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Paul B. Rava
Padua University

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Paul B. Rava †

THE Emergency Price Control Act is now on the statute book after six months of Congressional debate.[1] It is the purpose of this paper to examine the administrative procedure set forth by the act.

I

INADEQUACY OF CONVENTIONAL METHODS FOR EMERGENCY PRICE-FIXING PURPOSES

An all-out emergency requires special procedures. Indeed, the conventional administrative methods for fixing prices appear inadequate for two reasons, namely delay and lack of overall co-ordination.

A. *Delay*

Peacetime procedures developed in relation to government price fixing have been characterized by a high degree of formality centering in elaborate hearing provisions. That is true not only as to the particular field of public utilities rates and wage determinations,[2] but also as to other areas of a less specialized nature. Thus, formal hearings are prerequisites to price-fixing orders under the Bituminous Coal Act, which authorizes the fixing of maximum and minimum prices at the

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† LL.B., Washington University; J.U.D., Padua University; formerly lecturer on public law, Padua University; author of various publications here and abroad.—*Ed.*

[1] The original administration bill was introduced in the House on August 1, 1941. H. R. 5479, S. 1810, 77th Cong., 1st sess. The Emergency Price Control Act (hereinafter cited EPCA) was signed by the President on January 30, 1942. Pub. 421, 77th Cong., 2nd sess.

[2] Rate fixing under the Packers and Stockyards Act, 42 Stat. L. 166 (1921), 7 U. S. C. (1940), §§ 211, 212, has employed the same procedure. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT, S. Doc. No. 8, 77th Cong., 1st sess. (1941), pp. 106-107 (hereinafter cited "Administrative Procedure Final Report").

mine,[3] under the Sugar Act, which provides for regulating sugar prices to producers,[4] and under the Agricultural Marketing Agreements Act, which authorizes the Secretary of Agriculture to fix milk prices.[5]

It is significant, however, that the monographs of the Attorney General's Committee on Administrative Procedure have concluded in many instances that these procedures are too cumbersome, and that the delay involved in advance notice and hearing makes them hardly suitable to the administration of the Bituminous Coal,[6] and Packers and Stockyards Acts.[7] Whatever may be the correct solution of the problem in peacetime,[8] it seems evident that emergency procedures cannot successfully operate if based on hearings requiring some forty thousand pages of record collected over several years, as in the case of the Bituminous Coal price orders[9] and of proceedings under the Packers and Stockyards Act.[10]

It may be noted that emergencies have been recognized as a reason for dispensing with ordinary procedure in a number of instances, from the most traditionally respected Interstate Commerce Act[11] to the recent bills to revise federal administrative proceedings, which are com-

[3] 50 Stat. L. 72 (1937), 15 U. S. C. (1940), § 829 (a). The scope of the statutory requirements is not perfectly clear. Mallory Coal Co. v. National Bituminous Coal Commission, (App. D. C. 1938) 99 F. (2d) 399 at 405. Maximum prices have not yet been fixed.

[4] 50 Stat. L. 909 (1937), 7 U. S. C. (1940), § 1131 (d).

[5] 50 Stat. L. 246 (1937), 7 U. S. C. (1940), § 608c (18), (19). Cf. Whittenburg v. United States, (C. C. A. 5th, 1939) 100 F. (2d) 520, and as to state laws, Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15, 1 A. (2d) 775 (1938), and Ray v. Parker, 15 Cal. (2d) 275, 101 P. (2d) 665 (1940).

[6] ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. 10, 77th Cong., 1st sess. (1941), pt. 10, pp. 1, 29 (hereinafter cited "1941 Administrative Procedure Monographs"). See also the statement of the Division at the HEARINGS ON ADMINISTRATIVE PROCEDURE BEFORE A SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY, 77th Cong., 1st sess. (1941), pt. 2, p. 748 (hereinafter cited S. Hearings on Administrative Procedure), and Rostow, "Bituminous Coal and the Public Interest," 50 YALE L. J. 543 at 567 (1941).

[7] 1940 ADMINISTRATIVE PROCEDURE MONOGRAPHS, S. Doc. 186, 76th Cong. 3d sess., pt. 11, p. 22.

