administer the stabilization program were exempted from most of the provisions of the Administrative Procedure Act<sup>25</sup> by the Economic Stabilization Act Amendments of 1971.<sup>26</sup> Executive agencies were not exempt, however, from provisions governing the information, rules, opinions, and orders that must be published in the *Federal Register*; the material that must be available for public inspection;<sup>27</sup> the procedures for agency rulemaking;<sup>28</sup> and the notice requirements in connection with agency proceedings.<sup>29</sup> Other sections of the APA dealing with adjudications,<sup>30</sup> hearings,<sup>31</sup> decisions on adjudications,<sup>32</sup> imposition of sanctions,<sup>33</sup> and judicial review<sup>34</sup> were among those made inapplicable to the stabilization agencies.

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house to take legally effective action without the concurrence of the other house and without the opportunity for a Presidential veto. See generally *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, H.R. 8231, and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 378 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Department of Justice); Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1053 (1975).

24. This is similar to the procedure provided in the Reorganization Act of 1977 that guarantees that every reorganization plan will be put to a vote in both Houses of Congress. 5 U.S.C. §§ 911-912 (1976). See H.R. REP. NO. 105, 95th Cong., 1st Sess. 17 (1977).

25. 5 U.S.C. §§ 551-559, 701-706 (1976).

26. Pub. L. No. 91-210, § 207, 85 Stat. 746 (expired 1973). Section 207 provides in part that: "The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirements of §§ 552, 553, and 555(e) of title 5, United States Code." *Id.* § 207(a).

27. 5 U.S.C. § 552 (1976).

28. *Id.* § 553.

29. *Id.* § 555(e).

30. *Id.* § 554.

31. *Id.* § 556.

32. *Id.* § 557.

33. *Id.* § 558.

34. *Id.* §§ 701-706.

In support of this exemption, it was argued that the APA was not intended to apply to agencies administering economic controls. It was argued that when strictly followed, the requirements of the APA can become cumbersome, time consuming, and expensive, thus conflicting with the goals of speed and limited bureaucracy essential to a program of economic stabilization.<sup>35</sup> It was further pointed out that past legislation establishing forms of economic control, such as the Export Control Act of 1949,<sup>36</sup> the Defense Production Act of 1950,<sup>37</sup> and the Export Administration Act of 1969,<sup>38</sup> exempted implementing agencies from all provisions of the APA except that section pertaining to public information.<sup>39</sup> Individuals and groups representing disparate ideological interests opposed the exemption of stabilization agencies from the APA, contending that the APA was an intricate set of procedures necessary to protect the rights of individuals and businesses in administrative dealings with the federal government.<sup>40</sup>

Because of their exemption from the APA, stabilization agencies were directed by statute to develop their own procedures to govern requests for the interpretation, modification, and rescission of, and exception or exemption from, agency rules, regulations, and orders.<sup>41</sup> These were to include an appeals process within the agency. Agencies were not required to conduct hearings at any stage;<sup>42</sup> however, agencies were directed by law to conduct formal

35. 1971 Senate Hearings, *supra* note 8, at 92 (letter from L. Patrick Gray III, Assistant Attorney General, Civil Division, Department of Justice to Sen. Sparkman (Nov. 8, 1971)).

36. Ch. 11, § 7, 63 Stat. 7 (1949) (expired 1969).

37. Ch. 932, § 709, 64 Stat. 798 (1950) (expired 1979). Under the authority granted by this Act, wage and price controls were instituted during the Korean War. For a description of the agency procedures during the Korean War stabilization period, see *Reports on Control Agencies by the Committee on Emergency Control Agencies, Administrative Law Section, Bar Association of the District of Columbia*, 20 GEO. WASH. L. REV. 559 (1952).

38. Pub. L. No. 91-184, § 8, 83 Stat. 841 (1969) (expired 1971).

39. 5 U.S.C. § 552 (1976) (original version at ch. 324, § 3, 60 Stat. 237 (1946)).

40. See, e.g., 1971 House Oversight Hearings, *supra* note 5, at 149 (statement of Patrick E. Gorman, representing the Amalgamated Meat Cutters Union); 1971 Extension Hearings, *supra* note 8, at 500 (statement of Milton A. Smith, representing the United States Chamber of Commerce); *id.* at 491-92 (statement of Milton M. Carrow, representing the American Bar Association); *id.* at 504 (statement of Ralph Nader); *id.* at 448 (statement of Rep. Ryan).

41. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 207(b), 85 Stat. 743 (expired 1973).

42. *Id.* Hearings were not required because of the feeling that, although they would encourage public participation in the stabilization program, they would increase the chance of leakage in advance of wage or price decisions. See 1971 Senate Hearings, *supra* note 8, at 92 (statement of L. Patrick Gray III).

hearings, to the maximum extent possible, on any change or proposed change in wages, prices, or other areas which could have a significantly large impact upon the nation's economy.<sup>43</sup> Nevertheless, these agency procedures failed to provide adequate guarantees of basic procedural due process because the internal appellate process often required appeal to the person who had made the initial decision on the matter,<sup>44</sup> the exceptions process was inefficient and often inequitable,<sup>45</sup> and few public hearings were ever held.<sup>46</sup>

### A. Hearings

The first hearing on specific proposed price increases was not held until September 1972,<sup>47</sup> after \$10 billion in price increases had been granted without hearings.<sup>48</sup> It was held only after a suit to compel hearings had been filed<sup>49</sup> and was criticized as being designed merely to create the appearance of public participation rather than allowing substantive public comment.<sup>50</sup> In response to similar complaints and the general lack of hearings, a proposal was advanced requiring hearings when they would serve to inform the public or to aid in obtaining information on actions taken or proposed.<sup>51</sup> Under the proposal, hearings would have been re-

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43. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 207(c), 85 Stat. 743 (expired 1973).

44. See HISTORICAL WORKING PAPERS, *supra* note 2, at 644.

45. See notes 130-61 *infra* and accompanying text.

46. 1973 Senate Judiciary Hearings, *supra* note 8, at 53 (statement of Peter J. Petkas, Attorney, Corporate Accountability Research Group).

47. The hearing on proposed automobile price increases was held September 12 and 13, 1972. 1973 Senate Judiciary Hearings, *supra* note 8, at 53-54 (statement of Peter J. Petkas). There had been 11 prior Price Commission hearings, but they had not focused on specific price increases. See *Price and Wage Control: An Evaluation of Current Policies: Hearings Before the Joint Economic Comm.*, 92d Cong., 2d Sess. 192 (1972) (statement of C. Jackson Grayson, Chairman, Price Commission) [hereinafter cited as 1972 *Price and Wage Control Hearings*].

48. *Executive Compensation Rules: Hearings Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm.*, 93d Cong., 1st Sess. 209 (1974) (statement of Ralph Nader) [hereinafter cited as *Executive Compensation Hearings*].

49. *Nader v. Grayson*, No. 72-1492 (D.D.C., dismissed Aug. 22, 1972). See also C. GRAYSON & L. NEEB, CONFESSIONS OF A PRICE CONTROLLER 167 (1974).

50. 1973 Senate Judiciary Hearings, *supra* note 8, at 53 (statement of Peter J. Petkas). Inadequate prior notice was given of the hearing, and the Price Commission refused to release information about the requests for increased prices that were the subject matter of the hearing. *Id.* at 53-54. Senator Proxmire termed the hearing "a kind of Alice in Wonderland performance" since Chairman Grayson announced before the hearing that he had decided to deny the price increases sought by the automobile manufacturers. 1972 *Price and Wage Control Hearings*, *supra* note 47, at 189 (statement of Sen. Proxmire).

51. 120 CONG. REC. 12,632-33 (1974) (amendment of Sen. Mathias). The amendment

quired within forty-five days after the issuance of any rule, regulation, or order that would have a substantial affect on the nation's economy.<sup>52</sup> It is highly unlikely, however, that this change in statutory wording would have caused an understaffed agency, which doubted the positive benefit of hearings,<sup>53</sup> to actually conduct regular hearings. It is submitted that a system of regular hearings could best be assured by requiring that hearings be held in all cases in which rules, regulations, or orders having a major economic effect, measured in objective monetary terms, are issued. To guard against hearings becoming a sham, legislation could provide for a public advocates office, charged with bringing experts and citizens with dissenting views before stabilization agencies.<sup>54</sup>

### B. *Rulemaking*

The rulemaking provisions of the APA, which require that notice of proposed rules be published in the *Federal Register* and provide for public participation in the rulemaking process through the submission of comments,<sup>55</sup> were applicable to stabilization agencies. However, the agencies were able to avoid to a large extent the regular notice and comment procedure by taking advantage of the "good cause" exception.<sup>56</sup> This exception allows an agency to skirt the notice and comment procedure if such proce-

was adopted, but the Muskie amendment, which it modified, was later tabled. 120 CONG. REC. 12,641 (1974). For a slightly different proposal, see S. 2954, 93d Cong., 2d Sess. (1974), reprinted in *Economic Stabilization—1974: Hearings on S. 2599, S. 2892, S. 2895, S. 2954, S. 2961, S. 2987, and S. 3023 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 2d Sess. 11 [hereinafter cited as *1974 Senate Hearings*].

52. 120 CONG. REC. 12,633 (1974) (amendment of Sen. Mathias).

53. Stabilization officials doubted the positive benefit of regular public hearings, feeling that they failed to provide views beyond those available through press reports. HISTORICAL WORKING PAPERS, *supra* note 2, at 64-65.

54. See 1973 *Senate Judiciary Hearings*, *supra* note 8, at 56 (statement of Peter J. Petkas). See generally *Public Participation in Federal Agency Proceedings: Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976).

55. 5 U.S.C. § 553 (1976).

56. 5 U.S.C. § 553(b) (1976) provides:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

ture is found to be "impracticable, unnecessary, or contrary to the public interest." This finding, as well as a brief statement of reasons, must be incorporated in the rule issued.<sup>57</sup> During the stabilization program, however, orders and regulations were issued which did not comply with the good cause requirements. Nevertheless, these survived challenge in the courts.<sup>58</sup> A serious and comprehensive public comment process was conducted on only one occasion.<sup>59</sup> It has been argued that the regulations and the stabilization program itself were less effective because of the lack of opportunity for meaningful public comment,<sup>60</sup> but program officials contended that a formal notice and comment process was unnecessary and inappropriate.<sup>61</sup>

### C. Informing the Public

#### The translation of basic stabilization policy into the legal lan-

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Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, or

(B) when the agency for *good cause* finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(Emphasis added).

57. *Id.*

58. *E.g.*, *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). In *DeRieux*, the plaintiff sought declaratory and injunctive relief against the application and enforcement of the Phase I freeze with respect to the Atlanta Falcons football team ticket prices. No finding that advance notice of the freeze was "impracticable, unnecessary, or contrary to public interest" had actually been made, and no finding and statement was incorporated in the Executive order. Although noting that this was a technical violation of § 553(b)(3)(B), *see note 56 supra*, the court refused to hold the order unenforceable on this ground, stating that good cause had existed in fact and advance notice of the freeze would have served only to generate further increases.

