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PRICE CONTROL - PROBLEMS OF THE OVER-ALL CEILING - RENT CONTROL - RATIONING

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PRICE CONTROL — PROBLEMS OF THE OVER-ALL CEILING — RENT CONTROL — RATIONING — Three months after the passage of the Emergency Price Control Act a partial and selective approach to the problem of price control has been abandoned and a comprehensive over-all ceiling has been put into effect.[1] The economic forces generated by total war have quickly proved too powerful for the limited controls originally planned. As a result, a sweeping program of governmental control over the economic life of the nation has been instituted, with consequences too complex and far-reaching to be foreseen in any detail.

The economic factors which compelled this resort to an over-all ceiling are described in the statement of considerations, accompanying the General Maximum Price Regulation of April 28, 1942. Since the summer of 1941 a rapid shift has occurred in the fundamental balance between consumer purchasing power and the available supply of goods and services. Even as late as September, 1941, it was estimated that the portion of the national income that was available to consumers for the purchase of goods and services was at an annual rate of 78.2 billions of dollars, which almost exactly balanced the estimated goods and services available.[2] The use of idle plant capacity and labor resources made this balance possible in spite of the rapidly increasing defense production program. However, the quick rise in the rate of governmental expenditures, particularly since our entry into the war, and the accompanying restriction in the supply of goods and services available for civilian use have together produced the wide and increasing "inflationary gap," estimated at seventeen billion for 1942.[3] The measures of control already instituted have prevented the general level of wholesale prices from rising above the level of 1929 and the cost-of-living index is still substantially below the level of 1929.[4] More significant is the *rate* of increase in both wholesale and retail prices, which had tapered off after a sharp rise in the fall of 1939 only to

[1] Under the authority of the Emergency Price Control Act, Pub. L. 421, 77th Cong., 2d sess. (1942), 50 U. S. C. A. (Supp. 1942), appendix, § 901 et seq., the General Maximum Price Regulations were promulgated April 28, 1942, 7 FED. REG. 3153 (Apr. 30, 1942).

[2] SENATE HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY ON H. R. 5990, 77th Cong., 1st sess. (1941), pp. 28-29 (hereinafter referred to as the Senate Hearings).

[3] Statement by the OPA in O. P. A. BULLETIN 1, "General Maximum Price Regulations," p. 20 (1942). Secretary of Commerce Jones in a recent statement placed the figure at 30 billion. NEW YORK TIMES C3: 5 (July 9, 1942).

[4] HOUSE HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY ON H. R. 5479 (superseded by H. R. 5990), 77th Cong., 1st sess. (1941), p. 238 (hereinafter called House Hearings).

resume their upward movement at a more rapid rate after April, 1941.[5] A comparison with the record of the first world war suggests that in the spring of 1942 there was in prospect a broad upward sweep of the whole price level, of the type which produced a rise of 66 points (from a base of 1913 as 100) in the index of wholesale prices in a single year, from July 1916 to July 1917.[6] Though it is too soon after the General Maximum Price Regulation to make accurate predictions of success in controlling a similar rise today, a recent report of the Price Administrator may indicate some temporary success.[7]

The choice between selective and over-all methods of price control was extensively debated in Congress during consideration of the Emergency Price Control Act. At that time administration spokesmen repeatedly urged a selective method, on the ground of the administrative difficulties involved in a more comprehensive program and also on the ground that the immediate and urgent problem was control of critical commodities in which shortages had appeared. The present act, however, was intentionally framed so that a broader program could be adopted if necessary.[8] Though the procedure set up in the act evidently contemplates more limited objectives, there are enough elements of flexibility so that this major shift in policy will be possible without undue strain.

The present comment will not be concerned with the policies of a fiscal and monetary character that are clearly essential if there is to be effective restriction of consumer purchasing power. The problems of civilian rationing, however, are closely connected with the problems of price control[9] and a brief account will be given of the legislative provisions and administrative procedure in the rationing field. Likewise, rent control presents sufficiently distinct problems to warrant separate treatment from that of the general price ceiling.

I

THE OVER-ALL CEILING ON COMMODITIES AND SERVICES

An understanding of the problems, both legal and economic, arising from over-all price control is dependent upon an understanding of the

[5] Id. 240-246.

[6] WAR INDUSTRIES BOARD, PRICE BULLETIN No. 3, pp. 426-427 (1920) (Garrett, Government Control Over Prices).

[7] CHICAGO TRIBUNE 1:1 (June 21, 1942). Henderson reported that living costs had gone down 1/10 of 1% between May 15 and June 2, 1942, after a rise of 17.5% since the war broke out in Europe.

[8] HOUSE HEARINGS 102.

[9] Wallace and Coombs, "Economic Considerations in Establishing Maximum Prices in Wartime," 9 LAW & CONTEM. PROB. 89 at 91 (1942), in an excellent discussion of the economics of price control, state, "Similarly, price control and rationing of consumer goods must be coordinated to achieve equitable distribution and a high level of morale."

fundamental provisions of the Emergency Price Control Act and also the General Maximum Price Regulation of April 28, 1942. Therefore, before the specific problems are discussed, the essential provisions of the act and the regulation are set out.[10]

A. *The Emergency Price Control Act*

Section 1 (a) of the act sets out the reasons for its enactment in some detail, stating that the act was passed to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents"; "to eliminate and prevent profiteering, hoarding," and such "disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency"; to assure full value for defense expenditures; to protect persons with "relatively fixed and limited incomes"; to prevent hardships "which would result from abnormal increases in prices"; and to "stabilize agricultural prices."

The Price Administrator is authorized to establish such maximum prices "as in his judgment will be generally fair and equitable, and will effectuate the purposes of this Act."[11] He is to consider so far as practicable the prices prevailing between October 1 and October 15, 1941, but other relevant factors such as "speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation" and general changes in "profits" for the year ending October 1, 1941, can be considered. Each regulation must be accompanied by a "statement of the considerations" involved in the issuance of the regulation. The administrator is, so far as practicable, to consult with members of the industry before establishing the maximum price, and provision for industry advisory committees is made. The administrator has the power to issue sixty-day temporary regulations without regard to the foregoing provisions, but the price ceiling must be the price prevailing within five days of the issuance thereof.[12] The administrator may establish classifications when he thinks they are necessary to carry out the purpose of the act and may set prices below those prevailing at the time of the issuance of the regulation.[13] He also has the power to regulate or prohibit "speculative or manipulative practices."[14] Except for certain "strategic" materials and agricultural products, the administrator may buy or sell commodities to boost production.[15] The adminis-

[10] The Emergency Price Control Act will hereafter be referred to as "the Act" or "the EPCA."

[11] Sec. 2 (a).

[12] The provisions concerning rent control are set out, infra, p. 129 ff.

[13] Sec. 2. (c).

[14] Sec. 2 (d).

[15] Sec. 2 (e).

trator cannot sell agricultural commodities for less than the limitations set by section 3 (a) and he cannot "compel changes in business practices," etc., except to prevent evasion of the act.[16]

The act makes special provision for the price that can be established for agricutural commodities. No maximum can be set below the highest of (1) 110% of parity as established by the Secretary of Agriculture, (2) the market price as of October 1, 1941, (3) the market price as of December 15, 1941, or (4) the average price for the period of July 1, 1919, to June 30, 1929.[17] Maximum prices for commodities processed from agricultural products must be such that they do not depress the agricultural commodity price below the highest of the four standards.[18] All price regulations governing agricultural commodities must be approved by the Secretary of Agriculture.[19]

Section 4 (a) makes it unlawful to buy or sell, deliver or receive any commodity or service above the maximum prices, regardless of existing contracts, but no person is *required* to sell a commodity.[20]

After setting up the Office of Price Administration and providing for an administrator, the act provides that the President can transfer the power as to any commodity to other agencies and can give to the OPA rationing powers posessed by other agencies. The administrator is empowered to make investigations to carry out the act. He has the power to subpoena persons to appear, testify and produce documents, etc. District courts can order obedience to such subpoenas and punish for contempt for failing to obey such orders.[21]

The most novel provisions of the act are those providing for protesting regulations and obtaining review of the administrator's rulings. The method of obtaining relief is based on the idea of exhaustion of the administrative remedy with very limited judicial review. The specific details are set out below under the discussion of the requirements of the due process clause.[22]

The administrator has at his disposal for enforcement of the act civil injunction (which can be granted by any federal, state or territorial court), criminal penalties, treble damage suits by private citizens, and, most important of all since the promulgation of the General Maximum Price Regulation, licensing. A license may be required of all persons selling regulated commodities, but the administrator cannot refuse a license in the first instance. Licenses can contain no provision which could not

[16] Sec. 2 (f), (g). This was primarily aimed at the protection of advertising. Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 35, note 48 (1942).

[17] Sec. 3(a).

[18] Sec. 3(c).

[19] Sec. 3 (e).

[20] Sec. 4(d).

[21] The powers described in this paragraph are found in §§ 201 and 202.

[22] Infra, p. 123 ff.

be prescribed by regulation under other sections of the act, and a license may be revoked only through a judicial proceeding,[23] brought by the administrator after a *second* violation, following a first violation which has been the subject of a warning notice.[24] Under the exclusive jurisdiction provision of section 204(d), the validity of the regulation involved in the license suit may not be questioned in that suit.[25]

B. *The General Maximum Price Regulation of April 28, 1942*

The regulation provides that no person can sell or deliver, buy or receive, any commodity or service[26] at a price higher than the highest price charged by the seller during March, 1942, for the same commodity or service, or if the seller made no sales during March, his charge for "the similar commodity or service most nearly like it."[27] If the seller made no sales within the above definition, the highest price charged during March by the "most closely competitive seller of the same class" is the standard. "Highest price" is defined as the highest price charged for a commodity actually *delivered* or service supplied during the month, or, if none were delivered or supplied, the highest offering price during March. A special provision is made for fixing the prices to be charged for those commodities which cannot be priced under the above standards.

To prevent indirect price increases, the regulation provides that the seller may not change his "customary allowances, discounts or other price differentials" unless it results in a lower price, nor may the seller require or permit the purchaser to pay a larger proportion of the transportation costs than was done in March. This power is expressly given by section 2(d) of the act. To prevent another indirect form of evasion, the regulation stipulates that, if a business or assets of any business are sold or transferred and the transferee carries on the business, the maximum prices of the transferee shall be the ones the transferor would have had if the business had not been transferred. For the same reason, federal and state taxes in effect before March are or are not to be included in the maximum price depending on the practice in March; future taxes are to be collected separately.

Section 9 lists the commodities exempted from the regulation, in-

[23] The federal district courts can only be used if the person does business in more than one state or if the gross receipts are $100,000 annually. Sec. 205 (f) (2).

[24] These provisions are contained in § 205.

[25] Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 55 (1942).

[26] The provisions as to rent control are set out, infra, p. 129 ff. By definition of the OPA and § 302 (c) of the act, wages are not included in "services."

[27] Price Regulation, § 2. The definitions for such phrases as these are found in § 20, General Maximum Price Regulation.

cluding agricultural commodities,[28] and books, magazines, motion pictures, newspapers, etc.[29] The excepted services include personal services not rendered in connection with a commodity, professional services, public utility services, and services of employees to employers.

To facilitate enforcement of the regulations, certain records are required. Maximum prices for "cost-of-living commodities" must be posted after May 18, 1942, and filed with the Rationing Board for each community. A list of such commodities is printed as an appendix to the regulation. Likewise, sales slips may be requested even though the seller did not follow that practice before the regulation.

Under the licensing power given by section 205 (f) (1), the regulation provides for the registration of all persons subject to the regulation, and specifically grants a license for selling at retail. The regulation does not apply to any sale for which another maximum price is in effect. The provisions as to services did not take effect until July 1, 1942.[30] The immediate purpose of the regulation is stated to be "to guarantee to the American people that their living costs will remain stable."[31] The reason for adopting the universal price ceiling is stated as follows:

> ". . . The pressure toward higher prices is now not merely on shortage commodities, but on all commodities. The same reason which called for selective controls—the need for avoiding price increases beyond those reasonably required to increase production —now calls for the universal control over all commodities."[32]

The reasons for adopting March as the base period are set out, as required by section 2 (a) of the act.