[8] Cf. Feller, "Prospectus for the Further Study of Federal Administrative Law," 47 YALE L. J. 647 at 660 (1938).

[9] S. HEARINGS ON ADMINISTRATIVE PROCEDURE, pt. 2, p. 746.

[10] ADMINISTRATIVE PROCEDURE, FINAL REPORT, Appendix, p. 348.

[11] Esh Car Service Act, 40 Stat. L. 101 (1917), 49 U. S. C. (1940), § 1 (15). Cf. 1941 ADMINISTRATIVE PROCEDURE MONOGRAPHS, pt. 11, pp. 63-65. See also Federal Water Power Act, 49 Stat. L. 849 (1935), 16 U. S. C. (1940), §§ 824c, 824d and Communications Act, 48 Stat. L. 1104 (1934), 47 U. S. C. (1940), § 606. For other cases, see GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 65-67 (1941).

monly known as the Walter-Logan Bill,[12] the Attorney General's Committee Majority[13] and Minority Bills,[14] and the American Bar Association or Groner Bill.[15]

The administration of the World War I price control also shows that ordinary and rigid procedures cannot successfully apply to emergency conditions, and that extraordinary and flexible devices must be available to the administrative agencies in their discretion.[16] Moreover, a general survey of the price-fixing procedure followed during the first world war shows that no formal hearings were held regarding price regulations. As to the need to avoid lengthy procedures, it may be recalled that maximum prices were fixed only for a three-months period because of the rapidly changing conditions.[17]

B. *Lack of Overall Co-ordination*

Since peacetime agencies are already entrusted with price-fixing functions, the question arises as to whether and how they should be utilized for wider price fixing in a major emergency.[18] First, each of these agencies has been established to deal with a specific field and seems wholly inadequate to handle commodities of a different nature.[19] Secondly, a successful administration of price fixing cannot be divided among a number of agencies, because of the interrelations characteristic of various aspects and phases of the problem. In fact, the fixing of the price for a certain product implies repercussions not only upon related items, but also upon competitive products, substitutes and so forth. An excellent illustration of these complexities is offered by a situation which arose during the first world war in connection with

[12] H. R. 6324, 76th Cong., 1st sess. (1941). Cf. Jaretzki, "The Administrative Law Bill: Unsound and Unworkable," 2 LA. L. REV. 294 at 302 (1940), for a broad interpretation of the provision of the bill.

[13] S. 675, 77th Cong., 1st sess. (1941). Cf. also ADMINISTRATIVE PROCEDURE FINAL REPORT 100-101, 108.

[14] S. 674, 77th Cong., 1st sess. (1941).

[15] S. 918, 77th Cong., 1st sess. (1941).

[16] Such are government purchases of copper and aluminum at a tentative price, with a guarantee to the producer that he would be paid 10% in addition to the cost to be determined later. WAR INDUSTRIES BOARD, PRICE BULL. 3, pp. 277, 285 (1920) (Garrett, Lubin and Stewart, Government Control Over Prices).

[17] Haney, "Price Fixing in the United States during the War," 34 POL. SCI. Q. 104 at 126 (1919).

[18] Cf. Memorandum of the Division of State and Local Cooperation and Proposed State Councils of Defense Act, § 5, THE BOOK OF THE STATES, 1941-42, pp. 35-42. But the establishment of new agencies was favored by the War Department Industrial Mobilization Plan, Revision of 1939, pt. 1, B, 1 C. C. H., WAR LAW SERVICE, 2d ed., ¶ 10,411 (1942).