59. The Cost of Living Council released for public comment the bulk of the Phase IV regulations. By the end of a 12-day comment period, the Council received 671 comments on the proposed regulations, with later arrivals bringing the total to over 800. The review of these comments resulted in 20 major changes and 50 minor corrections of the regulations. HISTORICAL WORKING PAPERS, *supra* note 2, at 61, 85.

60. *See, e.g.*, *1973 Senate Judiciary Hearings*, *supra* note 8, at 43 (statement of Prof. Ernest Gellhorn).

61. It was felt that "the long intensive public debate about the Administration's economic policies . . . did provide policy makers with considerable information about the desires of different segments of the society." HISTORICAL WORKING PAPERS, *supra* note 2, at 64-65. More formal procedures for obtaining public comment were burdensome and not cost effective since "the views of significant interests were easily available through the press; their spokesmen often were unfamiliar with the complex problems posed by a comprehensive body of regulations and, thus, were unable to go beyond their public pronouncements . . ." *Id.* at 65.

guage needed for regulations presented considerable difficulty.<sup>62</sup> As soon as a policy decision was reached, the Price Commission frequently would issue a press release providing a general description of the new policy.<sup>63</sup> The regulation in final form, however, often varied considerably from the policy announced and described by the prior press release.<sup>64</sup> Notwithstanding the reliance by businesses on the contents of such press releases,<sup>65</sup> the regulations were held to be controlling even when they differed from the earlier announcements.<sup>66</sup> Stabilization regulations were also considered difficult to understand<sup>67</sup> in spite of the fact that they were often deliberately general in nature to effectuate the desire for simplicity and flexibility.<sup>68</sup>

Stabilization agencies did take a variety of steps beyond the publication of rules in the *Federal Register* to inform interested and affected parties of stabilization policies. In addition to issuing numerous press releases<sup>69</sup> and responding to literally millions of inquiries,<sup>70</sup> there was a regular speaker's pro-

62. See HISTORICAL WORKING PAPERS, *supra* note 2, at 1133-34; R. LANZILLOTTI, M. HAMILTON & R. ROBERTS, PHASE II IN REVIEW: THE PRICE COMMISSION EXPERIENCE 33 (1975).

63. HISTORICAL WORKING PAPERS, *supra* note 2, at 1133.

64. This variance resulted because a press release contained only a very general description of a policy, while final regulations required a major "fleshing out" of that policy. *Id.*

65. Stabilization officials discovered that business people were making decisions regarding compliance with the stabilization program on the basis of reports in *The Wall Street Journal* and other business publications. *Id.*

66. *E.g.*, United States v. Jefferson Parish School Bd., 333 F. Supp. 418 (E.D. La. 1971).

67. See 1973 Senate Judiciary Hearings, *supra* note 8, at 108-09 (statement of William N. Walker, General Counsel, Cost of Living Council) (In an economic stabilization program, "it is not going to be possible to set forth a series of rules and regulations that are readily understandable to the layman or to the small businessman who does not come into contact with the program.").

68. R. LANZILLOTTI, M. HAMILTON & R. ROBERTS, *supra* note 62, at 66, 200; A. WEBER, IN PURSUIT OF PRICE STABILITY: THE WAGE-PRICE FREEZE OF 1971, at 51-53 (1973).

69. The Cost of Living Council issued numerous press releases, approximately 470 in less than a two-year period, to a regular mailing list of approximately 2,800 names, and maintained a larger mailing list of approximately 10,000 names for distribution of special publications. 1973 Senate Judiciary Hearings, *supra* note 8, at 115. *The Wall Street Journal*, *The New York Times*, and *The Washington Post* often carried news releases verbatim. HISTORICAL WORKING PAPERS, *supra* note 2, at 1152.

70. Through April 30, 1973, the Internal Revenue Service responded to 4,500,000 inquiries. *Treasury, Postal Service and General Government Appropriations For Fiscal Year 1974: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong., 1st Sess. 649 (1973) (statement of Edward F. Preston, Assistant Commissioner for Stabilization, Internal Revenue Service) [hereinafter cited as *1974 House Appropriations Hearings*].

gram,<sup>71</sup> general coordination with trade associations,<sup>72</sup> and widespread distribution of explanatory material concerning stabilization policies.<sup>73</sup> Commercial concerns also published looseleaf binder services containing official stabilization material.<sup>74</sup>

#### D. *Proposals to Improve Rulemaking*

Various legislative proposals were designed to provide public notice of proposed regulations and an increased opportunity for comment. One proposal would have required a minimum ten-day period for comment on all proposed rules, regulations, and orders.<sup>75</sup> The comment period, however, could have been waived when strict compliance would have caused serious harm or injury due to rapid inflation or shortages of vital commodities.<sup>76</sup> In practical application, this proposal would have required little more than the existing good cause exception under section 553 of the APA. It did call for a more specific finding of potential harm before the comment period could be waived.<sup>77</sup> However, a change of this nature probably would have had little effect unless the courts were to scrutinize strictly the validity of an administrative finding that the notice and comment provisions should be waived because of the potential for serious harm. In addition, the short

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*See also* H. YOSHPE, J. ALLUMS, J. RUSSEL & B. ATKIN, *STEMMING INFLATION: THE OFFICE OF EMERGENCY PREPAREDNESS AND THE 90-DAY FREEZE 66-70* (1972) [hereinafter cited as *YOSHPE & ALLUMS*].

71. Speakers' bureaus in the various stabilization agencies arranged speeches, conferences, and presentations before trade and professional groups to discuss stabilization regulations in detail. *HISTORICAL WORKING PAPERS*, *supra* note 2, at 1152, 1163, 1203-94. In addition, agency officials and staff frequently appeared as guests on news programs. *Id.* at 1152. *See also* *YOSHPE & ALLUMS*, *supra* note 70, at 155-57.

72. *See* *YOSHPE & ALLUMS*, *supra* note 70, at 157-59.

73. During Phase I, a series of questions and answers explaining the operation of the freeze was collected in booklet form. Ten million copies were published and distributed widely throughout Internal Revenue Service district offices, Agricultural Stabilization and Conservation Service rural offices, and local post offices. *HISTORICAL WORKING PAPERS*, *supra* note 2, at 1153.

74. Both the Commerce Clearing House and the Bureau of National Affairs published loose-leaf binder services, respectively entitled *Economic Controls* and *Federal Controls*. *1973 Senate Judiciary Hearings*, *supra* note 8, at 115 (letter from Robert Bradford, Associate Director of Congressional Affairs, Cost of Living Council to Sen. Mathias (Dec. 11, 1973)).

75. 120 CONG. REC. 12,632-33 (1974) (amendment of Sen. Mathias). For a slightly different proposal, see S. 2954, 93d Cong., 2d Sess. (1974), *reprinted in 1974 Senate Hearings*, *supra* note 51, at 11.

76. 120 CONG. REC. 12,632-33 (1974) (amendment of Sen. Mathias).

77. Section 553(b)(3)(B) simply requires a finding that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest" before they may be waived. 5 U.S.C. § 553(b)(3)(B) (1976).

ten-day comment period would not have provided adequate opportunity for effective comment. Only organizations which regularly monitored the *Federal Register* and maintained staffs able to analyze a proposed regulation and draft comments on short notice would have been able to present their views for official consideration by the stabilization agency. This problem, inherent in a notice and comment procedure which does not provide for extensive public interest representation in the administrative process, could be alleviated somewhat by an adequately staffed and funded public advocates office.<sup>78</sup>

Another proposal would have eliminated the existing good cause exception of section 553 of the APA and provided for a more limited exception allowing an agency to omit notice and comment procedures when it found they were unnecessary because of the "routine nature or insignificant impact" of the proposed rule.<sup>79</sup> Under a provision allowing for emergency rules, the proposal would have permitted promulgation of rules without public notice when an agency found that a delay in putting a rule into effect would have seriously injured an important public interest, substantially frustrated legislative policies, or seriously damaged a person or class of persons without serving any important public interest.<sup>80</sup> Something similar to this proposal would be appropriate for a future stabilization program. Emergency rules effective for a limited period of time could be issued, with public comment invited on them. After receiving and analyzing these comments, agency officials could make appropriate changes and adopt new regulations. This procedure would only formalize the process which often unfolds. Groups which are dissatisfied with agency regulations will express that dissatisfaction to agency officials, and parties finding the regulations to be poorly drafted and difficult to understand will voice their opinion to the agency, even in the absence of procedures allowing and encouraging such actions.

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78. See 1973 Senate Judiciary Hearings, *supra* note 8, at 56 (statement of Peter J. Petkas).

79. H.R. 12,048, 94th Cong., 2d Sess. § 3 (1976). This bill failed to pass the House of Representatives under suspension of its rules. 122 CONG. REC. H10,718 (daily ed. Sept. 21, 1976).

80. H.R. 12,048, 94th Cong., 2d Sess. § 3 (1976); H.R. REP. NO. 1014, pt. I, 94th Cong., 2d Sess. 20-24 (1976).



### III. ORGANIZATION AND STAFFING OF THE STABILIZATION PROGRAM

The minimization of bureaucracy was an explicit goal of the stabilization program,<sup>81</sup> and it was a source of pride among administration officials that the program was run by a relatively small staff.<sup>82</sup> The number of government workers employed in the stabilization effort was far less than the number employed in past programs<sup>83</sup> and was not considered adequate for the wide-scale system of controls being administered.<sup>84</sup> Because of the small number of workers employed in the stabilization effort, the costs incurred by the government as a result of the program were fairly limited.<sup>85</sup> However, major administrative costs were borne by

81. President Nixon was strongly opposed to a stabilization bureaucracy: "[W]hile the wage-price freeze will be backed by Government sanctions, if necessary, it will not be accompanied by the establishment of a huge price control bureaucracy." President's Message to the Nation, *The Challenge of Peace*, 7 WEEKLY COMP. OF PRES. DOC. 1170 (Aug. 23, 1971). With regard to the Pay Board and Price Commission, the President stated, "Their staffs will be small. Stabilization must be made to work by an all-volunteer army of patriotic citizens in every walk of life." President's Message to the Nation, *The Continuing Fight Against Inflation*, *id.* at 1377 (Oct. 11, 1971). There was a feeling that a lightly staffed agency would avoid excessively complicated procedures. A. WEBER, *supra* note 68, at 129.

82. See A. WEBER, *supra* note 68, at 128-29.

83. There were never more than 4,100 personnel, including Internal Revenue Service workers, employed in the stabilization program at any given time period. 1973 *Senate Judiciary Hearings*, *supra* note 8, at 93 (statement of Charles Emley, Assistant Director, Cost of Living Council); C. GRAYSON & L. NEEB, *supra* note 49, at 70. This compares with 16,000 personnel employed in the stabilization program during the Korean War and 60,000 to 70,000 personnel and over 100,000 volunteers employed in the World War II stabilization effort. 1971 *House Oversight Hearings*, *supra* note 5, at 3 (statement of Paul Porter, Director, Office of Price Administration during World War II stabilization program); C. GRAYSON & L. NEEB, *supra* note 49, at 70.

84. During debate on the Economic Stabilization Act, it was estimated that a minimum of 21,000 and as many as 130,000 government employees would be needed to administer stabilization controls. See 116 CONG. REC. 26,800 (1970) (remarks of Rep. Widnall). During Phase II, the Price Commission estimated that it needed 1,100 employees; it was authorized to hire only 600. C. GRAYSON & L. NEEB, *supra* note 49, at 54-55.