In the statement of considerations appended to the regulation, it is interesting to note that the administrator hopes to affect wages indirectly, though he cannot do so directly.

> ". . . With price stability, wage stabilization, an important step toward stabilization of the aggregate volume of purchasing power, becomes a practical goal of public policy."[33]

[28] As provided by the § 3 of the act.

[29] As provided by § 205 (f) (1).

[30] The text of the regulation for retail services is set out in 10 U. S. LAW WEEK 2894 (1942).

[31] Services to industrial and commercial users is still covered by the General Maximum Price Regulation. Sec. 202 (a) requires that a statement accompany each regulation made.

[32] O. P. A. BULL. 1, p. 23.

[33] Id. 19.

C. *Economic and Administrative Problems Involved*

Limitations of space prevent an attempt at complete and adequate discussion of the many problems of this phase of price control. Nevertheless some of the most important, from the standpoint of those who are directly affected by the act and the regulation, are economic and administrative. Undoubtedly the most complete discussion of the economic necessity and justification for price control is to be found in the House and Senate Hearings on the EPCA[34] as it wound its way slowly through the Congressional mill.

When individual price schedules were issued by the OPA it was possible to take into account many factors peculiar to the particular industry or commodity. With the advent of an over-all ceiling, especially in the first stages in administering the regulation, such particularized attention must be abandoned.

One of the chief problems resulting from this application of base period prices is that of the "squeeze" and how to accomplish a "rolling back of the squeeze." This "squeeze" results from the time lag between retail and wholesale prices.

> ". . . The frozen price for an individual retailer or a group of retailers for a particular commodity may reflect a normal mark-up over the cost of present inventories purchased some weeks or months before the basic freeze date, at wholesale prices which subsequently moved up and became frozen at higher levels. Where this is the case and retailers are faced with the prospect of higher cost to replenish stocks, they find their margins squeezed between the frozen wholesale and retail levels."[35]

The reason the Maximum Regulation did not attempt to take this "squeeze" into account was because it did not exist universally in March as to all commodities and, secondly, because of widely varying lags for different commodities, making uniform standards impracticable.[36]

[34] One of the best discussions of the economic reasons for and problems of price control is Wallace and Coombs, "Economic Considerations in Establishing Maximum Prices in Wartime," 9 LAW & CONTEM. PROB. 89 (1942). Other discussions are Henderson and Nelson, "Prices, Profits, and Government," 19 HARV. BUS. REV. 389 (1941); BARUCH, AMERICAN INDUSTRY IN THE WAR (1941) (U. S. War Industries Board, Report, 1921); WILSON, PRICE CONTROL IN CANADA (1941) (War Time Prices and Trade Board, Booklet No. 1); Hannah, "Some Aspects of Price Control in Wartime," 27 CORN. L. Q. 21 (1941); 55 HARV. L. REV. 427 (1942); and 51 YALE L. J. 819 (1942).

[35] Wallace and Coombs, "Economic Considerations in Establishing Maximum Prices in Wartime," 9 LAW & CONTEM. PROB. 89 at 105 (1942).

[36] Id. at 105 and O. P. A. BULL. 1, p. 28.

In "rolling back the squeeze," the underlying philosophy of the OPA is extremely significant: the general price ceiling must not be punctured.[37] The seriousness of even a single break through the ceiling cannot be overemphasized, since the rise in the price of one commodity sets in action the very spiraling effect which the regulation seeks to prevent.[38] Since the whole program is dependent on a policy of no exceptions, the "squeeze" must be eased by other methods, specifically, by "rolling back the squeeze." The general policy of the OPA is one of hands off: to let the retailer negotiate with his suppliers for voluntary reduction of wholesale costs and inaugurate a policy of trimming his sails as to overhead expenses.[39] This same problem may well arise at stages of production and distribution other than retail selling and the same remedies will be necessary there.

Much can undoubtedly be accomplished by voluntary action, but obviously many cases will present problems too difficult for voluntary adjustment. If the OPA adheres to its general policy of no exceptions to the ceiling, as it would seem it must,[40] relief will have to be granted in the form of setting up (1) special price schedules for certain commodities (in the sense of setting wholesale and production prices at lower levels, not higher retail levels),[41] (2) governmental purchasing and selling so as to grant cost and profit margins to some concerns, or (3) subsidy, especially for certain high cost producers whose production is vital to defense production.[42] Which method will be used is of course a matter for the administrative discretion of the Price Administrator.

In addition to this problem of getting his "squeeze" rolled back, the retailer must keep records, report to the OPA, and keep up with the new regulations as they come out. The problems of definition and interpretation are many and difficult.[43] One of the most difficult from

[37] O. P. A. BULL. 1, p. 28.

[38] TIME, July 13, 1942, p. 16. The effect that even one uncontrolled price can have on the whole price ceiling is indicated by the rise in raw fruit prices (protected under § 3) which caused a squeeze on the wholesalers and so Henderson had to allow a 15% increase in the price of canned goods. The ceiling on gas on the Eastern Seaboard was also increased. 10 U. S. LAW WEEK 2764, 2903 (1942).

[39] Some of the many methods of reducing overhead expenses are suggested in RESEARCH INSTITUTE ANALYSIS, No. 21, "Price Controls," p. 12 (1942).

[40] But see note 38, supra.

[41] An example of this is the recent order on men's clothing, 11 U. S. LAW WEEK 2031 (1942).

[42] Wallace and Coombs, "Economic Considerations in Establishing Maximum Prices in Wartime," 9 LAW & CONTEM. PROB. 89 at 105-106 (1942); TIME, June 29, 1942, p. 61.

[43] A very complete discussion of the many problems of interpretation is found in RESEARCH INSTITUTE ANALYSIS, No. 21, "Price Control" (1942). By giving hypothetical examples, the discussion attempts to anticipate some of the practical problems which every retailer, wholesaler, and manufacturer regulated will have to meet.

the standpoint of the retailer is that of adjusting his new prices in the light of changing quality and quantity, and substitution of new products for former commodities, all of which are provided for in the regulation.[44] The problem of getting OPA relief for such discrepancies as low March prices because of loss leaders or bargain rate prices[45] probably will not be too difficult upon production of sufficient proof, but one of the hardest, if not insurmountable problems will probably be to convince OPA that the ceiling for a certain commodity is too low.

The hardships and difficult problems are not all with the buyer and seller, however. The tremendous problem of policing any such comprehensive scheme of control will test the administrator's resources to the limit.[46] The arguments of the administration spokesmen for the individual schedule approach indicate their realization of these problems of administering a universal ceiling. It will be impossible to do more than suggest some of the more serious ones, reserving a discussion of the legal difficulties till later in this comment.

That enforcement problems can reach serious proportions is indicated by the experience of England.[47] Of the many devices for evasion that are used, three of the most difficult to control are requiring combination purchases, multiplication of middlemen, and unreasonable trade allowances, all of which cause the consumer to spend more than the maximum price.[48] OPA has the authority to control these practices, along with hoarding, forward buying, etc., but such practices are often most difficult to discover.[49]

Even more difficult to prevent is the manipulation of form and quality. Some degradation of quality is inevitable,[50] but the OPA has the necessary authority to punish violators and can facilitate control

[44] From interviews with individual merchants the writer found that most felt they would have the greatest difficulty in making these adjustments for quality.

[45] RESEARCH INSTITUTE ANALYSIS, No. 21, "Price Control," pp. 60-61 (1942).

[46] The magnitude of the job which the OPA is handling is indicated in the recent attempt of Congress to hamper Henderson's work by refusing sufficient appropriations for the 2,736 lawyers, 1,800 specialists, 600 economists and many thousands of "legmen" needed to enforce the price ceiling. TIME, July 6, 1942, p. 15.

[47] The extent of these attempted evasions is indicated by the reports of the number of cases tried in England since the war started as reported in BULLETINS OF UNITED KINGDOM MINISTRY OF FOOD, 1939-1942, especially Nos. 88 (May 30, 1941), 93 (July 4, 1941), 97 (August 1, 1941), and 121 (Jan. 16, 1942). So bad have the "black markets" (a method of evading rationing regulations) become in England that one official suggested that violators be executed. TIME, Mar. 9, 1942, p. 29.

[48] For a list and description of some of the many methods of evasion, see BACKMAN, GOVERNMENT PRICE-FIXING 239 (1938).

[49] See Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 34 (1942).

[50] Id. at 33 and the interview with Henderson reported in CHICAGO TRIBUNE 1:1 (June 21, 1942).

of this problem by its classification of different grades of the same commodity.[51]

In addition to the methods of enforcement specifically given by the act, the administrator will undoubtedly be greatly aided by patriotic adherence to the regulations. As one writer put it, in speaking of enforcement during World War I,

> ". . . While there can be no doubt that in the minds of business men in general, profits stimulated patriotism, yet a feeling of loyalty to the nation . . . made possible much that would be difficult or impossible in times of peace. Publicity was made more effective; and not infrequently complaints and information came to the War Industries Board and other branches of government from patriotic third parties. The patriotism of possible purchasers helped to defeat the activities of such producers as were willing to sell their products to commercial buyers at higher prices than those fixed. Patriotism also secured a cooperation and service on the part of the various industries that were essential to the success of the price-fixing program." [52]

The policy of the OPA to date, however, is to depend on professional investigators, on the ground that they are more efficient and can prevent unnecessary friction between retailer and consumer. Nevertheless the threat of civil suits by purchasers for treble damages or $50 will undoubtedly deter some would-be violators.[53]

The most effective control that the administrator has is that of licensing all regulated businesses.

> "Of all the sanctions provided by the Act, however, licensing is likely to prove the most useful. In industries in which great numbers of persons are engaged, the requirement of licenses pro-

[51] Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 33-34 (1942). Sec. 2 (d) of the act reads, "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act."

[52] The wider the gap is between grades, the easier the schedule is to administer. Haney, "Price Fixing in the United States During the War," 34 POL. SCI. Q. 104 at 117-118 (1919).

[53] Sec. 205 (e) provides "If any person . . . violates a regulation, order or price schedule . . . the person who buys . . . may bring an action for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater . . . [plus costs]." As suggested though, the OPA does not want a citizen army of sleuths. TIME, June 22, 1942, p. 17.

vides an excellent means of building up a register of persons subject to regulation. License suspension even for a limited period is a more flexible and less harsh procedure than criminal prosecution and, in the great majority of cases, is vastly more of a deterrent than the suit in equity to enjoin further violations." [54]

The licensing power is restricted by the requirement of a judicial proceeding for revocation and by the further requirement that revocation be predicated on a second violation, preceded by a warning, after a first violation has occurred.[55] Nevertheless the licensing power is expected to provide a principal method of enforcement, particularly with respect to the special problems of an over-all ceiling because of the speed, efficiency, and flexibility thereby secured.[56]

D. *Constitutionality of the EPCA Provisions as Affected by the General Maximum Price Regulation*

It is generally agreed that stringent and effective price control is an absolute necessity if inflation is to be prevented, with its dislocating effects on vital war production and national morale.[57] From this it by no means follows that basic constitutional guaranties have been suspended, however much the necessities of wartime may require their redefinition. Attention must therefore be directed to some issues of substantive and procedural due process, though discussions of the subject elsewhere justify an abbreviated treatment. The promulgation of the General Maximum Price Regulation has clarified the problem, particularly as to some of the provisions, and the emphasis will be upon the effect of this regulation.

1. *The Power of Congress to Control Prices and Delegate Authority*

The power of Congress to control inflation by means of price control legislation, as an exercise of the war power, would seem practically beyond doubt in the light of precedents from the first world war and

[54] Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 56 (1942).