[19] Cf. HARDY, WARTIME CONTROL OF PRICES 86 (1940).

the stabilization of the cottonseed industry, and required the co-ordinated actions of three agencies, the Food Administration, the War Industry Board and the War Trade Board.[20]

In the third place, the establishment of a new agency instead of expanding the powers of existing bodies appears preferable because widespread price fixing is due to, and may be kept within, the emergency. At the end of the emergency it should be easier to dissolve or modify a new agency than to reduce the functions of ordinary peacetime agencies.[21]

Finally, it must be noted that price fixing is merely one of the methods employed to carry on a policy of price control, which involves primarily fiscal, financial, tariff and industrial measures directed to increase the supply of defense goods and to reduce consumption of competitive nondefense items by restricting the purchasing power of the public and by resorting to a rationing system. Since the ultimate policy should be uniform, it follows that a close co-ordination is necessary among the agencies which are in charge of the various aspects of price control.[22] Such a co-ordination is more easily obtained and more likely to be efficient if price fixing is in the hands of one agency alone.[23]

The arguments advanced so far in favor of a new agency, able to face the problem as a whole and to develop a general program, do not mean that existing agencies should not be relied upon, each in its sphere of action. Not only must their services be wholly utilized in order to avoid duplication,[24] but also their personnel is likely to prove a valuable contribution to the new agency.[25]

[20] The Food Administration, in order to stabilize the cottonseed industry, allowed a price increase on cottonseed meal, which is a joint product with the oil, the price of which it was necessary to maintain. But the agency was impotent to increase prices regarding linters, and to prevent importation of foreign oils, because the War Industry Board and the War Trade Board were respectively in control; it could only make recommendations to these agencies. Haney, "Price Fixing in the United States during the War," 34 POL. SCI. Q. 104, 262 at 276-277 (1919).

[21] The EPCA shall terminate on June 30, 1943, unless otherwise provided. Sec. 1 (a).

[22] Cf. HARDY, WARTIME CONTROL OF PRICES 81-86 (1940), and Moulton, "War-Time Price Control," 7 VITAL SPEECHES 90 at 92 (1940).

[23] Cf. BACKMAN, WAR TIME-PRICE CONTROLS 48 (1940) (New York University Contemporary Law Pamphlets, Series 4, No. 5); HARDY, WARTIME CONTROL OF PRICES 86 (1940).

[24] This method seems also to meet the objections against the establishment of new agencies which are grounded on the difficulties inherent in *ex novo* administrations. Harris, "The Emergency National Defense Organization," 1 PUB. ADM. REV. 1 at 18-19 (1940).

[25] See, however, McReynolds, "The Office for Emergency Management," 1 PUB. ADM. REV. 133 (1941), who stresses the danger of "pirating personnel."

The first attempt at price fixing during the present emergency was through the Price Stabilization Division and Consumer Division of the Council of National Defense and its Advisory Commission, established by order of the President.[26] These two divisions were later merged into the office of Price Administration and Civilian Supply,[27] which was given additional duties. A further modification resulted in the Office of Price Administration,[28] limited to price fixing and consumer protection. The acts of each agency were ratified by the succeeding one.[29] Congress, through the EPCA, has now given legislative authorization to the OPA.

The EPCA authorizes the President to appoint a price administrator by and with the consent of the Senate.[30] The OPA is organized in functional units which comprise price, consumer, legal, ration, and fields operation divisions. The price division is composed of fourteen commodity sections[31] representing a highly desirable imitation of the similar units of the War Industry Board, which were recognized as the "backbone" of its machinery.[32] They are set up for each branch or related branches of the industry, and they study the factual background in order to have documentation available at the arising of a "price situation." Expertness is insured by choosing their personnel among industrialists, industrial consultants, university professors, and employees of federal agencies.[33]

[26] The commission was established on May 29, 1940, 5 FED. REG. 2114 (1940), and appointment followed on June 24, 1940. 5 FED. REG. 2381 (1940).

[27] Executive Order 8734, 6 FED. REG. 1917 (1940).

[28] Executive Order 8875, 6 FED. REG. 4483, §§ 7, 8 (1941).

[29] Ruling of the OPACS on April 15, 1941, 6 FED. REG. 1965 (1941); OPA Release P.M. Nos. 1059, 1058 (Aug. 30, 1941).