85. Accurate figures on the cost of the stabilization program are available only for fiscal years 1972 and 1973, shown below (in millions of dollars):

	<i>Fiscal 1972</i>	<i>Fiscal 1973</i>	<i>Total</i>
Cost of Living Council			
Price Commission	20.5	26.0	46.5
Pay Board			
Internal Revenue Service	34.5	40.3	74.8
Department of Justice	1.3	2.5	3.8
Total	56.3	68.8	125.1

R. LANZILLOTTI, M. HAMILTON & R. ROBERTS, *supra* note 62, at 190-91. A Cost of Living Council study estimated that the annual cost to the government of a Phase II type of stabilization program, calculated at January 1974 salary rates, would be \$108 million, compared with \$78 million for a Phase III type of program, and \$100 million for a Phase IV type of

those who had to comply with stabilization regulations.<sup>86</sup> Furthermore, the stabilization program resulted in economic distortions and dislocations.<sup>87</sup>

The government largely used existing agencies such as the Office of Emergency Planning,<sup>88</sup> the Internal Revenue Service,<sup>89</sup> and

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program. *Economic Stabilization—1974: Hearings on H.R. 13206 Before the House Comm. on Banking and Currency*, 93d Cong., 2d Sess. 62 (1974) (statement of John T. Dunlop, Director, Cost of Living Council) [hereinafter cited as *1974 House Hearings*].

86. In February 1974, the Cost of Living Council estimated the cost to business of compliance with the stabilization program at between \$700 million and \$2 billion annually. *1974 House Hearings*, *supra* note 85, at 62 (statement of John T. Dunlop). A poll of its membership conducted by the National Association of Manufacturers found the average cost of compliance to be \$26,854 for companies with annual revenues under \$50 million and \$174,865 for companies with annual revenues over \$50 million. NATIONAL ASS'N OF MANUFACTURERS, *INDUSTRY SURVEY ON WAGE AND PRICE CONTROLS 29*, reprinted in *1973 Senate Judiciary Hearings*, *supra* note 8, at 311, 340.

87. Product shortages were created when firms cut back on production because of insufficient profits or when they exported an increased number of goods to exploit foreign markets not subject to the controls. NATIONAL ASS'N OF MANUFACTURERS, *INDUSTRY SURVEY ON WAGE AND PRICE CONTROLS 5, 9, 11, 27*, reprinted in *1973 Senate Judiciary Hearings*, *supra* note 8, at 316, 320, 322, 338. In addition, traditional institutional arrangements, such as collective bargaining, were disrupted. It was not unusual for contracts between labor unions and corporate management to expire before the wage increases contained in them were approved by the Pay Board or the Cost of Living Council. This was viewed as having a chaotic and stifling effect on contract negotiations. *1974 House Hearings*, *supra* note 85, at 369 (statement of Leon B. Schachter, Vice President, Amalgamated Meat Cutters Union). It was alleged that some businesses were able to effectively short-circuit union organizing campaigns by explaining that wage increases would be limited to a set percentage by the government even if employees had a union agreement. *Id.* Moreover, it has been submitted that any control on wages agreed to by employee and employer and any controls on the price of goods or services agreed to by private parties infringes the freedom of contract. *See* A. WEBER, *supra* note 68, at 129. It has also been argued that the application of stabilization authority to contracts for salary increases entered into prior to the date of the statutory enactment but designed to take effect after enactment constituted a taking of property without just compensation in violation of the fifth amendment. *See, e.g., New Economic Program Hearings*, *supra* note 8, at 432 (statement of Prof. Arthur S. Miller). This argument, however, was rejected by the courts. *Western States Meat Packers Ass'n v. Dunlop*, 482 F.2d 1401, 1403-04 (Temp. Emer. Ct. App. 1973) (price increase); *Local 11, IBEW v. Boldt*, 481 F.2d 1392, 1395 (Temp. Emer. Ct. App.), *cert. denied*, 414 U.S. 1093 (1973) (wage increase).

88. The Office of Emergency Planning (OEP) was assigned to administer the Phase I freeze program because one of its national emergency functions was the development of economic stabilization plans. Although this responsibility was carried out by only one person, the OEP was the only agency with a bureaucratic commitment in this area. The OEP also had a national field structure, which included a sophisticated computer-assisted communications network, and maintained a roster of personnel in other government agencies who could be assigned to duties in a stabilization program. A. WEBER, *supra* note 68, at 24-25.

89. The Internal Revenue Service was brought into the stabilization program on August 19, 1971, to carry out the informational and compliance functions. It was chosen for this task because of its network of district and subdistrict offices, its highly visible enforcement capability, and its recognized competence in communicating complex rules and regu-

the Agricultural Stabilization and Conservation Service<sup>90</sup> to administer the program. In addition, the Cost of Living Council and subordinate agencies developed their own staffs.<sup>91</sup> Stabilization agencies hired employees directly and also made use of detailees on temporary assignment from other federal agencies.<sup>92</sup> At the inception of the program, when a legal staff and office support had to be assembled quickly, a significant portion of the program's employees were detailees, many of whom were assigned involuntarily.<sup>93</sup> One major problem in building a legal staff for the new agencies was the reluctance of many lawyers to join an agency that could be phased out at any time.<sup>94</sup> Detailees were assigned to stabilization agencies with the understanding that they could be sent back to their parent agency or department if their work was not considered adequate,<sup>95</sup> and many staff lawyers were not retained in the stabilization program.<sup>96</sup> Those who volunteered for detail to stabilization agencies were often attracted by the uncommon opportunities for civil service grade advancement and the resultant increase in pay.<sup>97</sup> In general, the work of office support detailees warranted no particular commendation.<sup>98</sup>

After the initial stages of the program, the majority of employees were hired by the stabilization agencies themselves,<sup>99</sup> generally as "emergency indefinites."<sup>100</sup> This permitted the selection,

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lations to the public in a relatively simple manner. A. WEBER, *supra* note 68, at 25-26; N.Y. Times, July 20, 1973, at 8, col. 6.

90. The Agricultural Stabilization and Conservation Service was brought into the program to utilize its extensive network of county offices in rural areas as information centers and to funnel complaints of violations to Internal Revenue Service offices for action. A. WEBER, *supra* note 68, at 26.

91. C. GRAYSON & L. NEEB, *supra* note 49, at 53-54.

92. The detailing of Executive employees to stabilization agencies was authorized by Congress. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 212(e), 85 Stat. 743 (expired 1973).

93. HISTORICAL WORKING PAPERS, *supra* note 2, at 1135.

94. *Id.* See also Askin, *supra* note 12, at 32.

95. HISTORICAL WORKING PAPERS, *supra* note 2, at 1135.

96. Only 3 of 10 detailees assigned to the Office of General Counsel at the Price Commission were retained. *Id.*

97. *Id.*; Askin, *supra* note 12, at 32. When detailed employees returned to their former agencies, civil service rules guaranteed most of them a job at their original grade. However, the agency, although strongly encouraged to do so, was under no obligation to maintain an employee's salary at the rate attained while working for the stabilization program. 5 C.F.R. § 352.601-.608 (1978); HISTORICAL WORKING PAPERS, *supra* note 2, at 1410; Askin, *supra* note 12, at 32.

98. HISTORICAL WORKING PAPERS, *supra* note 2, at 1135.

99. As of November 19, 1973, less than one-third of the Cost of Living Council employees were detailees. See *id.* at 1409.

100. *Id.*; C. GRAYSON & L. NEEB, *supra* note 49, at 53.

hiring, and firing of employees without the encumbrances of the Civil Service registers or any other official merit system, thus allowing the stabilization agencies the flexibility to vary their employee levels rapidly.<sup>101</sup> Nevertheless, despite the stimulating challenges offered,<sup>102</sup> the stabilization agencies had difficulty recruiting employees.<sup>103</sup> Economists, in particular, were not well represented in the stabilization agencies for a variety of political, professional, and personal reasons.<sup>104</sup>

The staffing problems encountered during the stabilization program are, perhaps, not surprising. On the one hand, an emergency program must have the flexibility allowed by freedom from Civil Service regulations. On the other hand, a certain amount of security and permanence may be necessary to recruit and maintain quality personnel. A large, permanent staff, however, might develop bureaucratic tendencies toward complicated procedures and self-perpetuation.<sup>105</sup> A partial solution would be the maintenance of some permanent staff members in an agency who would monitor the economy and be prepared in a contingency to perform stabilization functions.<sup>106</sup> To some extent, the Council on Wage and Price Stability, an eight-member Executive-appointed board created in 1974, which with staff assistance monitors the economy, fills this role.<sup>107</sup> In any future stabilization program,

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101. "Emergency indefinite" employees were subject to termination without cause at any time after 30 days of employment. HISTORICAL WORKING PAPERS, *supra* note 2, at 1409. However, many office directors were reluctant to discharge employees because of the difficulties and pressures involved in such actions. *Id.* at 1136.

102. See C. GRAYSON & L. NEEB, *supra* note 49, at 61-62; Askin, *supra* note 12, at 32.

103. Many individuals were unwilling to work in the program because of the inherent lack of job security offered by an agency destined to be phased out on short notice. HISTORICAL WORKING PAPERS, *supra* note 2, at 1135. The recruitment of employees was also said to be hampered by salary levels below those of the private sector and by the lack of reimbursement for employee moving expenses. C. GRAYSON & L. NEEB, *supra* note 49, at 53.

104. Experience with the Price Commission indicated that agency officials did not fully appreciate the need for economists. Additionally, some economists opposed the use of broad economic controls and refused to be associated with them, while others sympathetic to the controls program were either reluctant to work for the Nixon administration or unable to free themselves from prior commitments. The combination of these factors resulted in a maximum of 15 to 20 professional economists working at the Price Commission at any one time. Askin, *supra* note 12, at 24, 30, 31.

105. See A. WEBER, *supra* note 68, at 128-29.

106. Near the end of the stabilization period, the Nixon administration proposed turning the Cost of Living Council into such a smaller economic monitoring agency. HISTORICAL WORKING PAPERS, *supra* note 2, at 168-69.

107. The Council was established by the Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974) (codified at 12 U.S.C.A. § 1904 note (1978 Supp.)). Its authority was most recently extended by the Act of Oct. 6, 1977, Pub. L. No. 95-121, § 1, 91

employees of this agency could form the nucleus of a larger staff. Council employees would be experienced at monitoring the economy by analyzing economic information—such as reports on wages, prices, costs, profits, productivity, sales, and imports and exports—since such analysis is part of the Council's statutory function.<sup>108</sup> Opposition to such a permanent entity is based partly on the fear that the power to develop voluntary remedies could develop into the power to impose mandatory wage and price controls.<sup>109</sup>

#### IV. PROCEDURES FOR EXEMPTIONS AND EXCEPTIONS FROM REGULATIONS

During the stabilization program, selected areas of the economy were relieved of the controls entirely through an exemption process. Relief from one or several of the controls was achieved through an exception process.<sup>110</sup> Similar criteria were applied to exemption and exception requests: "serious hardship" or "gross inequity" had to be shown to merit relief from the controls. The serious hardship standard involved an assessment of the impact of the regulations on the financial situation of the requesting firm; the gross inequity criterion focused on the impact of the regulations on the position of the firm relative to other firms in the industry and relative to similarly situated firms in all industries.<sup>111</sup> The party requesting an exemption or exception also had to demonstrate that financial hardship resulted from the imposition of the controls and that other avenues of relief available under the regulations had been exhausted.<sup>112</sup>

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Stat. 1091, until September 30, 1979. For a description of Council activities and a proposal to expand its powers, see Note, *supra* note 2, at 378-410.