[55] Sec. 205 (f) (2). The effect on administration of these restrictions is indicated by Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 58-59 (1942), "suspension by court order may be less speedy, in many cases, than the more usual procedure of administrative suspension with subsequent judicial review. The fact that suspension proceedings will often be brought in the state courts means that those charged with the administration and enforcement of the Act must take account of 48 different systems of trial and appellate practice."

[56] For the advantages of licensing, see SENATE HEARINGS 150, 182 and HOUSE HEARINGS 524, 618. See 87 CONG. REC., No. 213, p. 9478 (Rep. Steagall), No. 211, p. 9398 (Rep. Boggs) (1941), to the effect that licensing suspensions are more reasonable than harsh criminal proceedings.

[57] Taft, "Price Fixing—A Necessary Evil," 27 A. B. A. J. 534 (1941).

the tendencies of recent Supreme Court decisions.[58] Nor can there be much question that Congress, in the exercise of its express powers, can cut across existing contract rights, after the decisions in the Gold Clause cases.[59] Though the separation of powers doctrine, as expressed in the *Schechter* case,[60] creates some limitations on the power of Congress to delegate authority to administrative bodies, the standards of the present act seem sufficiently definite to meet the tests applied in recent cases upholding similar delegations of Congressional power.[61]

The establishment of an over-all ceiling should not change the above conclusions, at least as to the power of Congress to control prices and cut across existing contract rights, since the same considerations apply in establishing a general ceiling. However, it might be argued that Congress should establish the base period of any over-all ceiling, delegating to the administrator only the authority to grant relief in cases of hardship, since the base period is the very foundation of this type of price control. Such a distinction would seem wholly unjustified, however, if the power to establish individual ceilings is granted. The problems of evaluating the complicated economic factors involved in establishing a general ceiling are just as difficult as, if not more difficult than, those involved in setting up individual ceilings.

[58] United States v. Macintosh, 283 U. S. 605 at 622, 51 S. Ct. 570 (1931), Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458 (1921), and Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 S. Ct. 314 (1929), though they are not unqualified authority for the present act, certainly indicate that price fixing, in certain circumstances at least, is constitutional. Likewise Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934), and Olsen v. Nebraska ex rel. Western Reference & Bond Assn., 313 U. S. 236, 61 S. Ct. 862 (1941), granted states power to control the economic activities and by analogy Congress probably has similar power. For discussions of this phase of the problem, see Ginsburg, "Legal Aspects of Price Control in the Defense Program," 27 A. B. A. J. 527 (1941); Freund, "The Emergency Price Control Act of 1942: Constitutional Issues," 9 LAW & CONTEM. PROB. 77 (1942); 51 YALE L. J. 819 at 828 (1942); Hannah, "Some Aspects of Price Control in Wartime," 27 CORN. L. Q. 21 at 47-55 (1941). 51 YALE L. J. 819 at 828 (1942) suggests the war power is the most obvious choice. The present writer feels it is much better to base authority on the war power because of the particularly novel procedural set-up required by a war emergency and which the writer feels cannot be justified on any other ground than a great emergency, infra, p. 129. Government counsel has argued that it may be upheld on the commerce and monetary powers as well, however. Ginsburg, supra, at 530; HOUSE HEARINGS 81-87.

[59] Norman v. Baltimore & Ohio R. R., 294 U. S. 240, 55 S. Ct. 407 (1935); Nortz v. United States, 294 U. S. 317, 55 S. Ct. 428 (1935); and Perry v. United States, 294 U. S. 330, 55 S. Ct. 432 (1935), where the Court held that Congress could abrogate provisions in both private and government contracts calling for payment in gold. See also articles cited in note 58, supra.

[60] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 at 529-530, 55 S. Ct. 837 (1935).

[61] See articles listed in note 58, supra, especially Freund, "The Emergency Price Control Act of 1942: Constitutional Issues," 9 LAW & CONTEM. PROB. 77 (1942).

2. *Problems of Enforcement—Licensing*

It has already been indicated that no seller can be denied a license, that no provisions can be incorporated unless they could be imposed by regulations under sections 2 or 202, and that a license can be revoked only for a second violation, after a warning, and then only by a court order.[62] It would therefore seem that there are sufficient safeguards to prevent arbitrary action by the administrator.[63] The license provision seems clearly intended to apply to all persons subject to price regulations,[64] but instrumentalities for the dissemination of ideas are excepted expressly,[65] thereby precluding any question of an unconstitutional restriction of freedom of speech and press.

Upon a second violation and after warning, the administrator may "petition any State or Territorial court of competent jurisdiction" or the federal district courts in case the licensee is doing business in more than one state or his gross sales exceed $100,000 annually. Upon a finding of a violation the court may suspend a license for a period not to exceed a year, subject to ordinary appeal.[66] Some of the many legal questions that will arise under this provision of the act will be: the right of the licensee to a jury trial in actions to suspend the license, whether a decree suspending a license may include an injunction against doing business without a license, and whether both violations or only the second must be proved in court.

The two provisions of the licensing sections of the act which will raise the most serious questions are (1) the provisions that in the suit for suspension of a license the validity of the particular maximum regulation cannot be challenged (though the basic constitutionality of the EPCA can of course be questioned),[67] and (2) the granting to state courts of jurisdiction to entertain suspension suits. The first of these

[62] Sec. 205 (f) (1) is summarized on page 113, supra.

[63] Such is the conclusion reached by Ginsburg, "The Emergency Price Control Act of 1942: Basic Authority and Sanctions," 9 LAW & CONTEM. PROB. 22 at 59 (1942), and it would seem well justified in the light of the stringent limitations on the power. See also SENATE HEARINGS 181 et seq. and HOUSE HEARINGS 618-619.

[64] HOUSE HEARINGS 522: "Mr. Crawford. Referring to the bill again, it does carry powers authorizing the Administrator to absolutely put all dealers under a license? Mr. Henderson. That is correct; yes, sir."

[65] Sec. 205 (f) (1).

[66] Sec. 205 (f) (2).

[67] Sec. 205 (f) (2) provides that the state court is to suspend a license when a violation is found and § 204 (d) gives the ECA exclusive jurisdiction of the validity of regulations. Nathanson, "The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review," 9 LAW & CONTEM. PROB. 60 at 75, note 67 (1942), quotes S. REP. 931, 77th Cong., 2d sess. (1942), p. 25, to the effect that "Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

provisions will be considered later in connection with the discussion of the procedure and review provisions of the act.

The reason for granting to state courts the jurisdiction to suspend licenses was convenience, both to the licensee and to the OPA.[68] Nevertheless there would seem to be a serious question as to Congressional power to do so. If the provision is considered only as a permissive grant of concurrent jurisdiction, the grant can probably be upheld on the basis of previous grants to state courts of jurisdiction over matters of citizenship and naturalization, but more solidly on the basis of the decision in the *Prigg* case.[69] In that case the court held,

> ". . . As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist, still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."[70]

It would not seem, however, that Congress really meant the state courts to have only permissive jurisdiction, for the jurisdiction of the federal district courts is limited.[71] The result would be that a great majority of the licensees might be immune from revocation proceedings. The real question which the OPA will face, then, is whether the state courts are compelled to accept jurisdiction to enforce the act.

A somewhat analogous situation is the creating of private rights under federal statutes sometimes coupled with grants of jurisdiction to state courts.[72] A significant difference, however, is found in the application of the privileges and immunities clause to compel the assumption of jurisdiction by state courts where *private* rights are created by federal legislation. License suspension suits are attempts to *enforce* the federal act, a distinction expressly recognized in *McKnett v. St. Louis & San Francisco Ry.*[73] The language in some of these cases, divorced

[68] SENATE HEARINGS 550.

[69] Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 539 (1842). That such is the chief reliance of the OPA is indicated by Mr. Ginsburg's statement, SENATE HEARINGS 550.

[70] Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 539 at 622 (1842).

[71] Jurisdiction of the federal district courts is limited to those cases in which the gross receipts of the retailer amount to $100,000 annually, or when he is in business in more than one state. Sec. 205 (f) (2).

[72] These cases are, Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169 (1912); United States v. Bank of New York & Trust Co., 296 U. S. 463, 56 S. Ct. 343 (1936); and McKnett v. St. Louis & S. F. Ry., 292 U. S. 230, 54 S. Ct. 690 (1934). But see note 74, infra. Cf. Douglas v. New York, N. H. & H. R. R., 279 U. S. 377; 49 S Ct. 355 (1929); Ex parte Crandall, (C. C. A. 7th, 1931) 53 F. (2d) 969; Southern Ry. v. Cochran, (C. C. A. 6th, 1932) 56 F. (2d) 1019.

[73] 292 U. S. 530, 54 S. Ct. 690 (1934).

from context, would uphold the proposition that state courts are bound to entertain suits founded on federal legislation,[74] but if the grant of jurisdiction in *enforcement* suits is to be upheld it should be rested on other grounds. It cannot be denied that license revocation proceedings not only place an additional burden on the dockets of the state courts but also in effect make them agencies for the enforcement of what in effect are penalty provisions of a federal act. The number of such proceedings will inevitably be greatly increased as a result of the promulgation of the General Maximum Price Regulation, so the question is a serious one. The question will perhaps be settled by the voluntary assumption of jurisdiction by the state courts, though the fact that they cannot determine the validity of the regulation under which the licensee is being penalized may cause considerable reluctance.[75]

3. *Due Process under the Fifth Amendment—Procedure and Review*

It seems clear that even in the exercise of the war power Congress and the executive are subject to the constitutional limitations of the Fifth Amendment.[76] If it can be assumed for the immediate purpose that issues as to substantive due process can be satisfactorily resolved,[77]

[74] In Second Employers' Liability Cases, 223 U. S. 1 at 58, 32 S. Ct. 169 (1912), the Court says, "The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws." And in United States v. Bank of New York & Trust Co., 296 U. S. 463 at 479, 56 S. Ct. 343 (1936), we find, "Upon the state courts, equally with courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them." But in both cases the right enforced was a private one. In quoting from Claflin v. Houseman, 93 U. S. 130 at 137 (1876), the Court in the Second Employers' Liability Cases, supra, 223 U. S. at 57, interpreted "penalty" in the sentence beginning, "If an act of Congress gives a penalty" to mean civil and remedial. And see the language of Justice Jackson in his concurring opinion in the recent case of Miles v. Illinois Central R. R., (U. S. 1942) 62 S. Ct. 827 at 832, where he expresses doubt as to the ability of Congress to impose even civil right jurisdiction duties on state courts. Frankfurter's dissent, p. 834, expresses the same idea.

[75] As one writer put it, "In any event, denial to a violator of the defense of invalidity of the price order may be a serious impairment of his defenses." 51 YALE L. J. 819 at 846 (1942). Such being the case it would seem a state court might refuse to suspend the license, if it is a voluntary matter. See also, Rava, "Procedure in Emergency Price Fixing," 40 MICH. L. REV. 937 at 967-968 (1942).

[76] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146 at 156, 40 S. Ct. 106 (1919), stating, "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

[77] One of the most complete discussions of the problem of "taking" is Abels, "Price Control in War and Emergency," 90 UNIV. PA. L. REV. 675 (1942). See also

there remain serious questions of procedural due process that deserve attention. The effects of the procedural provisions are exaggerated through the sweeping controls initiated by the General Maximum Price Regulation.

The statement of one writer that the procedural provisions of the EPCA "constitute an ingenious endeavor to adjust familiar forms to emergency uses,"[78] is well justified when an over-all analysis of the provisions is made. Within sixty days after promulgation of a regulation any person subject to such regulation may protest and the administrator must act within thirty days, either granting or denying relief, or note it for hearing, or provide for submission of further evidence. The administrator can take "official notice" of economic data and may limit proceedings to written evidence. If the protest is denied the protestant may, within thirty days, appeal to the Emergency Court of Appeals, which has exclusive jurisdiction to set aside such regulation or remand the proceeding to the administrator. The administrator may modify or rescind the regulation at any time during the pendency of the proceeding in the Emergency Court. No evidence not presented to the administrator may be presented to the ECA and a regulation is set aside only if the schedule is "not in accordance with law, or is arbitrary or capricious." An order setting the regulation aside is not effective for thirty days, during which time the administrator may appeal to the Supreme Court, and if certiorari is granted the judgment of the ECA is suspended until final disposition by the Supreme Court. No temporary or interlocutory stay or restraining order may be granted by *any* court. No other courts but the ECA and the Supreme Court have jurisdiction to set aside any such order. If the ECA denies relief, the protestant also may appeal to the Supreme Court.[79]

Of the many provisions of the act about which controversy will arise there are six that probably will provide the most serious threats to its validity. The effect of three of these has not been sufficiently influenced by the General Maximum Price Regulation to warrant discussion in this comment, in the light of previous discussions. The cases of *Norwegian Nitrogen Products Co. v. United States*,[80] *Bi-Metallic Inv. Co. v. State Board of Equalization*,[81] and, more recently, *Opp Cotton Mills v. Administrator of Wage and Hour Division*,[82] would seem clear authority for validating the failure to provide for formal hearings before issuance of a regulation, since such action is more quasi-legislative

Hannah, "Some Aspects of Price Control in Wartime," 27 CORN. L. Q. 21 at 53-54 (1941).

[78] Cavers, "Foreword," 9 LAW & CONTEM. PROB. 1 at 2 (1942).

[79] These provisions are found in §§ 203 and 204.

[80] 288 U. S. 294, 53 S. Ct. 350 (1933).

[81] 239 U. S. 441, 36 S. Ct. 141 (1915). [82] 312 U. S. 126, 61 S. Ct. 524 (1941).

than quasi-judicial.[83] Likewise the provision that no new evidence can be presented to the ECA without first presenting it to the administrator probably is valid under *Manufacturers Railway v. United States*.[84] The provision restricting hearings to the presentation of writ-

[83] Sec. 2 (a) of the act reads, "Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order."

Cases in addition to those mentioned in the body which involved the same question are: Assigned Car Cases, 274 U. S. 564, 47 S. Ct. 727 (1927); Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349 (1904); Highland Farms Dairy v. Agnew, (D. C. Va. 1936) 16 F. Supp. 575, affd. 300 U. S. 608, 57 S. Ct. 549 (1937); Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 A. 116 (1935); Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 P. 595 (1920). In Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 at 305, 53 S. Ct. 350 (1933), the Court held that the changing of tariff rates by the Tariff Commission and the President was a permissible delegation of legislative power and only a hearing such as those before Congressional committees was required. In Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U. S. 441 at 445, 36 S. Ct. 141 (1915), the statement is made that, "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. [All public acts do not need to be done in public meetings.] . . . Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule." Such reasoning would seem particularly applicable to the situation in which the OPA finds itself when promulgating general regulations. The same conclusion is reached in Opp Cotton Mills v. Administrator of Wage and Hour Division, 312 U. S. 126, 61 S. Ct. 524 (1941), but there the administrator was to give a hearing later when protest was made by individuals, a provision not found in the EPCA. See generally Hankins, "The Necessity for Administrative Notice and Hearing," 25 IOWA L. REV. 457 (1940).

The OPA, however, will have to meet the Morgan cases, Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936); 304 U. S. 1, 58 S. Ct. 773, 999 (1938); United States v. Morgan, 307 U. S. 183, 59 S. Ct. 795 (1939); 313 U. S. 409, 61 S. Ct. 999 (1941). In the second case the Court held invalid an order of the Secretary of Agriculture which established "reasonable" charges for market agencies for lack of a full hearing. A different result from the one desired by the OPA is reached also in public utility rate cases. Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 57 S. Ct. 724 (1937), and Railroad Commission of California v. Pacific Gas & Elec. Co., 302 U. S. 388, 58 S. Ct. 334 (1938), where the Court held that rate determinations had to be made only after a full hearing had been given. These cases can be distinguished on the ground that a public utility is *required* to furnish services at the set rates while persons are not required to sell commodities or services under the EPCA.

[84] 246 U. S. 457 at 490, 38 S. Ct. 383 (1918). Such a provision was included in the Fair Trade Commission Act and the National Labor Relations Act. National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241 at 249-250, 60 S. Ct. 203 (1940). And see Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 (1939), and Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 at 50-51, 58 S. Ct. 459 (1938). Cf. Armour & Co. v. Alton R. R., 312 U. S. 195, 61 S. Ct. 498 (1941).

ten evidence presents more serious questions of validity, but, since contrary evidence can be given and the problem of administering an over-all ceiling by oral hearings is so great, the Court may well uphold this provision also, though mere expediency alone may not suffice.[85]

The practical necessity for placing exclusive jurisdiction to review regulations in the Emergency Court of Appeals[86] has become even more apparent since the promulgation of the General Regulation. If courts throughout the country were allowed to set aside regulations the whole program would undoubtedly be destroyed, since uniformity of judicial decision is a vital part of any effective general ceiling. This provision has been criticized,[87] but in the light of *Myers v. Bethlehem Shipbuilding Corp.*[88] and other cases[89] the Supreme Court could easily sustain it. However, the fact cannot be ignored that the General Regulation now makes it probable that the ECA docket will be so crowded that speedy, effective *judicial* relief will be impossible.

The provision that a regulation can be set aside only if not according to law or if "arbitrary and capricious" would also seem to be affected by the General Regulation. An exact meaning of this term cannot be given,[90] but ample precedent for its use as a basis for review is found in *Denver Union Stock Yard Co. v. United States*[91] and *Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co.*[92] The position of the Court in

[85] In general, see Nathanson, "The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review," 9 LAW & CONTEM. PROB. 60 at 64 (1942), especially note 23; and also Rava, "Procedure in Emergency Price Fixing," 40 MICH. L. REV. 937 at 937-939 (1942).

[86] Nathanson, "The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review," 9 LAW & CONTEM. PROB. 60 at 75 (1942). See also note 38, supra.

[87] 51 YALE L. J. 819 at 845-846 (1942), and Rava "Procedure in Emergency Price Fixing," 40 MICH. L. REV. 937 at 967-968 (1942).

[88] 303 U. S. 41, 58 S. Ct. 459 (1938).

[89] Cited Nathanson, "The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review," 9 LAW & CONTEM. PROB. 60 at 75, note 70 (1942).

[90] Id. at 71, to the effect that it does not mean "substantial evidence." See also Stason, " 'Substantial Evidence' in Administrative Law," 89 UNIV. PA. L. REV. 1026 at 1036-1037 (1941).

[91] 304 U. S. 470, 58 S. Ct. 990 (1938).

[92] 289 U. S. 266, 53 S. Ct. 627 (1933). Other cases which consider the problem of "arbitrary and capricious" are Farley v. Simmons, (App. D. C. 1938) 99 F. (2d) 343, cert. den. Simmons v. Farley, 305 U. S. 651, 59 S. Ct. 244 (1938); Atlanta Beer Distributing Co. v. Alexander, (C. C. A. 5th, 1937) 93 F. (2d) 11; Inghram v. Union Stock Yards Co. of Omaha, (C. C. A. 8th, 1932) 64 F. (2d) 390 at 392 (describing the power as "analogous to the power of an appellate court to determine the sufficiency of evidence to support a judgment at law"); Farley v. Heininger, (App. D. C. 1939) 105 F. (2d) 79 at 82 ("It is of no importance that we might have reached a different result"); American Sumatra Tobacco Corp. v. Securities & Ex-

such cases that "Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action," [93] will make it somewhat difficult to obtain an overruling of a regulation, especially since the burden of establishing the existence of arbitrary action is upon the protestant.[94] However, the March ceiling set by the General Regulation, as applied to particular commodities or businesses, may be more liable to attack on this ground than would individual schedules.

Of all the provisions that aim to ensure effective price control the one providing that no temporary stays may be given, even by the Emergency Court, is perhaps the most effective.[95] By this provision the administrator is assured that once a ceiling is established it is there to stay, for a substantial period at least. Language in the recent case of *Scripps-Howard Radio v. Federal Communications Commission*[96] perhaps indicates that when Congress expressly makes such a provision it is valid. On the other hand the OPA must meet other very strong language to the contrary,

> ". . . The power to stay [orders of the F. C. C. while appeal is pending] was so firmly imbedded in our judicial system, so consonant with the historic procedures of federal appellate courts,

change Commission, (App. D. C. 1940) 110 F. (2d) 117; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 at 580-581, 60 S. Ct. 1021 (1940); Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541 at 547, 32 S. Ct. 108 (1912). See also SENATE HEARINGS 251-252, and HOUSE HEARINGS 406.

[93] Federal Radio Commission v. Nelson Bros. Bond & Mtg. Co., 289 U. S. 266 at 277, 53 S. Ct. 627 (1933).

[94] Pacific States Box & Basket Co. v. White, 296 U. S. 176 at 185-186, 56 S. Ct. 159 (1935). See also South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177 at 191, 58 S. Ct. 510 (1938), and American Tel. & Tel. Co. v. United States, 299 U. S. 232, 57 S. Ct. 170 (1936).

Some of the challenges that can be made to regulations and orders under this standard are that the regulation was issued without assembling the full data, that the data considered was grossly inaccurate, that the data offered by the industry was ignored, that no differentials were provided for different products or classes of producers or at least those that were made did not accord with the facts (e.g., a higher price was allowed for a lower grade product), and that the regulation is confiscatory for most of the industry. RESEARCH INSTITUTE ANALYSIS No. 12, "Price Control," pp. 70-71 (1942).

[95] Sec. 204 (c) provides, "that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206."

[96] (U. S. 1942) 62 S. Ct. 875 at 883, "Where Congress wished to deprive the courts of this historic power, it know how to use apt words—only once has it done so and in a statute [the EPCA] born of the exigencies of war."

that there was no necessity for the Court of Appeals to justify its settled practice."[97]

In referring to this power later in the case, the Court described it as "a power as old as the judicial system of the nation."[98] If the Court meant as much as the language indicates, it would seem that anything so fundamental in our concept of review of administrative tribunals is a part of the due process requirements which cut through the other powers of Congress under the usual interpretation given to the *Hamilton* case.[99] The basis for such a provision is clearly administrative necessity, as illustrated by the length of time during which injunctions have prevented action under acts finally declared valid in a number of cases.[100] However, since the adoption of the General Regulation as the method of control, the practical effect of this provision on the value of a protest right is that effective relief is seriously curtailed. Even assuming an expedited judicial treatment, a protestant will at best have to wait a year or eighteen months before any relief is granted. If stays cannot be given, at least by the Emergency Court, the person may be facing bankruptcy by this time, since he has been subject to the regulation during this period.

When a proper perspective of the whole procedure is gained, it is impossible to avoid the conclusion that the rights of the individual have been seriously impaired, particularly from a procedural standpoint. However, it is submitted that since the provisions (with the possible exception of that preventing any temporary stays) seem essential to an effective price control program, the act should be sustained, even as to procedural due process requirements[101] and even with the added problems produced by the General Regulations. The position of the present writers is that because of the extreme national emergency produced by the war and because the price control program is dealing with *economic* rights only, the Supreme Court should and probably will uphold the EPCA as interpreted in the General Maximum Price Regulation. As Charles Evans Hughes put it, in referring to the restrictions placed on the war power of Congress by the Fifth Amendment,

"... That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later

[97] Id. 881.

[98] Id. 883.

[99] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146 at 156, 40 S. Ct. 106 (1919). See note 76, supra. But even in this case the Court said "but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power."

[100] Note 85, supra.