108. Council on Wage and Price Stability Act, § 3(a), 12 U.S.C.A. § 1904 note (1978 Supp.).

109. See 123 CONG. REC. S15,275 (daily ed. Sept. 21, 1977) (remarks of Sen. Tower) ("[I]nformal and voluntary guidelines have a way of becoming something more than originally intended and they seduce us into thinking that mandatory controls will work where voluntary controls have failed. And mandatory controls are a bankrupt economic policy for any nation.").

110. HISTORICAL WORKING PAPERS, *supra* note 2, at 644-45. Class exceptions consisted of requests from similar firms seeking relief from one or several of the controls, rather than from all regulations. The criteria applied to these requests were similar to those applied to individual requests for exception. *Id.*

111. *Id.* Since a decision on an exemption affected an entire industry, it was essentially a policy decision involving an examination of other factors, such as impact on inflation. *Id.* at 644.

112. *Id.*

### A. Exemptions

At its inception, the stabilization program had broad, almost all-inclusive coverage of economic activity.<sup>113</sup> Everything except interest rates,<sup>114</sup> corporate profits,<sup>115</sup> dividends,<sup>116</sup> government taxes,<sup>117</sup> imports and exports,<sup>118</sup> and raw agricultural products,<sup>119</sup>

113. Some people active in past stabilization programs considered an initial period of broad controls to be essential to the success of the program. Michael V. DiSalle, former Director of the Office of Price Stabilization and former Administrator of Economic Stabilization, supported such controls, based on the history of economic controls in World War I, World War II, and the Korean War. In each of these contexts, attempts to use voluntary controls failed and severe inflation continued unabated. In World War II and the Korean War, it eventually became necessary to institute mandatory controls. Mandatory controls were not used during World War I and this contributed to the severe recession of the early 1920's. *1971 House Oversight Hearings, supra* note 5, at 60-63 (statement of Michael V. DiSalle).

114. The Act, as originally enacted, did not explicitly give the President power to control interest rates. The Nixon administration used this as a justification for not applying controls to these items. A. WEBER, *supra* note 68, at 37. Explicit authority for the regulation of interest rates was provided in the Credit Control Act, 12 U.S.C. §§ 1901-1909 (1976), but the administration deemed this law inapplicable because it was designed to deal with credit shortages, a condition which did not prevail at the time. A. WEBER, *supra* note 68, at 39. The Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 203(a)(2), 85 Stat. 743 (expired 1973), specifically granted the President the power to control interest rates, but no controls were ever instituted. Controls were not applied to interest rates, in part because the administration found that interest rates were declining and it concluded that controls were unnecessary. A. WEBER, *supra* note 68, at 40-41.

115. No controls were applied to profits partly because the administration felt that corporate profits were already relatively narrow. In fact, the ratio of corporate profits for all industries (before taxes and with inventory valuation adjustment) to gross national private product had been steadily declining during the 1964-71 period. A. WEBER, *supra* note 68, at 38-39. President Nixon stated that "higher profits in the American economy would be good for every person in America." He added that higher profits would be conducive to business expansion, thus creating new jobs; stimulate investments, thus making American goods more competitive, both at home and abroad; and provide added tax revenues. President's Message to the Nation, The Post-Freeze Economic Stabilization Program, 7 WEEKLY COMP. OF PRES. DOC. 1378 (Oct. 11, 1971).

116. No controls were applied to dividends partly because a ceiling on dividend payments would permit a corporation to retain a larger percentage of its earnings, theoretically increasing the value of its stock. A. WEBER, *supra* note 68, at 38-41. However, there was an effort to secure voluntary compliance with a dividend freeze and, as part of that effort, the Secretary of Commerce sent telegrams to about 1,300 major corporations requesting their cooperation. ECONOMIC REPORT OF THE PRESIDENT 80 (Jan. 1972).

117. Although there was a heavy demand for controlling property and other taxes, no serious consideration was ever given to their inclusion in the Phase I freeze. A. WEBER, *supra* note 68, at 41.

118. Imports and exports were exempted from controls to help improve the relative position of American goods in domestic and foreign markets and to provide a stimulus to American production and employment. *Id.* at 42-43.

119. Unprocessed agricultural products were exempted from controls based on a mixture of historical, administrative, and economic factors: such products were excluded from past stabilization controls; there was a fear of shortages and the emergence of black mar-

was subject to control. The reasons for this broad coverage were a concern for equity and the appearance of equity, and a desire to emphasize the President's intention to deal seriously with inflation.<sup>120</sup> The first rationale, at least, was probably overstated. It is questionable whether the inclusion of such items as objects of art,<sup>121</sup> used cars,<sup>122</sup> and stamps sold to collectors<sup>123</sup> significantly affected the public's sense of equity, particularly when raw agricultural products—which were highly visible—were exempted from the initial freeze without any severe public complaint.<sup>124</sup> The stabilization program's attempt at broad coverage resulted in the diversion of an inordinate amount of scarce administrative resources into peripheral economic areas which had little significance or impact in terms of the objectives of the program. Thus, there developed a desire and a necessity for exempting additional sectors of the economy from the coverage of the stabilization program.<sup>125</sup> During Phase II, major exemptions granted included those of all firms with sixty or less employees,<sup>126</sup> the wages and salaries of professional athletes,<sup>127</sup> federal employee sala-

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kets; the administrative burden of maintaining even a pretense of controls on these products was insuperable; and many raw agricultural commodities were subject to price support programs and, if prices were not permitted to rise, government purchases might be required by law. *Id.* at 41-42.

120. *Id.* at 126; ECONOMIC REPORT OF THE PRESIDENT 84 (Jan. 1972).

121. During the Phase I freeze period, a work of art could not be sold for more than the price of the most "comparable work" sold during the 30-day base period prior to August 15, 1971. A. WEBER, *supra* note 68, at 66-67.

122. The price of a used car could be no more than the price of that car, or a similar car, during the 30-day base period. *Id.* at 126.

123. After an impassioned plea from the American Philatelic Society, the Cost of Living Council ruled that the price of stamps bought and sold by collectors could not be increased during the freeze period. *Id.* at 67.

124. *Id.* at 126. For a discussion of the general unenforceability of such provisions, see *id.* at 67.

125. ECONOMIC REPORT OF THE PRESIDENT 108 (Jan. 1972); C. GRAYSON & L. NEEB, *supra* note 49, at 16; A. WEBER, *supra* note 68, at 131. The Economic Report argued that excluding sectors from control "should not be interpreted as signs of the weakening of the system or portents of its early termination. They may, in fact, make the system stronger and more durable by permitting the administrative effort to be concentrated on the sectors most significant for inflation." ECONOMIC REPORT OF THE PRESIDENT 108 (Jan. 1972).

126. HISTORICAL WORKING PAPERS, *supra* note 2, at 342-44; A. WEBER, *supra* note 68, at 131.

127. Consideration of the issue of pay for professional athletes originated with a request for a ruling as to whether Vida Blue of the Oakland Athletics baseball team could receive a salary increase from \$14,000 to \$92,000 per year. After determining that the salaries of professional athletes had little economic significance and fearing that unsuccessful attempts to control such highly visible salaries would affect public compliance with the stabilization program, the Pay Board, after much study and consideration, informally requested the Cost of Living Council to grant the exception, which the Council did. No

ries,<sup>128</sup> and the wages of those earning less than \$2.75 per hour.<sup>129</sup> During Phase IV, most sectors of the economy were gradually exempted or decontrolled as part of the termination policy.

### B. *Exceptions*

The regulations governing the stabilization program were relatively general. No attempt was made to deal with special needs and problems in the regulations; these were to be met by the granting of an exception from the applicable regulation.<sup>130</sup> The provision of the Stabilization Act which stated that stabilization "orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities"<sup>131</sup>

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similar exemption was granted to the entertainment industry, largely because there were no highly visible cases or strong pressures for exemption. HISTORICAL WORKING PAPERS, *supra* note 2, at 340-41.

128. A. WEBER, *supra* note 68, at 131. This exemption did not extend to employees of the United States Postal Service, the Tennessee Valley Authority, or other groups of employees whose pay was not covered by the Federal Civil Service plan. HISTORICAL WORKING PAPERS, *supra* note 2, at 340.

129. The Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 203(d), 83 Stat. 743 (expired 1973), required that "wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor." The Cost of Living Council initially exempted only employees earning less than \$1.90 per hour from controls, but this limited exemption was found to be inadequate in *Jennings v. Connally*, 347 F. Supp. 409 (D.D.C. 1972), and all employees earning less than \$2.75 per hour were exempted from controls. This exemption was upheld in *Jennings v. Schultz*, 355 F. Supp. 1198 (D.D.C. 1972). See HISTORICAL WORKING PAPERS, *supra* note 2, at 345-47.

130. 1973 *Senate Judiciary Hearings*, *supra* note 8, at 39 (statement of Edward Dunkelberger, Attorney, Covington & Burling).

There were, in fact, numerous requests for exceptions. Between August 15, 1971 and June 30, 1974, stabilization agencies completed action on over 8,100 requests for exceptions and 600 requests for reconsideration relating to price matters. These figures do not include requests related to health, rent, or wage regulations. Nearly two-thirds of the requests were submitted during the two freeze periods. HISTORICAL WORKING PAPERS, *supra* note 2, at 646. By late 1973, there had been a total of 51,850 requests for exceptions, of which 2,247 (4.3%) were granted, 12,865 (24.8%) were denied, and 1,408 (2.7%) were pending. The total number of exception requests received was greater than the total of exceptions granted, denied, or pending because of three factors. First, approximately 6,000 requests were counted twice due to inter-agency transfers of requests; second, changes in the stabilization policy, from one phase to another, rendered many requests moot; and third, many requests did not require any decision since relief was already provided in regulations or the request required only interpretation of certain regulations, not an exception from the regulations. 1973 *Senate Judiciary Hearings*, *supra* note 8, at 110 (letter from Robert Bradford, Associate Director of Congressional Affairs, Cost of Living Council, to Sen. Mathias (Dec. 11, 1973)).

131. Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 202, 84 Stat. 799 (expired 1971).



strongly implied the power to establish an administrative process for the granting of exceptions. Moreover, some considered the establishment and administration of an effective exceptions procedure essential to finding that the stabilization program was constitutional.<sup>132</sup>

### 1. *Regulations Governing Exceptions*

The regulations adopted by the Cost of Living Council governing the granting of exceptions were vague.<sup>133</sup> They did not go far beyond the language of the Stabilization Act, stating only that exceptions "may be granted for the purpose of preventing or correcting a serious hardship or gross inequity."<sup>134</sup> With only general regulations and scant official criteria governing exceptions from regulations, stabilization agencies had great flexibility and discretion. While this flexibility was beneficial in allowing prompt action to be taken on urgent problems,<sup>135</sup> it was easily subject to abuse through favoritism and ad hoc and inconsistent decision-making.<sup>136</sup>

Although the regulations did not provide criteria for determining hardship and inequity, certain criteria came to be accepted as indicative of these factors: inadequate cash flow to service debt obligations; declining over time of standard accounting indices such as current ratio, debt to equity ratio, return on investment, return on equity, capital turnover ratio, and operating profit margin; and any special, recognized measure of financial condition suggested by the party requesting the exception.<sup>137</sup> During the Phase I freeze and the freeze period at the end of Phase III, hardship criteria were narrowed to an assessment of whether a party

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132. See *1973 Senate Judiciary Hearings*, *supra* note 8, at 46 (statement of Prof. Ernest Gellhorn); *Meat Cutters and Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971), *discussed in* notes 13–15 *supra* and accompanying text.

133. *1973 Senate Judiciary Hearings*, *supra* note 8, at 46 (statement of Prof. Ernest Gellhorn).

134. 6 C.F.R. § 155.41 (1973) (repealed 1973).

135. See *1973 Senate Judiciary Hearings*, *supra* note 8, at 71 (statement of William N. Walker, General Counsel, Cost of Living Council).

136. See *id.* at 43, 48 (statement of Prof. Ernest Gellhorn). Gellhorn stated that, on the basis of information publicly available, one might conjecture that decisions on exception requests were made on an ad hoc basis. *Id.* at 48. There were allegations of corruption and favoritism in the administration of the exceptions process, and at least one investigation of the charges was made by the Watergate Special Prosecutor. See 119 CONG. REC. 42,353 (1973) (extension of remarks by Rep. Fraser); 31 CONG. Q. 724 (Mar. 27, 1974).

137. HISTORICAL WORKING PAPERS, *supra* note 2, at 661–63.

could survive the freeze.<sup>138</sup> Gross inequity criteria required more subjective analysis than did the serious hardship tests,<sup>139</sup> and included, but were not limited to, an assessment of whether the regulations caused one or more of the following: disruption of normal business practices; product pricing at or below cost; restriction on internal replacement or expansion capital, or disincentive to plan replacement or expansion; curtailment or discontinuance of product or produce line production or sales; conflict with court decrees or regulations of other government agencies; unequal competitive position compared to similar firms in the same industry; inadequate supply of raw materials caused by the inability to buy at the regulated price; and the application of historically unrepresentative limitations such as base period profit margin, base price, and base cost period.<sup>140</sup>

During the Phase I freeze and the freeze period at the end of Phase III, inequity other than local supply or market distortions did not provide operative criteria for relief.<sup>141</sup> Additionally, the effect of a denial of an exception on third parties was considered. Here such factors as the following were considered: the employment impact on the local community or region; the impact on industries supplying raw materials to or purchasing products from the firm making application for exception; the impact on minority stockholders of the firm or its subsidiary; product and supply distortions, both current and prospective; the impact on the competitive structure of the industry; the impact on capital investments, including shifts from domestic to foreign investment; the impact on technological and productivity enhancing investments; and the impact on price stability in other industries.<sup>142</sup> While these criteria were generally accepted as indicative of hardship and inequity, they were still broad and were not publicly known. As a result, they did little to limit the discretion in the exceptions process.<sup>143</sup>

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138. *Id.* at 682-83; A. WEBER, *supra* note 68, at 80-82. During the Phase I freeze, impending bankruptcy per se was not sufficient justification for an exception. A petitioning party also had to prove that it had not contributed to its difficulties and that all other alternatives had been exhausted. *Id.* at 81-82.

139. HISTORICAL WORKING PAPERS, *supra* note 2, at 663.

140. *Id.* at 664-65.

141. *Id.* at 682-83.

142. *Id.* at 665.

143. See 1973 Senate Judiciary Hearings, *supra* note 11, at 22 (statement of Edward Dunkelberger, Attorney, Covington & Burling).

## 2. Administration of the Exceptions Process

Petitions for exceptions to stabilization regulations were first analyzed and reviewed by agency staff analysts, generally lawyers and accountants, to determine if relief was necessary.<sup>144</sup> A determination was then made whether additional data was needed to evaluate the exception request, and, in many cases, additional data was requested. Representatives of many businesses requested informal conferences to present their cases for exceptions, and conferences were held at a stabilization agency's discretion.<sup>145</sup> After adequate data was collected, a detailed analysis was prepared for presentation to the Exceptions Reconsiderations Committee.

During Phase IV, the Committee was composed of three Cost of Living Council officials—the Director of the Exceptions Division, who served as chairperson, the Director of Economic Policy and Analysis or the Deputy Director, and the General Counsel or the Deputy General Counsel.<sup>146</sup> After hearing a brief oral summary of the prepared analysis and discussing the matter, the Committee reached a decision. If it considered the case to have major policy or precedential impact, it was referred to a higher level—during Phase IV to the Executive Committee or the Deputies Group—for review and decision.<sup>147</sup> After a final decision was reached, a Decision and Order was prepared to communicate the decision to the petitioning party and the public.<sup>148</sup> This entire

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144. HISTORICAL WORKING PAPERS, *supra* note 2, at 648. See generally Bacon, *Government Price-Control Analysts Play Key Role in Ruling on Requests for Boosts by Many Firms*, Wall St. J., Sept. 13, 1972, at 38, col. 1. In many cases petitioners sought approval of conduct already permitted under the regulations. HISTORICAL WORKING PAPERS, *supra* note 2, at 652-53.

145. *Id.* at 653-54.

146. *Id.* at 653-56. During Phase IV, all requests by food manufacturers, food wholesalers, and food retailers were decided by the Food Review Group, which consisted of the Administrator of the Office of Food and representatives of the Office of Economic Policy, the General Counsel, the Office of Operations, the Office of Compliance, and the National Office of the Internal Revenue Service. *Id.* at 656.

147. *Id.* at 654.

148. *Id.* at 656-58. Examples of Decisions and Orders are reprinted in *id.* at 688-96. A Decision and Order was issued with the signature of a high stabilization official. In theory, the Committee's decision was only a recommendation to this official, but in practice there were only a few cases in which the Committee was requested to review its initial decision. *Id.* at 656-57. Among officials who had signature authority during various phases of the stabilization program were the Executive Director, the Deputy Director, and the Director of the Office of Price Operations of the Price Commission, the Administrator of the Office of Price Stabilization, and the Deputy Director of the Cost of Living Council. *Id.*

process took four to five weeks for an average case.<sup>149</sup> If the petitioner was not satisfied with the result, a request for reconsideration could be made.<sup>150</sup>

Among the criticisms raised concerning the exceptions procedure were its deleterious impact on small businesses and the failure to develop clear, publicly known standards for exceptions through the orders and decisions. The burden on small businesses caused some concern because it was thought that the necessity of compiling supporting data for a successful exception request, as well as the complexity of the process, would, as a practical matter, force smaller businesses to sustain possibly burdensome general regulations.<sup>151</sup> Various proposals, such as the exemption of all firms below a certain size from controls<sup>152</sup> and the establishment of a corps of attorneys to aid small businesspeople in dealings with stabilizations agencies,<sup>153</sup> were advanced to relieve this burden. As a result, on May 1, 1972, firms with sixty or fewer employees and less than \$50 million in sales or revenues were exempted from the controls.<sup>154</sup>

Although the agencies published their exception decisions, these decisions were of little benefit in developing a body of precedent setting out clear, widely known standards for exceptions.<sup>155</sup>

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149. *Id.* at 655.

150. *Id.* at 644. Exception requests were handled during Phase I by the Office of Emergency Preparedness in its national office and each regional office. *Id.* at 648. See YOSHPE & ALLUMS, *supra* note 70, at 99-104. Most exception requests in Phase II, Phase III, and the Phase III freeze were decided by the Price Commission; however, during Phase IV most exception requests were handled by the Cost of Living Council. HISTORICAL WORKING PAPERS, *supra* note 2, at 648. Limited authority to handle exceptions was granted to the Internal Revenue Service and exercised through its district offices during Phase II and Phase IV. *Id.* at 648-50. Reconsiderations, however, were still handled for the most part by other agencies until a period toward the end of Phase IV. *Id.* at 649-50. During Phase IV, the Cost of Living Council handled 67% of all reconsideration requests. *Id.* at 650.

151. See, e.g., 117 CONG. REC. 43,243 (1971) (remarks of Sen. Proxmire).

152. Congress considered, but rejected, proposals to exempt all firms below a certain size from controls. See S. REP. NO. 507, 92d Cong., 1st Sess. 4, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2286; 117 CONG. REC. 43,686 (1971) (remarks of Sen. Proxmire). Instead, Congress directed that exemptions from controls be provided for small businesses to the extent feasible without impeding the stabilization program. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 214(b)(2), 85 Stat. 743 (expired 1973).

153. 1971 House Oversight Hearings, *supra* note 5, at 510 (statement of Ralph Nader).

154. HISTORICAL WORKING PAPERS, *supra* note 2, at iii; A. WEBER, *supra* note 68, at 131 n.4. Firms involved in construction or health care were excluded from this exemption. HISTORICAL WORKING PAPERS, *supra* note 2, at iii; A. WEBER, *supra* note 68, at 131 n.4.

155. See 1973 Senate Judiciary Hearings, *supra* note 8, at 56 (statement of Peter J. Petkas, Attorney, Corporate Accountability Research Group). But see HISTORICAL WORKING PAPERS, *supra* note 2, at 657 (decisions did communicate precedent).

The decisions were generally brief and not accompanied by opinions, findings, or precedential terms.<sup>156</sup> Often, a decision was the result of prior informal contacts, negotiations, and compromises reached between agency staff and the representative of an industry or company.<sup>157</sup> Thus, the formal decision frequently did not reflect the policy considerations of the decisionmakers and was of precedential value only to the party that petitioned for the exception.<sup>158</sup> Under these circumstances, judicial review of decisions denying exceptions was difficult. The courts were frustrated by an inadequate record and lack of specific standards governing individual requests for exceptions.<sup>159</sup> However, agency decisions were invariably upheld by courts on the basis that flexibility and responsiveness justified the lack of standards governing exceptions.<sup>160</sup>

### 3. *Proposed Reforms of the Exceptions Process*

The Government in the Sunshine Act,<sup>161</sup> enacted in 1976, prohibits ex parte contacts between agency decisionmakers and all persons outside the agency where the purpose of the contact is to discuss the merit of any hearing before the agency.<sup>162</sup> To a certain extent, this restriction would promote fairness and equity in an exceptions process during a stabilization program by restricting the advantage of parties that enjoy greater access to agency officials. The Sunshine Act places restrictions on ex parte contacts because of the concern that such contacts do not allow other inter-

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156. 1973 Senate Judiciary Hearings, *supra* note 8, at 48 (statement of Prof. Ernest Gellhorn); *id.* at 56, 62 (statement of Peter J. Petkas).

157. *Id.* Petkas repeated allegations that the only way to get action on an exception request was to talk to an agency staff official "off the record" and have that person agree to the granting of the exception since formal petitions and letters were rarely acknowledged and, perhaps, not even considered by stabilization agencies. *Id.* See also Bacon, *Government Price-Control Analysts Play Key Role in Ruling on Requests for Boosts by Many Firms*, Wall St. J., Sept. 13, 1972, at 38, col. 2.