[101] The practical necessity is indicated by Rava, "Procedure in Emergency Price Fixing," 40 MICH. L. REV. 937 (1942).

provision of the Constitution or by any one of the amendments. These may all be construed so as to avoid making the Constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defense and the perpetuity of our liberties. These rest upon the preservation of the Nation."[102]

Since *economic* rights only are involved, the Court would seem to have ample precedent for allowing greater restrictions on procedural due process than would be the case if freedom of speech and press were in question. This distinction has been recognized by the Court as to substantive rights in such cases as *Nebbia v. New York*[103] and *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*[104] It would seem better for the Court to admit frankly that when economic rights are at stake, traditional requirements of due process are subservient to the war power, except as to the barest fundamentals. This means that effective relief largely will depend on a fair and liberal administration of the provisions by the OPA. The attitude of that office to date certainly indicates that fair treatment will be given.[105]

II

RENT CONTROL

In view of the fact that rent accounts for almost one-fifth of the average wage earner's budget, being second only to food in that respect, legislation pertaining to rents substantially affects many million Americans. For this reason the rent provisions of the EPCA were thought sufficiently important to warrant a separate discussion. This section will undertake to examine those provisions.

[102] Address before the American Bar Association, reprinted in 55 CONG. REC., Part 8, Appendix 551 at 555 (1917). At p. 551 he also said, ". . . The framers of the Constitution did not contrive an imposing spectacle of impotency. One of the objects of 'a more perfect union' was 'to provide for the common defense.' A nation which could not fight would be powerless to secure the 'blessings of liberty to ourselves and our posterity.' Self-preservation is the first law of national life, and the Constitution itself provides the necessary powers in order to defend and preserve the United States. Otherwise, as Mr. Justice Story said, 'the country would be in danger of losing both its liberty and its sovereignty from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.' "

[103] 291 U. S. 502, 54 S. Ct. 505 (1934).

[104] 313 U. S. 236, 61 S. Ct. 862 (1941).

[105] This is indicated by the large number of individual protests that have been heard by the OPA and even more clearly by a recent regulation stating that if a person acted in good faith penalties would not be inflicted, 11 U. S. LAW WEEK 2006 (1942).

A. *Establishment of Defense-Rental Areas*

The need for the development of programs directed towards the stabilization of rents was recognized in the Executive Order of April 11, 1941, establishing the Office of Price Administration and Civilian Supply.[106] The activity under that order is described by Karl Borders, Director of the Rent Division of the OPA, as follows:

> ". . . With the cooperation and assistance of the Rent Section of the Office of Price Administration, mayors and local defense councils appointed Fair Rent Committees in more than two hundred defense communities throughout the country between June 1941 and January 1942. These committees, through appeals to the community spirit of fairness, undertook to inhibit exorbitant rent increases. Their efforts were effective in thousands of individual cases, but they were wholly unable to reverse an upward rent movement for which there were basic social and economic causes deriving from the expansion of the defense program. The widespread activities of these committees did, however, assist materially in focusing local and national attention upon the need for statutory rent control." [107]

Although precedents exist for government regulation of rents both in this country and elsewhere,[108] nationwide regulation such as provided by the EPCA has never before been experienced by the people of the United States.[109] Under the terms of section 2 (b) of the act, the administrator is authorized to designate "defense-rental areas" in which stabilized or reduced rents are vital in carrying out the purposes of the act. The original designation contains a "rent declaration," which sets out the reasons why rent control is needed in the area and makes recommendations for the establishment of maximum rents at specified levels. The recommendations involve no legal compulsion. When, however, a Maximum Rent Regulation [110] is issued, it has the force and

[106] Executive Order No. 8734, 6 FED. REG. 1917 (1941). For a discussion of the social and economic considerations leading to rent control legislation, see Borders, "Emergency Rent Control," 9 LAW & CONTEM. PROB. 107 (1942); HOUSE HEARINGS 264.

[107] Borders, "Emergency Rent Control," 9 LAW & CONTEM. PROB. 107 (1942).

[108] See DRELLICH and EMERY, RENT CONTROL IN WAR AND PEACE (1939); SAFFORD, THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACTS, 1920 to 1939, 10th ed. (1939); Borders, "Emergency Rent Control," 9 LAW & CONTEM. PROB. 107 at 112 (1942); 50 YALE L. J. 176 (1940).

[109] For federal precedent, however, see the Ball Rent Law, Act of Oct. 22, 1919, c. 80, Tit. II, 41 Stat. L. 298 (1919).

[110] Separate regulations are issued for each area, but as the provisions are substantially the same they will be referred to herein generally as "the regulations."

effect of law. State and local authorities are given sixty days from the declaration date to act on the administrator's recommendations. If within that period rents have not been reduced and stabilized in accordance with the recommendations, the administrator may issue a regulation establishing a rent ceiling in that area. Section 2 (c) provides for flexibility in the establishment of maximum prices and rents. It authorizes classifications, differentiations, adjustments and reasonable exceptions which in the judgment of the administrator are necessary or proper to effectuate the purposes of the act. Section 2 (d) authorizes the regulation of leasing practices, including evictions, which are equivalent to or are likely to result in rent increases. Section 4 is generally devoted to making violations of the act unlawful and subject to the penalties set forth in section 205. There are no additional penalties for violations of the rent provisions of the act.[111]

On March 2, 1942, the administrator in his first official action designated twenty "defense-rental areas."[112] By June 26, 1942, 386 additional designations had been made, and regulations had been issued for 75 areas.[113] Since hotels and rooming houses were not covered by those regulations, they were the subject of separate regulations issued June 25, 1942 and effective in the 75 areas on July 1.[114] Provision for landlord registrations has been included in the regulations under the authority of section 202.

B. *Legal Problems*

The basic question of the constitutionality of rent control legislation has been raised on several occasions, and despite varied attacks[115] the United States Supreme Court has sustained such legislation as within the police powers of the state.[116]

Adoption of the act does not mean that all rents for dwellings in the United States are going to be brought under federal control, for the administrator's authority extends only to those areas which he designates as "defense-rental areas."[117] This term is defined as the "District of Columbia and any area designated by the Administrator as an area

[111] The penalties are discussed at pp. 112-113, supra.

[112] 7 FED. REG. 1675-1695 (1942).

[113] NEWSWEEK, July 13, 1942, at 45.

[114] The differences between the two types of regulations are discussed at page 138, infra.

[115] See DRELLICH and EMERY, RENT CONTROL IN WAR AND PEACE (1939).

[116] Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458 (1921); Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 S. Ct. 289 (1922); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Ct. 465 (1921). See 55 HARV. L. REV. 427 at 497-498 (1942), and the discussion at page 119 ff., supra.

[117] Sec. 2 (b).

where defense activities have resulted or threatened to result in an increase in the rents for housing accommodations inconsistent with the purposes" of the act.[118] This language permits the administrator to act on the basis of his knowledge that a new factory, Army camp or other war activity will commence in a particular locality. Preventive rather than corrective measures may thus be employed. Any challenge to the administrator's actions on the ground that the area affected is not a "defense-rental area" would probably be unsuccessful in the face of this broad language.

Within any "defense-rental area" rent control is limited to housing accommodations. This would seem to cover any places wherever people live and pay rent, whether in houses, apartments, flats, tenements, rooms, hotels, fraternity houses, boarding houses, college dormitories, auto camps or trailers. However, rent control does not extend to buildings used solely for business or industrial purposes. The regulations which have been issued to date have exempted farm dwellings occupied by tenants engaged for a substantial portion of their time in working on the farm. Likewise, dwelling space occupied by domestic servants, caretakers, managers, or other employees to whom the space is provided as part of their compensation and who are employed for the purpose of rendering services in connection with the premises of which the dwelling space is a part have been exempted.[119]

The technique employed under the act has been rent pegging within a particular defense area by reference to a specified date,[120] which is

[118] Sec. 302 (d). The question was raised in the hearing before the House Committee whether a "defense-rental area" was coterminous with the so-called defense-housing areas proclaimed by the President under the Defense Housing Insurance Act, 55 Stat. L. 55 (1941), amending the National Housing Act, 48 Stat. L. 1246 (1934), 12 U. S. C. A. (Supp. 1941), § 1738. Mr. Ginsburg, General Counsel of OPA, replied that although the terms were "substantially equivalent in operation," a separate finding was necessary under the EPCA. HOUSE HEARINGS 413. In practice the administrator has recited in his designations the fact that the President has found that an acute shortage of housing exists or impends in the particular area in question under the National Housing Act. Mr. Henderson has stated that in his opinion the "test is whether or not rents have been affected by the defense efforts." Id. 962.

[119] The question was raised in a case filed in Detroit (reported in the DETROIT FREE PRESS, 1:4, July 10, 1942) whether the ceilings apply to tenants who are professional men or others whose income is not fixed, the theory apparently being that since one of the general purposes of the act, as stated in § 1 (a), is "to protect persons with relatively fixed and limited incomes," those whose incomes are not fixed or limited are not covered by the act. While such a contention appears unsound upon a reasonable construction of § 1 (a) in its entirety, it does indicate a drafting weakness inasmuch as rent increases impose a burden on people with low incomes and "fixed and limited incomes" alike. HOUSE HEARINGS 2278.

[120] The legislation of Great Britain is basically similar, and has apparently been successful in checking the advancing cost of living. See SAFFORD, THE RENT AND

designated as the maximum rent date. This date varies from area to area depending on local conditions, and it marks the level above which rents in general cannot go. The use of this date standard avoids the gigantic administrative task of inspecting the living accommodations of each of America's sixteen million rent-paying families and setting a maximum rent for each place. It also provides a definite standard to guide administrative action in establishing maximum rents.[121] The act indicates, generally, an intent to stabilize rents as of the April 1, 1941, level. However, the administrator is empowered to make adjustments for changes in operating costs and may, under certain conditions, go back as far as April 1, 1940, or any time subsequent to that date for the level desired. One of the factors leading to the choice of the April 1, 1940, date was that considerable rent data had been gathered by the Census Bureau as of that time.[122] Between April 1, 1940, and the date on which the administrator acts, his only guide in setting maximum rents is that they be rents such "as in his judgment will be generally fair and equitable and will effectuate the purposes" of the act. Although the use of such generalized language undoubtedly was necessary, it provides landlords acting in good and bad faith alike a tool with which to challenge the administrator's action. The directive to the administrator to make adjustments for relevant factors of general applicability, "including increases or decreases in property taxes and other costs," is similarly couched in such broad form as to provide a possible ground for protest of a rent regulation.

It was recognized that the establishment of a maximum rent would be ineffective if landlords remained free to cut down or eliminate services bargained for in the leasing agreement or furnished as of the maximum rent date. Consequently, "housing accommodations" are defined in the act to include "privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property."[123] Unless the landlord files a petition for approval of decreased services he is required to maintain services of the same type, quantity, and quality as those provided on the date determining the maximum rent. It was argued in a case which arose under the New York Housing

MORTGAGE INTEREST RESTRICTIONS ACTS, 1920 to 1939, 10th ed. (1939). Canadian legislation is of the same type. Order-in-Council, P. C. 4616, Sept. 11, 1940.

[121] 50 YALE L. J. 176 at 180 (1940) contains a discussion of the difficulties encountered in the administration of the "fair rent" legislation enacted in New York after World War I. See also, DRELLICH and EMERY, RENT CONTROL IN WAR AND PEACE 63 (1939). The date standard was not a part of the bill as it was first introduced, the requirement merely being that rents be fixed so as to effectuate the purposes of the act. H. R. 5479, 77th Cong., 1st sess. (Aug. 1, 1941).

[122] Borders, "Emergency Rent Control," 9 LAW & CONTEM. PROB. 107 at 118 (1942).

[123] Sec. 302 (f).

Laws of September, 1920, that to compel the continuance of services would be violative of the Thirteenth Amendment.[124] The United States Supreme Court, speaking through Justice Holmes, dismissed the contention, saying,

> "... the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that in the old law might issue out of or be attached to land."[125]

Because of the comparative ease with which a landlord can evade rent restrictions through the threat of dispossession, the success of any rent control program depends in large part upon the regulation of evictions.[126] The Ball Rent Law affecting the District of Columbia and the postwar laws of New York contained over-all restraints on evictions.[127] In general these local laws prohibited eviction or dispossession regardless of the terms of any lease or contract, except where there had been a default in the payment of rent, or the tenant had committed a nuisance, or had used the premises for illegal or immoral purposes, or where the landlord sought the premises for immediate occupation by himself or a member of his family, or where he planned to make substantial alterations to the dwelling, or planned to raze the property and replace it with a new construction. The EPCA provides unusually broad powers for the control and restraint of evictions. Specifically, section 2 (d) of the act states:

> "... he [the administrator] may, by regulation or order, regulate or prohibit ... renting or leasing practices (including practices relating to recovery of the possession) ... likely to result in ... rent increases ... inconsistent with the purposes of this Act."

In addition, section 4 (b) declares,

> "It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations, the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or oc-

[124] Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465 (1921).

[125] Id., 256 U. S. at 199. Practically speaking, questions of involuntary servitude are likely to be academic since § 4 (d) provides that a lessor cannot be compelled to offer housing accommodations for rent. However, in the absence of a written lease, the problem of what services were furnished or should have been furnished at the base date may well be a difficult one.

[126] HOUSE HEARINGS 960.

[127] Act of Oct. 22, 1919, c. 80, Title II, 41 Stat. L. 298 (1919); N. Y. Laws (1920), c. 944.

cupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder."

It is questionable, nevertheless, whether all of the provisions of the Maximum Rent Regulations issued pursuant to the act are authorized by these sections of the act itself. The section of the regulations pertaining to evictions is so framed as to deprive the landlord of all remedies of dispossession except in certain specified cases.[128] It appears

[128] Section 6 of the Maximum Rent Regulations, 7 FED. REG. 4038 (1942), as amended June 30, 1942, id. 4885, provides as follows:

"(a) So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, not withstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, unless:

"(1) The tenant, who had a written lease or other written rental agreement, has refused upon demand of the landlord to execute a written extension or renewal thereof for a further term of like duration but not in excess of one year but otherwise on the same terms and conditions as the previous lease or agreement except insofar as such terms and conditions are inconsistent with this Maximum Rent Regulation; or

"(2) The tenant has unreasonably refused the landlord access to the housing accommodations for the purpose of inspection or of showing the accommodations to a prospective purchaser, mortgagee or prospective mortagee, or other person having a legitimate interest therein: *Provided, however,* That such refusal shall not be ground for removal or eviction if such inspection or showing of the accommodations is contrary to the provisions of the tenant's lease or other rental agreement; or

"(3) The tenant (i) has violated a substantial obligation of his tenancy, other than an obligation to pay rent, and has continued, or failed to cure, such violation after written notice by the landlord that the violation cease, or (ii) is committing or permitting a nuisance or is using or permitting a use of the housing accommodations for an immoral or illegal purpose; or

"(4) The tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the housing accommodations or a predominant part thereof are occupied by one or more subtenants or other persons who occupied under a rental agreement with the tenant; or

"(5) The landlord seeks in good faith to recover possession for the immediate purpose of demolishing the housing accommodations or of substantially altering or remodeling it in a manner which cannot practicably be done with the tenant in occupancy and the plans for such alteration or remodeling have been approved by the proper authorities, if such approval is required by local law; or

"(6) The landlord seeks in good faith to recover possession of the housing accommodations for immediate use and occupancy as a dwelling by himself, his family or dependents; or he has in good faith contracted in writing to sell the accommodations for immediate use and occupancy by a purchaser, who in good faith has represented in writing that he will use the accommodations as a dwelling for himself, his family or dependents; or the landlord seeks in good faith not to offer the housing accommodations for rent. If a tenant has been removed or evicted under this paragraph (a) (6) from housing accommodations, such accommodations shall not be rented for a period

that a landlord cannot evict, merely on the ground of the expiration of the lease, a tenant whose faults fall short of a substantial breach of the lease or commission of an outright nuisance unless the landlord decides in good faith not to offer the premises for rent to anybody. Implicit is the idea that the landlord must, in effect, renew the lease;[129] yet section 4 (d) of the act provides that "Nothing in this Act shall be construed to require any person to . . . offer any accommodations for rent." *A fortiori* it would seem that the landlord could not be required to *rent* his accommodations.[130] No matter how liberal a construction be given section 2 (d), it is clearly limited by section 4 (d).[131]

of six months after such removal or eviction without permission of the Administrator. The landlord may petition the Administrator for permission to rent the accommodations during such six month period, and the Administrator shall grant such permission if he finds that the action was in good faith and not for the purpose of evading any provision of the Act or this Maximum Rent Regulation.

"(b) No tenant shall be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law. The Administrator shall so certify if the landlord establishes that removals or evictions of the character proposed are not inconsistent with the purposes of the Act or this Maximum Rent Regulation and would not be likely to result in the circumvention or evasion thereof.

"(c) The provisions of this section do not apply to a subtenant or other person who occupied under a rental agreement with the tenant, where removal or eviction of the subtenant or other such occupant is sought by the landlord of the tenant, unless under the local law there is a tenancy relationship between the landlord and the subtenant or other such occupant.

"(d) At the time of commencing any action to remove or evict a tenant (except an action based on non-payment of rent not in excess of the maximum rent) the landlord shall give written notice thereof to the Area Rent Office stating the title and number of the case, the court in which it is filed, the name and address of the tenant and the grounds on which eviction is sought.

"(e) No provision of this section shall be construed to authorize the removal of a tenant unless such removal is authorized under the local law."

[129] This situation may arise when the landlord cannot in good faith withdraw the premises from the market altogether, because he wishes to rent to a particular person other than the tenant whose lease has expired.

Cf. Stern v. Equitable Trust Co., 238 N. Y. 267, 144 N. E. 578 (1924), where a tenant for a term of years refused to deliver possession at the expiration of the lease. The tenant died several months afterwards, and the court held that under the emergency rent law of New York, N. Y. Laws (1920), c. 944 and amendments, there was a statutory tenancy at will and the deceased's estate was liable for only a reasonable rental up to the death of the tenant. The case is discussed in 23 MICH. L. REV. 75 (1924).

[130] If it be argued that the action of the tenant in wishing to renew is "action authorized" by the act within the meaning of § 4 (b), the absurd result is reached that the landlord cannot be required to renew, but if he refuses to do so he is subject to the penalties of the act.

[131] It is arguable that § 2 (d) fails to support the eviction section of the regula-

Granting, however, that section 2 (d) of the act standing alone cannot support the eviction section of the regulations on the above facts, does section 6 (b) of the regulations, which permits the landlord to remove the tenant for any reason with the approval of the administrator, save the situation? It might be said that the mere opportunity for petition and approval takes the case out of section 4 (d) of the act —that the landlord is not being required to offer his accommodations for rent so long as he may be granted permission which will enable him to refuse to make such an offer. But, if permission is not granted, the result is the same as if the opportunity never existed, and the landlord is in effect being required to rent.[132] It is provided that the administrator shall certify that the landlord may pursue his remedies in accordance with the requirements of the local law if the proposed remedies would not be likely to result in an evasion of the act.[133] Thus, on the supposed facts and in the majority of cases, the certificate permitting eviction would issue and the matter would end. This has been done in numerous cases already. The further question remains, however, whether, in view of section 4 (d) of the act, the landlord can be required to rent to the tenant whose lease has expired even though his petition to rent to someone else was refused on the ground that it would evade the act. If it can be said that section 4 (d) of the act by implication contains the limitation that the landlord can be required to rent if an evasion of the act would otherwise result, any possible conflict between the act and the regulations in this connection would be avoided.

Another question as to the validity of the regulations is raised by section 5 (e) of the regulations, which provides that where housing accommodations are occupied by subtenants, the tenant may petition the administrator for leave to exercise any right he would have, except for the Maximum Rent Regulation, to sell his underlying lease. The section seems to imply that the tenant cannot sell his lease without permission even though no evasion of the act is intended or effected. Again it is doubtful whether section 2 (d) of the act will sustain such a provision. In practice, the result will depend on whether the administrator's permission is given with reasonable liberality. Quite obviously the interpretation of section 2 (d) of the act will determine the extent of the

tions on the above facts even if § 4 (d) were not in the act or were inapplicable, on the ground that a refusal to renew is not a "renting or leasing practice" or a "practice relating to recovery of the possession." The same reasoning might be used to challenge the authority of the administrator to require permission to rent the premises again after having removed the tenant under § 6 (a) (6) of the regulations, note 128, supra.

[132] As a matter of procedure, the Emergency Court of Appeals will probably require the landlord to obtain a refusal of his petition before hearing his protest challenging the validity of the eviction section, the reason being the familiar doctrine of exhaustion of administrative remedies.

[133] Sec. 6 (b) of the Regulations, note 128, supra.

administrator's authority in a number of situations. Whether it is given a broad or narrow construction will depend largely on the effect given the so-called rule that statutes which alter the common law are to be construed narrowly. In view of the emergency character of the act and its place in the war effort, it is not unreasonable to suppose that ordinary rules of construction will be disregarded.

The chief difference between the regulation for hotels and rooming houses and that for dwelling units is the manner in which the maximum legal rent is determined. For the dwelling units the highest permissible rent is the amount charged on a specified date. For hotels and rooming houses the maximum rent is the highest rent charged during the thirty days preceding the specified date. This difference reflects the peculiar economic situation of the hotel or rooming house proprietor. It permits him to quote varying rents for varying terms of occupancy and varying numbers of occupants. A practical problem in the determination of the maximum rent will arise in connection with rooms which were furnished with meals. Section 4 (e) of the Maximum Rent Regulation for Hotels and Rooming Houses[134] provides for apportionment of the rent from the total charge for the room and meals by the landlord. Landlords are now required to make separate charges. The eviction section is substantially the same as that for the dwelling houses with the exception that the section does not apply to "A tenant occupying a room within a hotel on a daily or weekly basis; or a tenant occupying on a daily basis a room within a rooming house which has heretofore usually been rented on a daily basis."[135]

Here again we see clearly demonstrated the inadequacy of traditional methods of administration and review in the novel situations created by a war emergency with the consequent necessity for powerful centralized authority. It is clear that fairness and effective relief to persons subjected to hardship by the EPCA, especially under the General Regulations, will depend to a very great extent on a fair and liberal administration of the act and regulations by the O.P.A.

III

RATIONING

One of the most powerful weapons in the hands of the government in effectuating a workable wartime economy is the authority to ration consumer goods. It serves a twofold purpose, in that it makes possible an equitable distribution of scarce essential materials and prevents

[134] 7 FED. REG. 4916-4919 (1942).

[135] Id., § 1388.1856(d)(2). The provisions of the regulations for dwelling houses making an exception where the landlord seeks to use the accommodations for himself or family or to sell the house, are omitted.

hoarding by those persons who are able to pay the price demanded. Hence it is not surprising that rationing is generally recognized as an integral part of the war effort.[136]

While the average consumer of rationed goods will be confronted chiefly with the economic aspects of rationing in that he will have to curtail his purchasing, the wholesale and retail merchant will, in addition, be faced with the enforcement provisions of the rationing legislation.

This section will consider primarily some of the controversial legal problems raised by the enforcement provisions.[137]

A. *Authorization and Delegation of Powers*

The statutory basis for the rationing program is section 2 (a) of the National Defense Act,[138] as amended by the Vinson Act[139] in May 1941. The act provides in part:

> ". . . Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The act further provides:

> ". . . The President may exercise any power, authority or discretion conferred on him by this Act, through such department,

[136] For a detailed discussion of the economic problems of rationing see, Weiner, "Legal and Economic Problems of Civilian Supply," 9 LAW & CONTEM. PROB. 122 (1942).

[137] It is not the purpose of this comment to cover the broad constitutional problems connected with rationing. Some of the questions that will be raised are: Does the war power of Congress extends to rationing? Are the acts passed arbitrary so as to amount to a deprivation of due process? Are the standards of the act definite enough? Does rationing amount to a taking of property? See generally, 26 MARQUETTE L. REV. 157 (1942); Weiner, "Legal and Economic Problems of Civilian Supply," 9 LAW & CONTEM. PROB. 122 (1942); ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT, S. Doc. 8, 77th Cong., 1st sess. (1941), p. 101, "the very emergency character of the situations [wars] makes inapplicable the procedures evolved for dealing with the normal regulations promulgated by administrative agencies in the performance of their duties." Cf. Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935).