158. 1973 Senate Judiciary Hearings, *supra* note 8, at 56, 62 (statement of Peter J. Petkas). This was said to have led to a "secret law" or body of precedent known only to agency staff and certain Washington lawyers and law firms. *Id.* at 62; "The Finalists"—Lawyers, Consultants Kept Busy by Phase 2, But Can They Help Out?, Wall St. J., Dec. 2, 1971, at 1, col. 6. It was said that "one pipeline directly into the government's controls bureaucracy is worth a thousand seminars." *Id.* at 27, col. 2.

159. 1973 Senate Judiciary Hearings, *supra* note 8, at 51 (statement of Prof. Ernest Gellhorn).

160. *Id.* at 51-52.

161. 5 U.S.C. §§ 551, 552, 552b, 556, 557 (1976).

162. *Id.* § 557(d)(1)(A), (B).

ested parties to counter the arguments presented.<sup>163</sup> This rationale, however, is not directly applicable to an exception request since it is not an adversary proceeding with contesting parties. In addition, it is unlikely that the penalty of the Sunshine Act—dismissal or a possible decision on the merits against a party knowingly making improper contact, applied at the discretion of the agency involved<sup>164</sup>—would be an adequate deterrent. This is because stabilization agency officials would be disinclined to penalize parties making improper contacts, since in the past *ex parte* contacts had been at least tacitly approved by these same officials.<sup>165</sup> Therefore, something beyond applying the Sunshine Act to stabilization agencies would seem to be necessary. In certain cases decisions reached on the basis of *ex parte* contacts can be challenged on due process grounds.<sup>166</sup> However, the possibility for outside enforcement of judicially developed restrictions on *ex parte* contacts is limited by the fact that these contacts, by their very nature, are difficult to detect. The best solution would be to establish more specific and understandable regulations, thus reducing the number of exception requests, and to better staff the exceptions procedure so that officially filed petitions alone would be sufficient to bring appropriate relief.<sup>167</sup>

## V. ENFORCEMENT OF STABILIZATION CONTROLS

Although the architects of the stabilization program relied primarily on voluntary compliance with wage and price controls, an attempt was made to develop an overall enforcement strategy which included administrative sanctions and litigation.<sup>168</sup> The enforcement mechanisms of the Stabilization Act provided for suits for damages, writs of injunction, declaratory judgments, and criminal fines.<sup>169</sup> Original jurisdiction for all suits arising under

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163. S. REP. NO. 354, 94th Cong., 1st Sess. 8 (1975).

164. 5 U.S.C. § 557(d)(1)(D) (1976).

165. See 1973 Senate Judiciary Hearings, *supra* note 8, at 56, 62 (statement of Peter J. Petkas).

166. *E.g.*, Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

167. See 1973 Senate Judiciary Hearings, *supra* note 8, at 45, 52 (statement of Prof. Ernest Gellhorn); N.Y. Times, Sept. 13, 1971, at 32, col. 4 (open letter from Chester Bowles, former Administrator, Office of Price Administration), cited in 1971 House Oversight Hearings, *supra* note 5, at 564. Bowles stated that stabilization agencies must promulgate reasonably precise regulations to avoid being swamped with special appeals and subjected to political pressures. *Id.*

168. HISTORICAL WORKING PAPERS, *supra* note 2, at 1053.

169. The Act as passed in 1970 provided for a \$5,000 fine for willful violation of any

the Act lay in the federal district courts, regardless of the amount in controversy.<sup>170</sup> To achieve consistency, appeals from the district court decisions, as well as all constitutional issues, were decided by the Temporary Emergency Court of Appeals.<sup>171</sup> Decisions of the Emergency Court could be taken to the Supreme Court by writ of certiorari.<sup>172</sup> However, mainly because of the limited number of agency officials, stabilization regulations were not strictly enforced<sup>173</sup> and compliance remained largely voluntary.

### A. *Enforcement of Wage Controls*

The enforcement that took place was concentrated heavily in the area of rents and prices. During Phase II, less than 3% of the total compliance effort was directed towards wages, and there was

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order or regulation and allowed for the issuance of injunctions against violators of any order or regulation. Economic Stabilization Act of 1970, Pub. L. No. 91-379, §§ 204-205, 84 Stat. 799 (expired 1971). The Act was amended in 1971 to provide additional enforcement mechanisms. A criminal fine of not more than \$5,000 for each violation of any order or regulation was added; the provision for injunctive relief was expanded; restitution of moneys received in violation of any order or regulation was specifically allowed at the discretion of a court; and provisions were added allowing private treble damage suits for intentional overcharges in the renting of property or in the sale of goods or services in violation of any order or regulation. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, §§ 208-210, 85 Stat. 743 (expired 1973).

170. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(a), 85 Stat. 743 (expired 1973).

171. *Id.* The court consisted of a three-judge panel comprised of federal district court and circuit court judges appointed by the Chief Justice. *Id.* § 211(b).

172. *Id.* § 211(f).

173. See A. WEBER, *supra* note 68, at 67.

[I]n many instances . . . effective control was a practical impossibility because of the nature of the commodities . . . or technical problems of enforcement beyond the capabilities of the existing staff. . . . The general strategy was to create sufficient restraint, if not uncertainty, so that the sellers would have a bias in favor of the status quo and lower prices rather than higher prices.

*Id.* Ralph Nader stated that "[b]usiness has learned to understand what toothless tigers are like and how to work with them. The Price Commission was a classic example of a regulatory charade in this respect." *Executive Compensation Hearings, supra* note 48, at 176. Nader cited Phase II as "the most flagrant and systematic nonenforcement of Federal regulations in the history of our Government." *Id.* at 175.

One commentator has suggested that the Nixon administration was indifferent to effective enforcement since the economic controls were primarily an external signal to foreign nations. See Askin, *supra* note 12, at 33. Controls were instituted by the Nixon administration at the same time the convertibility of the dollar was suspended and a short time before the dollar was devalued. Thus, the controls may have been instituted to show foreign nations that the United States intended to control domestic inflation rather than simply export it via exchange rate manipulations. *Id.* For a critical account of Nixon administration economic policies, see L. SILK, NIXONOMICS: HOW THE DISMAL SCIENCE OF FREE ENTERPRISE BECAME THE BLACK ART OF CONTROLS (1972).

no formal pay compliance program in Phase III.<sup>174</sup> There was little enforcement effort in the area of wages since there were relatively few public complaints about wage increases: of the alleged violations reported during Phase I, only 6% related to wages, while 75% involved prices, and 19% involved rents.<sup>175</sup> This can be explained by the fact that the 5.5% standard for pay increases adopted during Phase II received such public support that a strong compliance effort was deemed unnecessary,<sup>176</sup> and by the natural incentive of businesses to hold down employee wages.<sup>177</sup> Further, a sizeable percentage of wage earners were exempted legislatively from wage controls.<sup>178</sup> Moreover, the administration believed that strict enforcement of wage controls would be politically unsound. While administrative action calling for price rollbacks or imposing penalties on price gougers is bound to receive public approval, penalizing employers for granting substantial general pay increases is unlikely to receive similar approval.<sup>179</sup>

The major government effort was directed toward encouraging voluntary compliance with pay guidelines through noncoercive mediation of employee-employer wage disputes.<sup>180</sup> Approximately one-fourth of the wage increase investigations conducted during the program were the result of outside complaints.<sup>181</sup> Other investigations developed as a result of Internal Revenue Service audits usually performed to detect violations of price regulations, or through other channels, such as spot checks.<sup>182</sup> On the

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174. A. WEBER, *supra* note 68, at 107-08. During Phase II, the Internal Revenue Service received almost 156,000 complaints, only about 4,000 of which concerned wages. Mitchell, *The Impact and Administration of Wage Controls*, in WAGE AND PRICE CONTROLS, *supra* note 2, at 50.

175. HISTORICAL WORKING PAPERS, *supra* note 2, at 716.

176. *Id.* at 719. Internal Revenue Service field agents objected to this lack of enforcement and were anxious to pursue technical violations of wage regulations. Mitchell, *supra* note 174, at 51.

177. HISTORICAL WORKING PAPERS, *supra* note 2, at 719. Businesses resisted wage demands and frequently informed the Pay Board when unions demanded pay hikes greater than the Phase II guidelines. *Id.*

178. The Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 3, 87 Stat. 27 (expired 1973), exempted those earning \$3.50 or less per hour from wage controls. Prior to this, those earning \$2.75 or less per hour were exempted, and early in the program only those earning \$1.90 per hour or less were exempted from controls. See note 19 *supra*, HISTORICAL WORKING PAPERS, *supra* note 2, at 345-47.

179. Mitchell, *supra* note 174, at 500.

180. HISTORICAL WORKING PAPERS, *supra* note 2, at 719.

181. Mitchell, *supra* note 174, at 50. A large percentage of wage complaints concerned pay increases of public officials that were reported in the media. *Id.*

182. *Id.* Spot checks were used primarily to detect violations of rules governing executive compensation. Much of the spot-checking was directed at management-consulting



whole, wage controls worked effectively because of their self-executing nature.<sup>183</sup> Controls on executive compensation, however, were less effective since corporate management was often willing to grant relatively large pay increases to themselves and others of their general status and position.<sup>184</sup> Furthermore, while the general percentage standard for wage increases operated relatively effectively, such a standard has certain faults: it freezes intact the existing structure of relative rates of earned income,<sup>185</sup> adversely affects collective bargaining,<sup>186</sup> and, if applied to low income workers, perpetuates their status.<sup>187</sup>

### B. *Enforcement of Price Controls*

Price control regulations were not strictly enforced, partially as a result of the lack of a systematic enforcement policy and the assignment of limited personnel to the enforcement effort.<sup>188</sup> There were no guidelines as to when litigation or other administrative sanctions were to be imposed; thus, suits were brought on a random basis.<sup>189</sup> The basic objectives of the enforcement program were to identify and take visible action against violators, thereby

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firms and financial institutions since such organizations have many contacts in the business world, and would, presumably, spread the word concerning the strictness of the enforcement effort. *Id.*

183. *See id.* at 52-61.

184. In 1973, executive compensation increased by an average of 13% as compared to only a 7% increase in total compensation. *Executive Compensation: Getting Richer in '73,* BUSINESS WEEK, May 4, 1974, at 58-59. Senator Proxmire labeled this type of disparity "rank discrimination which applies one policy for the mass of Americans and another for the elitist few." *Proxmire Criticizes Executives' Raises*, Washington Post, Apr. 21, 1973, at 12, col. 6.

185. The goal of stabilization controls is to make both wages and prices rise more slowly, not to alter their relative rates of change or to redistribute income or wealth. Mitchell, *supra* note 174, at 50.

186. The imposition of a ceiling on wage increases tends to disrupt collective bargaining negotiations. Employees often believe that they are entitled to a certain percentage increase and become dissatisfied with union officials who settle at a lower figure. Conversely, employers are tempted, in the face of a strike, to settle for a higher figure and then argue to the stabilization agency that the increase embodied in the signed agreement should be reduced because it violates the wage ceiling. *1974 House Hearings, supra* note 85, at 13-14 (statement of John T. Dunlop, Director, Cost of Living Council).