[138] Act of June 28, 1940, 54 Stat. L. 676, 41 U. S. C. (1940), note preceding § 1.

[139] Act of May 31, 1941, 55 Stat. L. 236, 41 U. S. C. (Supp. 1941), note preceding § 1.

agency or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe."

Under the authority vested in him, the President, on August 28, 1941, delegated to the Office of Production Management the powers conferred upon him by section 2 (a).[140] In the OPM this authority was exercised by the Director of the Division of Priorities.[141] In January, 1942, the President by executive order transferred the rationing authority from the OPM to the newly established War Production Board.[142]

The basic rationing authority was placed in the Office of Price Administration by the WPB Directive of January 24, 1942, which provides:

> "The Office of Price Administration is authorized and directed to perform the functions and exercise the power, authority and discretion conferred upon the President by . . . [the Priorities Act] . . . with respect to the exercise of rationing control over (1) the sale, transfer or other disposition of products by any person who sells at retail to any person, and (2) the sale, transfer or other disposition of products by any person to an ultimate consumer."[143]

In April, 1942, the Second War Powers Act was enacted,[144] giving the President certain investigative powers and providing for criminal sanctions. To vest these new powers in the OPA the President issued the executive order of April 7, 1942. By that order he redelegated the powers previously given and included these new enforcement provisions.[145] In addition to its general powers, the OPA has been given authority over specific goods, such as new passenger automobiles, tire recapping and retreading material, and sugar, by supplementative directives from the WPB.[146]

B. *Criminal Sanctions of the Rationing Program*

Prior to the passage of the Second War Powers Act,[147] rationing orders were enforced only by suspension orders, or under sections 35 (A)[148] and 37[149] of the Criminal Code. Injunctions were also

[140] Exec. Order, No. 8875, 6 FED. REG. 4483 (1941).
[141] OPM Reg. No. 3, 6 FED. REG. 4865 (1941).
[142] Exec. Order No. 9024, 7 FED. REG. 329 (1942).
[143] WPB Directive No. 1, 7 FED. REG. 562 (1942).
[144] Act of March 27, 1942, Pub. L. 507, 77th Cong., 2d sess.
[145] Exec. Order No. 9125, 7 FED. REG. 2719 (1942).
[146] The complete text of these orders will be found in C. C. H., WAR LAW SERVICE, "Price," ¶ 52,051 et seq. (1942).
[147] Act of March 27, 1942, Pub. L. 507, 77th Cong., 2d sess.
[148] 18 U. S. C. (1940), § 80.
[149] 18 U. S. C. (1940), § 88.

used in some cases of violation. The inadequacy of such measures in a large-scale program forced Congress to arm the administrator with severe penal sanctions.[150] These sanctions are confined, however, to intentional acts and do not cover careless violations. Likewise such sanctions are often too severe for minor violations. To assure an adequate and efficient enforcement of rationing orders, it would seem desirable that some provision be made for minor fines and confiscatory orders, since such cases will undoubtedly constitute the large majority of violations.

The criminal sanctions of the Second War Powers Act, however, do not preclude the use of sections 35 (A) and 37. These sections will continue to be used because of the procedural advantages which they offer.

1. *Section 35 (A)*

Section 35 (A) imposes a very severe fine or imprisonment for making false statements in any matter "within the jurisdiction of any department or agency of the United States."[151] This would clearly apply to persons who falsify reports or otherwise conceal material facts with respect to their rationing activities. In at least two cases[152] convictions have been secured under this section of the code.

The advantage of using section 35 (A) is that it is directed against the falsification itself, and therefore anyone making a false statement in connection with a statute or regulation is precluded from questioning the validity of that statute or regulation.[153] Furthermore, the statement need not be made to an officer or agent of the government,[154] nor need it be made under oath[155] or cause the government pecuniary loss.[156]

[150] The Second War Powers Act, § 301, amending § 2 (a) of the National Defense Act, adds as subdivision (5): "any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a), or any rule, regulation or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor. . . ."

[151] 18 U. S. C. (1940), § 80.

[152] United States v. Hart, (D. C. Ind. 1942) discussed in C. C. H. WAR LAW SERVICE, "Priorities," ¶ 39,145 (1942); United States v. Tanley, (D. C. Minn. 1942) discussed in 10 U. S. LAW WEEK 2867 (1942).

[153] United States v. Kapp, 302 U. S. 214, 58 S. Ct. 182 (1937). In discussing this question, Hughes, C. J., said "It might just as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were solicited in the course of invalid transactions." 302 U. S. at 217.

[154] United States v. Mellon, (C. C. A. 3d, 1937) 96 F. (2d) 462, cert. den. Mellon v. United States, 304 U. S. 586, 58 S. Ct. 1061 (1937).

[155] United States v. Dumas, (D. C. N. Y. 1923) 288 F. 247.

[156] United States v. Gilliland, 312 U. S. 86, 61 S. Ct. 518 (1941); United States v. Goldsmith, (C. C. A. 7th, 1940) 108 F. (2d) 916, cert. den. Goldsmith v. United States, 309 U. S. 678, 60 S. Ct. 715 (1940). It has also been held that the

The burden, of course, is on the government to prove the fraudulent intent.[157] On the other hand, the restricted applicability of section 35 (A) is a disadvantage. It applies only when a false report is given and cannot be used to prevent violations in defiance of regulations.

2. *Section 37*

The passage of the War Powers Act has made section 37 even more effective than it was before. This section makes it criminal for two or more persons to conspire "to commit any offense against the United States, or to defraud the United States in any manner," if coupled with an overt act made by *one* of them to effect the object of the conspiracy.[158] Prior to the passage of the Second War Powers Act it was not clear whether or not a conspiracy to violate a rule or regulation of the rationing authorities would be a "conspiracy to commit an offense against the United States."[159] Since the new statute expressly makes such acts criminal, there can no longer be any doubt as to the applicability of section 37 in these situations.

The question remains: what constitutes a conspiracy? Under common-law principles, if the act or crime to be performed demands action by two parties, it is quite clear that these same parties cannot be charged with a conspiracy to perform the act.[160] Courts, however, have not considered a sale as the act of two parties, rather calling it a unilateral transaction.[161] Therefore, both buyer and seller are guilty of a con-

government need not be actually deceived. United States v. Presser, (C. C. A. 2d, 1938) 99 F. (2d) 819.

[157] United States v. Long, (D. C. Mass. 1936) 14 F. Supp. 29.

[158] 18 U. S. C. (1940), § 88. The overt act need not be criminal. Hoeppel v. United States, (App. D. C. 1936) 85 F. (2d) 237; Collier v. United States, (C. C. A. 5th, 1918) 255 F. 328. Cf. United States v. Britton, 108 U. S. 199, 2 S. Ct. 531 (1883).

[159] United States v. Hutton, 256 U. S. 524, 41 S. Ct. 541 (1921); Hoeppel v. United States, (App. D. C. 1936) 85 F. (2d) 237; Taylor v. United States, (C. C. A. 7th, 1924) 2 F. (2d) 444, cert. den. 266 U. S. 634, 45 S. Ct. 226 (1924). Contra, In re Wolf, (D. C. Ark. 1886) 27 F. 606. Cf. United States v. Winner, (D. C. Ill. 1928) 28 F. (2d) 295; Hammerschmidt v. United States, 265 U. S. 186, 44 S. Ct. 511 (1924).

[160] 2 WHARTON, CRIMINAL LAW, 12th ed., § 1604 (1932); United States v. Dietrich, (C. C. Neb. 1904) 126 F. 664; United States v. Sager, (C. C. A. 2d, 1931) 49 F. (2d) 725; Norris v. United States, (C. C. A. 3d, 1929) 34 F. (2d) 839, revd. on other grounds, United States v. Norris, 281 U. S. 619, 50 S. Ct. 424 (1930); United States v. Katz, 271 U. S. 354, 46 S. Ct. 513 (1926). But for application of this rule to statutory crimes, see Vannata v. United States, (C. C. A. 2d, 1923) 289 F. 424; Gebardi v. United States, 287 U. S. 112, 53 S. Ct. 35 (1932); United States v. Holte, 236 U. S. 140, 35 S. Ct. 271 (1915).

[161] Vannata v. United States, (C. C. A. 2d, 1923) 289 F. 424; Ex parte O'Leary, (C. C. A. 7th, 1931) 56 F. (2d) 515; Curtis v. United States, (C. C. A. 10th, 1933) 67 F. (2d) 943. But see United States v. Katz, 271 U. S. 354 at 355, 46 S. Ct. 513

spiracy under section 37 when they plan a sale in violation of rationing regulations.

C. *Other Sanctions*

1. *Injunction*

It seems well settled that when Congress passes a mandatory statute, the courts will enforce it by the use of the injunction.[162] In a closely analogous situation arising in World War I under the Lever Act, the court said:

> "It cannot be assumed that, because Congress did not expressly so provide, federal courts can shirk the responsibility of enforcing the administrative orders of the fuel administrator acting legally and rightfully within the terms and requirements of this act. Therefore it is . . . an absolute obligation upon this court . . . to see to it that this order . . . is enforced."[163]

The recognized state of emergency existing at the time of enactment, the provisions for criminal penalties for violations, and the testimony taken at Congressional hearings[164] clearly indicate that Congress meant the legislation to be mandatory. Therefore, there can be little doubt that the courts will enforce rationing regulations. The Second War Powers Act would clearly seem to establish this power to issue injunctions. That act provides that all district courts shall have jurisdiction in all civil actions to enforce any duty or liability created by the act.

To date, the administrator has used the injunctive remedy at least three times. In *Henderson v. Smith-Douglass Co.*[165] a purchaser started suit for delivery of tires he had purchased. The administrator, fearing that the court might order delivery of them, asked for and obtained an injunction restraining the transfer.[166] This demonstrates the peculiar

(1926), where the Court said "an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity."

[162] Texas & N. O. Ry. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 50 S. Ct. 427 (1930); Virginia Ry. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592 (1937); West Virginia Traction & Electric Co. v. Elm Grove Mining Co., (D. C. W. Va. 1918) 253 F. 772; United States v. Fletcher, (D. C. Idaho, 1934) 8 F. Supp. 233; United States v. Calistan Packers, (D. C. Cal. 1933) 4 F. Supp. 660; United States v. Shissler, (D. C. Ill. 1934) 7 F. Supp. 123.

[163] West Virginia Traction & Electric Co. v. Elm Grove Mining Co., (D. C. W. Va. 1918) 253 F. 772 at 777.

[164] See H. REP. 460, 77th Cong. 1st sess. (1941), pp. 2-5, for indications that the provision of the Priorities Act was meant to be mandatory.

[165] (D. C. Va. 1942) 44 F. Supp. 681. The other two cases are Henderson v. Bryan, (D. C. Cal. 1942); and Henderson v. Ace Tire, (Cal. 1942), neither of which have as yet been reported.

[166] The court said, 44 F. Supp. at 682: "The court may be inclined to be rather liberal in its views of situations like the present, but it is doubtful that courts ought

effectiveness of the injunctive remedy where no violation has occurred, though one is threatened.[167] The violation of an injunction will not only render the party liable for contempt but may also subject him to a conspiracy charge under section 37 of the Criminal Code,[168] if this element is present.

2. *Suspending the Supply of Rationed Goods*

The ability to suspend a violator's supply of rationed goods is another powerful rationing sanction. The authority to do this was delegated to the OPA by WPB Directive No. 1, which provides:

> "The authority of the Office of Price Administration under this Directive shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any retailer who has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder, and shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any wholesaler or other supplier or any retailer, directly or indirectly, if any wholesaler or other supplier has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder."[169]

The summary nature of this proceeding makes this sanction particularly useful. It was used recently to cut off the gasoline supply of 104 service station operators in metropolitan New York, Newark, and Philadelphia who had sold in violation of regulations.[170] Copies of suspension orders are sent to every known supplier of the violator and such suppliers are notified that no delivery of the rationed goods can be made to the violator. This sanction will undoubtedly be used more widely as rationing is extended to more commodities.

to be overzealous to search Acts of Congress, executive proclamations and regulations where only property is involved, to find . . . technical grounds from which to declare the regulations invalid. . . . Undoubtedly, it is the duty of the court to protect the rights of citizens . . . and to see that citizens are not deprived of their property without due process of law, even for a public use; but, at the same time, I do not think the court should be too zealous in reaching out to find grounds upon which to invalidate regulations of the type involved here, in the face of a pressing national emergency such as every sane person in this country knows exists."

[167] See Standard Oil Co. of Kansas v. Angle, Collector of Customs, (C. C. A. 5th, June 9, 1942) where the injunctive remedy was used by an individual to restrain a delivery of tires.

[168] Taylor v. United States, (C. C. A. 7th, 1924) 2 F. (2d) 444, cert. den. 266 U. S. 634, 45 S. Ct. 226 (1924).

[169] WPB Directive No. 1, 7 FED. REG. 562 (1942).

[170] See 7 FED. REG. 4550 (1942); C. C. H. WAR LAW SERVICE, "Price," ¶ 54,539 (1942). It should be noted that these orders did not prevent the violators from selling what they had on hand.

Although, when the first orders were issued, there was no specific provision, either by statute or regulation, for notice and hearing, actually both were given. The requirements of due process were therefore satisfied. These procedural guaranties were specifically incorporated in a temporary regulation[171] issued on June 5, 1942, by the OPA, dealing with suspension order proceedings.[172]

D. *Investigative Powers in Rationing Proceedings*

Under the Second War Powers Act, the President is vested with broad investigative powers.[173] Under section 301-2(a)(1) he is entitled to obtain information from and to inspect the premises of any person, firm, or corporation when he deems it necessary or appropriate to the enforcement or administration of the act. A later section, 301-2(a)(4) provides:

> ". . . the President may administer oaths and affirmations, and may require by subpena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be deemed relevant to the inquiry. . . . No person shall be excused from attending and testifying . . . in obedience to any such subpena, or in any action or proceeding . . . on the ground that the testimony . . . required of him may tend to incriminate him. . . ."

The use of these powers is not restricted to cases where there has been an actual violation.[174]

The recent *Cudahy* case[175] presents a serious problem in the use of the subpoena power provided for by the act. The Court held in that

[171] 7 FED. REG. 4296 (1942).

[172] The collateral problem of governmental requisitions and commandeering is not discussed here. They will prove a very effective sanction in controlling the supply of essentials materials and, depending on the duration of the war, they may be used in the future. Congress has already set up the machinery for this in the Property Requisitioning Act, 54 Stat. L. 1090 (1940), 50 U. S. C. (1940), §§ 711-713. See also 11 U. S. LAW WEEK 2024 (1942). For a detailed discussion of the legal problems of commandeering and rationing, see 55 HARV. L. REV. 427 at 506 (1942).

[173] Congress, when it enacted a substantially similar provision in the Priorities Act, was told by Representative Vinson, one of the sponsors of the bill, that "it is idle to say that full information can be had on a voluntary basis. Experience has taught the Priorities Board that a supply of information, necessary to the administration of statutes, must be mandatory." 87 CONG. REC. 3801 (1941).

[174] Cf. Ryan v. Amazon Petroleum Corp., (C. C. A. 5th, 1934) 71 F. (2d) 1, revd. on other grounds Amazon Petroleum Corp. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935). See also 55 HARV. L. REV. 427 at 469 (1942).

[175] Cudahy Packing Co. v. Holland, (U. S. 1942) 62 S. Ct. 651, affg. (C. C. A. 5th, 1941) 119 F. (2d) 209, noted in 40 MICH. L. REV. 894 (1942). Justices Douglas, Black, Byrnes and Jackson dissented.

case, by a five to four decision, that the Administrator of the Wage and Hour Division had no authority under the Fair Labor Standards Act to delegate to a subordinate officer the power to issue subpoenas, justifying their holding on the basis of strict statutory construction. If this is the sole reason for the decision, it does not necessarily affect the power of the President under the Second War Powers Act. Section 301-2(a)(8) of the War Powers Act provides:

> "The President may *exercise* any power, authority, or discretion conferred on him by this act, *through* such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which *he* may prescribe." (Italics added.)

The language of the Fair Labor Standards Act is not that explicit:

> "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place."[176]

The Court in the *Cudahy* case reasoned that since some of the administrator's powers, by their very nature, must be exercised by the administrator himself, Congress intended that none of his powers could be delegated unless the statute specifically so provided. Justice Douglas in a vigorous dissent upheld the right of the administrator to delegate the subpoena power as a "concomitant of the power to investigate," the administrator being expressly authorized to delegate the latter power.[177] He also found precedent in previous decisions holding that administrators could delegate their power to hold hearings without express statutory authority.[178] The minority also stressed the extreme impracticability of the position taken by the majority.

The effect of this decision upon the delegation of the subpoena power by the President to the Price Administrator and upon subdelegations by the administrator is uncertain. The Court could distinguish such delegations from those made under the Fair Labor Standards Act on two grounds: first, as already indicated, because different statutory language is used, and secondly, because the President and not an administrator is given the power to subpoena, a much stronger case for implying Congressional intent to give delegatory power.

[176] 29 U. S. C. (1940), § 204(c).

[177] 29 U. S. C. (1940), § 211(a).

[178] Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936). In commenting on this case, Justice Douglas said, 62 S. Ct. at 658: "The reasons for holding that authority to delegate this [subpoena] power is an incident of the office are certainly no less cogent than those underlying the cases which hold that an administrative officer may delegate the function of holding hearings without express statutory authority."

Assuming the right of the President to delegate, redelegations by the Price Administrator raise different considerations. The Court will undoubtedly scrutinize such delegations closely. Prior to July, 1942, the administrator made very limited delegations[179] for individual cases. That policy has now been abandoned and blanket delegations have been made to regional directors of the OPA.[180] These orders provide that the directors have the same power to issue subpoenas as the Price Administrator himself would have. From a practical point of view such delegations seem essential. In view of the possible implications of the *Cudahy* case it could be argued that such delegation is not permissible, though it seems unlikely that the Court will be so impressed.

E. *Immunity from Civil Liability When Complying with Regulations*

To protect persons who co-operate in the rationing program, Congress, in the Vinson and the Second War Powers Acts, made the following provisions:

> "No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a), or any rule, regulation, or order issued, thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid."[181]

Even without a statute, a mandatory rationing order which caused the breach of a contract would probably be a valid defense on the ground of impossibility or illegality.[182] Certainly this would be true if neither party anticipated such an order. Congress undoubtedly intended the above section to provide such a defense.[183]

There are some situations which probably should not be held to come under the protection of this provision, however. The seller prob-

[179] 7 FED. REG. 4191, 4621, 4746 (1942).

[180] 7 FED. REG. 5273 (1942).

[181] 55 Stat. L. 236 (1941); Act of March 27, 1942, Pub. L. 507, 77th Cong., 2d sess., 41 U. S. C. A. (Supp. 1942), note preceding § 1.

[182] Roxford Knitting Co. v. Moore & Tierney, (C. C. A. 2d, 1920), 265 F. 177 cert. den. 253 U. S. 498, 40 S. Ct. 588 (1920). See also Northern Pacific R. R. v. American Trading Co., 195 U. S. 439 at 466, 25 S. Ct. 84 (1904); Inter-coast S. S. Co. v. Seabord Transp. Co., (C. C. A. 1st, 1923) 291 F. 13 at 17; Berg v. Erickson, (C. C. A. 8th, 1916) 234 F. 817. Cf. Philadelphia Boiler Works v. Foundation Co., (App. Div. 1921) 190 N. Y. S. 696. See also Dodd, "Impossibility of Performance of Contracts Due to War-time Regulations," 32 HARV. L. REV. 789 at 793 (1919); 55 HARV. L. REV. 427 at 475 (1942).

[183] See 87 CONG. REC. 3801 (1941). For a general discussion of this problem, see Brown, "The Effect of Conscription of Industry on Contracts for the Sale of Goods," 90 UNIV. PA. L. REV. 533 (1942).

ably should not be excused if he can comply with a rationing order and still reasonably perform his contract with the buyer.[184] Likewise it would seem that partial impossibility should not be a complete defense.[185] It even has been suggested that failure to fulfill a contract because of regulations will not be excused, if the seller reasonably could have expanded his facilities so as to perform.[186] If the performance is excused, does that discharge the entire contract or merely suspend it until it can be carried out? This question is not settled, but the better solution would seem to be that there is a permanent discharge if the temporary impossibility goes to the essence of the contract.[187]

F. *Judicial Review of WPB and OPA Decisions*[188]

The Second War Powers Act does not specifically provide for judicial review of any rationing regulations or rulings. However, this does not mean that the opportunity to appeal to the courts is foreclosed. The Supreme Court in the past has granted judicial review of administrative orders in some cases in the absence of statutory provisions.[189]

It is possible that the Court will refuse to review the findings of the OPA and WPB in the rationing field on the ground that the activities

[184] Ingram Day Lumber Co. v. Kola Lumber Co., 122 Miss. 632, 84 So. 693 (1920).

[185] 6 WILLISTON, CONTRACTS, rev. ed. § 1962 (1938); 2 CONTRACTS RESTATEMENT, § 464 (1) (1932).

[186] Brown, "The Effect of Conscription of Industry on Contracts for the Sale of Goods," 90 UNIV. PA. L. REV. 533 at 551 (1942). See also Dodd, "Impossibility of Performance Due to War-time Regulations," 32 HARV. L. REV. 789 at 803 (1919).

[187] See Brown, "The Effect of Conscription of Industry on Contracts for the Sale of Goods," 90 UNIV. PA. L. REV. 533 at 551 (1942).

The effect of rationing orders on leases with restrictive covenants is an analogous problem which should be considered. In a recent New York City case, an automobile dealer with a lease of a showroom, "only for a showroom," was excused from payment of rent because of the OPM regulations on sale of cars. Colonial Operating Co. v. Hannon Sales & Service, N. Y. Municipal Court 2d Dist. Borough of Queens. (Mar. 20, 1942).

Whether all courts would treat this case the same way would depend on whether they looked upon a lease as a conveyance of land or as a contract. A court taking the former view might not excuse the rent but one taking the latter view would, on the grounds of impossibility of performance or illegality of object. See 3 WILLISTON, CONTRACTS, rev. ed., 890 (1938); Bennett, "The Modern Lease—An Estate in Land or a Contract," 16 TEX. L. REV. 47 (1937).

[188] Many of the intricate problems involved in the question of judicial review of this sort have been discussed by other writers. For a complete bibliography on this, see STASON, CASES AND MATERIALS ON ADMINISTRATIVE TRIBUNALS xxiii-xxiv (1937).

[189] Shields v. Utah Idaho Central Ry., 305 U. S. 177, 59 S. Ct. 160 (1938); Utah Fuel Co. v. National Bituminous Coal Commission, 306 U. S. 56, 59 S. Ct. 409 (1939). See also, Issacs, "Judicial Review of Administrative Findings," 30 YALE L. J. 781 (1921).

of these agencies are too closely related to the President's war prerogatives, which are not subject to judicial review.[190] However, the Court might review the findings in an indirect way when the government seeks to enforce its orders by the use of civil injunction,[191] or in a suit involving a violation under the new criminal provisions of the Second War Powers Act. Since due process is not infringed by refusing a review of administrative agencies in the courts, it is doubtful whether the courts will attempt to interfere with the rules and findings of the two agencies in this field.

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[190] See Weiner, "Legal and Economic Problems of Civilian Supply," 9 LAW & CONTEM. PROB. 122 at 146 (1942): "Certainly the judgments exercised by the WPB on behalf of the President involve all those matters of public policy which make up the national security and defense—matters hardly fitted to court review."

[191] See supra, p. 143.