187. *See 1971 House Oversight Hearings, supra* note 5, at 444 (statement of Rep. Ryan). To avoid this problem, low income workers could be exempted from controls, as was done in the World War II and Korean War stabilization programs, and eventually in the Nixon administration's stabilization program. *Id. See also* note 19 *supra*.

188. HISTORICAL WORKING PAPERS, *supra* note 2, at 1054. During Phase II, approximately 42% of the enforcement personnel was devoted to rent controls, even though rents accounted for less than 5% of the Consumer Price Index. *Id.*

189. *Id.* at 1056-57.

detering noncompliance and creating a "federal presence" in the field as a reminder to businesses that they were bound by price controls.<sup>190</sup> This federal presence was established primarily through the assignment of Internal Revenue Service agents to investigate stabilization regulation violations.<sup>191</sup> This had an implicit coercive effect because of the general reputation of that agency.<sup>192</sup> However, the fear of tax harassment against complaining or uncooperative businesses led to some congressional opposition to assigning this task to the Internal Revenue Service.<sup>193</sup>

Complaints by the public were the primary means of identifying suspected violations of price control regulations.<sup>194</sup> In addition, enforcement personnel examined economic data filed by businesses pursuant to stabilization regulations,<sup>195</sup> and conducted investigations and spot checks.<sup>196</sup> After detecting violations, the stabilization agencies issued remedial orders requiring violators to undertake affirmative action to correct their violations.<sup>197</sup> Punitive sanctions were sometimes assessed. For example, a treble rollback order required a firm to reduce its prices by triple the revenues derived from unlawful price increases.<sup>198</sup> Although there was no express statutory authority for the imposition of ad-

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190. *Id.* at 708.

191. *Id.* at 1052; YOSHPE & ALLUMS, *supra* note 70, at 118.

192. A. WEBER, *supra* note 68, at 95.

193. See 117 CONG. REC. 46,005 (1971) (remarks of Reps. Gonzales, Gross & Long). This was possible since Internal Revenue Service personnel sometimes combined tax and stabilization work. 1974 *House Appropriations Hearings*, *supra* note 70, at 685 (statement of Edward F. Preston, Assistant Commissioner for Stabilization, Internal Revenue Service).

194. A. WEBER, *supra* note 68, at 98. Earl D. Rhode, Executive Secretary of the Cost of Living Council, was quoted as saying "[t]he citizen's role in [the Phase II] program is to rat on his neighbor if his neighbor violated the controls." Wall St. J., Dec. 27, 1971, at 6, col. 1. Sophisticated and detailed complaints were sometimes received, for example, from a firm concerning its supplier. Such a detailed complaint could result in a careful investigation and a full audit. 1974 *House Appropriations Hearings*, *supra* note 70, at 686 (statement of Edward F. Preston). More general complaints were used, but primarily as intelligence leads. *Id.* Of 46,000 written citizen complaints received during Phase I, only a few hundred were found to merit some degree of investigation, and only 37 were referred to the Justice Department for possible litigation. A. WEBER, *supra* note 68, at 110-11.

195. HISTORICAL WORKING PAPERS, *supra* note 2, at 710-11.

196. *Id.* at 706, 709.

197. 1974 *House Hearings*, *supra* note 85, at 389 (statement of James B. Minor, Chairman, Wage-Price Stabilization Committee, American Bar Association).

198. *Id.* at 388; HISTORICAL WORKING PAPERS, *supra* note 2, at 1136-37. The punitive effect of a treble rollback order was questionable since some companies ordered to reduce prices in this manner experienced increased volume and a higher total profit as a result. C. GRAYSON & L. NEEB, *supra* note 49, at 202.

ministrative sanctions,<sup>199</sup> and Congress apparently had not envisioned such a procedure being used as a major enforcement tool,<sup>200</sup> the treble rollback procedure was never successfully challenged in court.<sup>201</sup> In addition to administrative sanctions, stabilization agencies developed a settlement procedure to avoid court or administrative proceedings.<sup>202</sup>

During the stabilization program, proposals were advanced to require hearings before an independent administrative law judge prior to the assessment of any penalty for price control violations.<sup>203</sup> After hearing evidence in each individual case, an administrative law judge could recommend a civil penalty which the agency might assess at its discretion. Both the stabilization agency and the alleged violator would be entitled to judicial review of the initial administrative decision without the necessity of a *de novo* proceeding.<sup>204</sup> The drawbacks of this proposal, however, outweigh its benefits. During the stabilization program, some companies charged with price control violations preferred the informal agency administrative procedures to court proceedings, despite the lack of procedural safeguards, since litigation engendered more negative publicity.<sup>205</sup> In addition, it would have been unduly cumbersome to set up a mini-judicial system, complete with administrative law judges, in a stabilization agency in which an immediate enforcement impact was necessary. Adequate due process safeguards were provided by an administrative determination of an appropriate penalty that was subject to compromise, eventual litigation, and *de novo* review.

Although the stabilization agencies were officially represented

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199. HISTORICAL WORKING PAPERS, *supra* note 2, at 1053. The Price Commission adopted the treble rollback procedure reasoning that it had an inherent power to issue any orders necessary and proper to accomplish its statutory responsibilities, except orders imposing criminal penalties. *Id.* at 1137.

200. See S. REP. NO. 507, 92d Cong., 1st Sess. 9, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2291 (indicating that injunctions would be the government's primary enforcement tool and that the government would not bring treble damage actions). *But see* H.R. REP. NO. 714, 92d Cong., 1st Sess. 8 (indicating that the treble damage provision was intended to serve as a deterrent as well as a means of recovering losses).

201. HISTORICAL WORKING PAPERS, *supra* note 2, at 1137.

202. Although there was no specific statutory authority for this, the Price Commission felt that it had inherent authority to settle for less than the maximum fine to avoid litigation. *Id.*

203. See 1974 House Hearings, *supra* note 85, at 389-91 (statement of James B. Minor); 1974 Senate Hearings, *supra* note 51, at 292 (statement of James B. Minor).

204. See 1974 House Hearings, *supra* note 85, at 389-91 (statement of James B. Minor); 1974 Senate Hearings, *supra* note 51, at 292 (statement of James B. Minor).

205. HISTORICAL WORKING PAPERS, *supra* note 2, at 1057.

in litigation by the Justice Department,<sup>206</sup> the government was reluctant to go to court to enforce stabilization regulations.<sup>207</sup> Reasons for this reluctance included the courts' inability to enforce the regulations due to their ambiguity and complexity, the time-consuming nature of litigation when an immediate enforcement impact was needed, and the inadequacy of enforcement investigation.<sup>208</sup> As a result, the threat of legal proceedings was the preferred technique, rather than their actual initiation;<sup>209</sup> formal legal action was instituted in very few cases.<sup>210</sup> With few exceptions litigation was pursued on a random basis,<sup>211</sup> with no real attempt to focus on particularly inflationary sectors of the economy or on market leaders.<sup>212</sup>

### C. *Use of Publicity as an Enforcement Tool*

Stabilization agencies allegedly used adverse publicity as an enforcement tool.<sup>213</sup> This was considered unfair and improper on the ground that it was unauthorized and beyond the effective pro-

206. The Department of Justice, through the Economic Stabilization Section of the Civil Division, handled enforcement litigation, defended suits brought against stabilization agencies, and on occasion intervened in private litigation. *1974 House Appropriations Hearings*, *supra* note 70, at 674 (statement of James W. McClane, Deputy Director, Cost of Living Council).

207. HISTORICAL WORKING PAPERS, *supra* note 2, at 1052-56; A. WEBER, *supra* note 68, at 95-96. Even when a stabilization agency concluded that a lawsuit should be filed against an alleged violator, the Justice Department sometimes refused to bring suit. HISTORICAL WORKING PAPERS, *supra* note 2, at 1052.

208. HISTORICAL WORKING PAPERS, *supra* note 2, at 1052-56.

209. *Id.* at 1056; A. WEBER, *supra* note 68, at 95.

210. HISTORICAL WORKING PAPERS, *supra* note 2, at 1052-56; A. WEBER, *supra* note 68, at 96.

211. HISTORICAL WORKING PAPERS, *supra* note 2, at 1056-57. Based largely on public relations considerations, exceptions were made during Phase II to pursue litigation to the fullest to obtain compliance with rent and retail price-posting regulations. *Id.*

212. *Id.* at 1057. There was an attempt to focus litigation on three industries—meat-packing, supermarkets, and lumber—in which there existed widespread noncompliance with stabilization regulations. The efforts were doomed to fail, however, because of imperfections in the applicable regulations. *Id.*

213. See *1973 Senate Judiciary Hearings*, *supra* note 8, at 48-50 (statement of Prof. Ernest Gellhorn); Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1403-06 (1973). Gellhorn cites an instance in which the Cost of Living Council, by public press conference, announced that the dividend policies of six firms were inconsistent with the wage-price control program. The Treasury Secretary and two Cost of Living Council aides met with the chief executive of each company and strongly discouraged dividend increases. One company, Florida Telephone Corporation, refused to limit dividends. Administration officials contacted financial institutions and large customers of the company and, apparently, persuaded them to exert pressure on the company's management. The chairman of Florida Telephone finally agreed to offset the dividend increase in the next quarter. *Id.* For another account of this incident, see A. WEBER, *supra* note 68, at 94.

tection of the courts.<sup>214</sup> Partially in response to this sentiment, both legislative<sup>215</sup> and administrative<sup>216</sup> proposals were advanced to restrict the use of prejudicial publicity by government agencies. However, the adoption of a strict rule restricting the use of publicity would be ill advised for several reasons. Public criticism of wage and price increases, or jawboning, has long been used as an integral part of government income policies.<sup>217</sup> In addition, restricting the dissemination of accurate information would be a retreat from the policy of favoring the public sector's right to know.<sup>218</sup> Furthermore, courts have been reluctant to prevent an agency or public official from publicizing suspected violations of the law.<sup>219</sup>

#### D. *Private Enforcement of Controls*

In response to testimony that the Executive should not be allowed to concentrate enforcement powers in itself,<sup>220</sup> Congress provided that private actions could be brought for violations of

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214. See 1973 Senate Judiciary Hearings, *supra* note 8, at 48-50 (statement of Prof. Ernest Gellhorn); Gellhorn, *supra* note 213, at 1403-06.

215. H.R. 10197, 94th Cong., 1st Sess. § 5 (1975), reprinted in *Administrative Procedure: Hearings on H.R. 10194, H.R. 10195, H.R. 10196, H.R. 10197, H.R. 10198, and H.R. 10199 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 12-20 (1975) [hereinafter cited as *1975 House Judiciary Hearings*]. The bill prohibited agencies and their employees from making public information about an investigation if the contents would harm a party, unless the benefit to the public clearly outweighed the potential harm to the party. It also required agencies to give advance notice to a party potentially affected by proposed publicity to allow the party to seek judicial review or prepare an answer for release to the press. *Id.* at 18-20; see *1975 House Judiciary Hearings, supra* at 35-36 (statement of William Warfield Ross, Chairman, Committee on Revision of the Administrative Procedure Act, Section of Administrative Law, American Bar Association).

216. Administrative Conference of the United States, Recommendation 73-1, reprinted in 1 C.F.R. § 305.73-1 (1977).

217. See EXHORTATION AND CONTROLS: THE SEARCH FOR A WAGE-PRICE POLICY 1945-1971, at 75-76, 205, 286 (C. Goodwin ed. 1975).

218. *1975 House Judiciary Hearings, supra* note 243, at 66-67 (statement of Judge William Fauver, President, The Federal Administrative Law Judges Conference). This policy has been recognized in such legislation as the Government in the Sunshine Act, 5 U.S.C. §§ 551, 552, 552b, 554, 556, 557 (1976), and the Freedom of Information Act, 5 U.S.C. § 552 (1976).

219. *E.g., FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968). In that case the court upheld the right of the Federal Trade Commission to issue a factual news release concerning a complaint issued in a pending adjudicatory proceeding. In a concurring opinion, Judge Robinson stated that "[p]ublicity, or the specter of publicity, may also, in a very practical way, achieve on its own a degree of informal regulation by deterring those who otherwise might be tempted to take liberties with the law." *Id.* at 1318.

220. *E.g., 1971 Extension Hearings, supra* note 8, at 504 (statement of Ralph Nader).

stabilization regulations.<sup>221</sup> However, because no provision was made for class action suits,<sup>222</sup> and because the public had little access to corporate data bearing on possible price violations,<sup>223</sup> relatively few private actions were brought under the Stabilization Act.<sup>224</sup>

### E. *A Suggested Program for Enforcement*

Should new price control regulations be imposed, a mix of enforcement tools should be provided to allow the government flexibility and discretion. These could include a treble damage provision for willful or knowing violations of price regulations, along with provisions for lesser civil fines and injunctive relief. Private enforcement actions could be encouraged by allowing class action suits for violations of price control regulations, with treble damages for intentional or knowing violations.

In cases in which it would be difficult to identify and compensate every party that suffered injury because of unlawfully high prices, the government could order the violator to reduce prices in the future until an amount equal to the damages resulting from its violation has been restored to the market.<sup>225</sup> To guard against the imposition of excessive penalties which could result from a combination of successful government and private class actions, provision could be made for the government to assume a private cause of action.<sup>226</sup> The government then would be authorized, if appropriate, to reach a settlement with the violator subject to the approval of the court in which the original class action was filed.<sup>227</sup> Agency assessment of penalties with the possibility of a *de novo* review in court would afford sufficient protection for violators while providing the immediate enforcement impact needed in a stabilization program.

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221. See note 169 *supra* and accompanying text.

222. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 210, 85 Stat. 743 (expired 1973). See also *Executive Compensation Hearings*, *supra* note 48, at 182 (statement of Ralph Nader).

223. See notes 228-34 *infra* and accompanying text.

224. HISTORICAL WORKING PAPERS, *supra* note 2, at 1051.

225. Cf. N.Y. Times, Jan. 26, 1978, § D, at 1, col. 3 (In enforcing violations of crude oil price regulations, the Department of Energy has required refunds to identifiable customers and sometimes ordered price reductions to compensate for overcharges to the general public.).

226. The assumption of a private cause of action by the government is provided for in the False Claims Act, 31 U.S.C. §§ 231-233, 235 (1976).

227. A federal class action cannot normally be compromised without the approval of the court. FED. R. CIV. P. 23(e).

## VI. PUBLIC ACCESS TO INFORMATION

Public access to certain corporate data would appear to be necessary to make a private enforcement system effective and to allow public investigation of the fairness of a stabilization program to consumers and wage earners.<sup>228</sup> After defeating proposals to make public much of the information submitted to stabilization agencies in justification of wage and price increases,<sup>229</sup> Congress enacted provisions designed to make some of this information publicly available.<sup>230</sup> However, Cost of Living Council regulations implementing this provision greatly restricted the categories of information available to the public. These regulations were held by a court to be illegal as a frustration of congressional intent, and the Council was ordered to promulgate new regulations.<sup>231</sup> When issued, the new regulations were challenged in

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228. See, e.g., 117 CONG. REC. 43,480 (1971) (remarks of Sen. Nelson); 117 CONG. REC. 43,244 (1971) (remarks of Sen. Proxmire). Some have suggested that the public should be granted a right to certain corporate information as it has been granted a right to certain government information. *Role of Giant Corporations: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business, Part 2, 92d Cong., 1st Sess. 1048 (1971)* (statement of Ralph Nader) [hereinafter cited as *Giant Corporation Hearings*].

229. See 117 CONG. REC. 46,015 (1971) (amendment of Rep. Badillo); 117 CONG. REC. 43,480 (1971) (amendment of Sen. Nelson).

230. Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 6, 87 Stat. 27 (expired 1974). This required the disclosure of data contained in quarterly reports filed by companies with annual sales of \$250 million or more which raised the price of a product accounting for 5% or more of their sales by an amount greater than 1.5%. An exception was made for proprietary data, which consisted of data relating to the trade secrets, processes, operations, style of work, or apparatus of the business. *Id.* It was argued that this exception was too broad since the term "trade secret" lacked a precise legal definition. *Giant Corporation Hearings, supra* note 228, at 1048 (statement of Ralph Nader).

231. *Consumers Union v. Cost of Living Council*, 491 F.2d 1396 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 98 (1974). The court held certain regulations to be illegal as contravening § 205(b)(3) of the Economic Stabilization Act which prohibited the Council from defining as proprietary and thus excluding from disclosure, "information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission . . ." Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 6, 87 Stat. 27 (expired 1974). The regulations defined proprietary data to include information concerning annual sales or revenues, net sales, and operating income, even though these types of information are reported to the SEC. However, since the Council's definitions of this data differed from the definitions used by the SEC—the Council's definition of annual sales or revenues did not include revenues from foreign corporations, and its definition of net sales excluded revenue from foreign operations, public utilities, insurance, and farming—this data remained confidential. The Council contended that since the "numbers" reported to it could be substantially different from those reported to the SEC, this data need not be disclosed. The court held that by adding the public disclosure provision to the Act, Congress did not intend "information or data" to mean "numerically identical information data," and that the intended effect was to withhold from the Cost of

court as going beyond the intent of Congress in requiring disclosure. However, the issue was mooted before resolution by the expiration of stabilization authority.<sup>232</sup>

In support of limiting public access to corporate information, the contention was made that businesses would not submit accurate, complete data unless assured by the government that they would be kept confidential.<sup>233</sup> Since agency decisions on matters such as exceptions often turn on the submission of complete supporting data, it is likely that companies would want to submit complete data if only to secure favorable treatment. The accuracy of the data could be enhanced further by provisions making the submission of false data a civil or criminal offense. In addition, agency subpoena authority could be exercised to secure data improperly withheld.<sup>234</sup>

Since a stabilization program depends so much on public support and voluntary compliance, nonproprietary data submitted by businesses should be disclosed to the public so that consumers can judge for themselves whether price increases or special exceptions are justified. In this way, the public can discover any special treatment given the more powerful or politically connected corporations and industries. Allowing the public access to data relied upon by stabilization officials in their decisionmaking could help check political favoritism by opening the decisionmaking process to more searching analysis. It could also encourage private investigations and enforcement actions by permitting private citizens to search for evidence of possible violations of regulations in the mass of information that normally can be examined only superficially by an understaffed agency.

## VII. CONCLUSION

In general, a stabilization program seeks to effectively and equitably control inflation, while avoiding the institution of massive bureaucracy. Although these goals may seem contradictory, certain changes in program structure and procedure, if administered

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Living Council any discretion to exclude from public disclosure business information required by the SEC, notwithstanding that divergence of definitions. 491 F.2d at 1403.

232. HISTORICAL WORKING PAPERS, *supra* note 2, at 1123-25.

233. *Id.* at 1122-23.

234. Stabilization agencies were granted subpoena power by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 206, 85 Stat. 743 (expired 1973). The Council on Wage and Price Stability has limited subpoena authority as a result of the Council on Wage and Price Stability Act Amendments of 1975, Pub. L. No. 94-78, § 2(g)(2), 89 Stat. 411 (codified at 12 U.S.C.A. § 1904 note (1978 Supp.)).



properly, could help to realize them should mandatory controls be reimposed. Detailed and precise stabilization regulations accompanied by understandable explanations could reduce the number of exception requests.<sup>235</sup> Fairness and predictability in the granting of exceptions could be promoted by the development of a known body of precedent setting forth guidelines for decisions on exception requests, rather than permitting unrecorded ex parte contacts.<sup>236</sup> Companies requesting exceptions or other special consideration should be forced to release relevant nonproprietary financial data, thus giving consumer groups and other interested parties an opportunity to analyze the validity of any special benefit allowed.<sup>237</sup> Enforcement of regulations could be strengthened by allowing private class action suits, and intentional or knowing violations of regulations could be deterred by authorizing treble damages for such infractions.<sup>238</sup> Finally, in any future program, Congress should exercise greater responsibility and control by mandating a general administrative structure and by providing more comprehensive policy guidelines.<sup>239</sup>

When considering the feasibility and advisability of imposing mandatory economic controls, an analysis of the Nixon administration's stabilization program provides a useful starting point. That analysis highlights the point that an almost unlimited delegation of power to the Executive, subject only to vague standards, can allow for the operation of a program which may effectively redistribute income from average wage and salary earners to the wealthier segments of society. The Nixon-era stabilization effort decreased workers' real income by controlling most salaries and wages while allowing prices to rise and while exempting corporate profits, dividends, and interest rates from any effective control.<sup>240</sup>

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235. See text accompanying notes 62-74 *supra*; notes 130 & 144 *supra*; and text accompanying notes 133-36 *supra*.

236. See text accompanying notes 155-60 *supra*.

237. See text accompanying notes 222-24, 228-34 *supra*.

238. See text accompanying notes 225-27 *supra*.

239. See text accompanying notes 21-24 *supra*.

240. According to Dr. Arnold R. Weber, a public member of the Pay Board during Phase II, "[t]he idea of the freeze and Phase II was to zap labor, and we did." BUSINESS WEEK, April 27, 1974, at 108. In the two-year period from December 1971 to December 1973, average after-tax weekly wages increased an average of 13%. See *Current Labor Statistics*, MONTHLY LAB. REV., Dec. 1972, at 97; *id.*, June 1974, at 106. The after-tax profits of the 1,000 largest industrial corporations, however, increased 66%, from \$25 billion a year in 1971 to \$42 billion a year in 1973. See FORTUNE DOUBLE 500 DIRECTORY 161, 231 (1974). During this period Senator Proxmire stated that "the administration has all but crossed over the threshold marking the point at which the authority granted by the Economic Stabilization Act is converted from a powerful tool designed to safeguard the

Clearly, the mere incorporation of the above proposed structural and procedural reforms in any future stabilization program would not guarantee an equitable and effective system. However, these, coupled with an organized and informed citizenry provided with structures and procedures that encourage and accommodate mass participation, will help ensure the effective and just administration of a system of economic controls.

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economic well-being of the Nation's People into a mechanism which victimizes most of the Nation's population." *The 1972 Economic Report of the President: Hearings Before the Joint Economic Comm.*, 92d Cong., 2d Sess. 4 (statement of Sen. Proxmire).