[30] Sec. 201(a). The use of a single administrator follows the precedent of the Lever Act, 40 Stat. L. 276 (1917). The principle was successfully applied by Mr. Baruch in the War Industry Board that committees are good for counsel and administrators for action. Ginsburg, "Legal Aspects of Price Control in the Defense Program—A Presentation of the Views of the OPACS," 27 A. B. A. J. 527 at 533 (1941); BARUCH, HEARINGS BEFORE HOUSE COMMITTEE ON BANKING AND CURRENCY ON PRICE CONTROL, 77th Cong., 1st sess. (1941) pt. 2, p. 1033 (hereinafter cited as "Price-Control Hearings"). Cf. testimony of Mr. Henderson, id., pt. 1, pp. 416, 943.

[31] As of November 8, 1941: textile, leather and apparel; automobiles and trucks; chemicals, drugs and paints; consumers' durable goods; food and food products; fuel; industrial and agricultural machinery; lumber and building material; non-ferrous metals (two); paper and paper products; rent; rubber and rubber products; steel, iron and steel products. Information supplied by the courtesy of the Assistant Administrator.

[32] BARUCH, AMERICAN INDUSTRY IN THE WAR 109 (1941) (U. S. War Industries Board, Report, 1921).

[33] Particularly the Securities and Exchange Commission, the Tennessee Valley Authority, and the Department of Agriculture and Commerce.

II

PRICE-FIXING METHODS

Procedural difficulties are to a great extent responsible for two major principles of the price-fixing policy followed by the administration. First, the general ceiling plan advocated by Mr. Baruch,[34] materialized in Canada,[35] and embodied in the Gore Bill,[36] has been rejected in favor of a selective price-fixing system[37] which undoubtedly presents a less cumbersome administration.[38] This system endeavors to control a large part of the price structure by keeping down the prices of basic commodities and to handle only items which show inflationary tendencies. Second, a single price has been adopted both for the government and the public,[39] thus sacrificing cheaper government buying[40] in favor of other considerations of policy[41] and of a simpler procedural system.[42]

Various methods have been employed to effectuate the price stabilization policy of the administration. Main reliance has been placed on maximum prices, which prohibit sales at a higher price, but have a certain degree of flexibility in that they do not prevent prices from falling

[34] Memorandum submitted by Mr. Baruch to the War Policy Commission, H. Doc. 271, 72nd Cong., 1st sess. (1932), p. 10; testimony before the Committee on Military Affairs, HEARINGS ON H. R. 3 AND H. R. 5293, 74th Cong., 1st sess. (1937), pp. 25, 40 (Taking the Profits Out of War) and lately PRICE-CONTROL HEARINGS, pt. 2, pp. 989 ff.

[35] Maximum price regulations of the Wartime and Trade Board of November 1, 1941, P. C. 8528, 2 EMERGENCY LAWS, ORDERS AND REGULATIONS OF CANADA 28-1.

[36] This was offered as an amendment to H. R. 5990, 77th Cong., 1st sess. and was defeated in the House on November 26, 1941, by a vote of 218 to 63. Cf. 87 CONG. REC. No. 211, p. 9410 (1941).

[37] This system has also been advocated by HARDY, WARTIME CONTROL OF PRICES (1940); BACKMAN, WAR TIME PRICE CONTROL 47 (1940), and Grether and Davisson, "Tax Policy and Price Fixing as Economic Controls for Defense Mobilization," 214 ANNALS 148 at 153 (1941).

[38] HENDERSON, PRICE-CONTROL HEARINGS, pt. 1, p. 863: "It would break down under the impossible task of administration."

[39] In particular cases, exceptions have been granted; e.g., lumber contracted by the army. P. M. 1262, p. 5.

[40] HARDY, WARTIME CONTROL OF PRICES 140-141 (1940), considers this argument as decisive against the single price system.

[41] President Wilson stated: "We must make the prices to the public the same as prices to the Government. Prices mean the same everywhere now; they mean the efficiency of the Nation, whether it is the Government that pays them or not; they mean victory or defeat." Quoted in BARUCH, AMERICAN INDUSTRY IN THE WAR 121 (1941). These political considerations are summarized by Haney, "Price Fixing in the United States during the War," 34 POL. SCI. Q. 102 at 108-109 (1919), in the legitimate desire to allay social unrest.

[42] Haney, id., p. 109, states that the existence of higher prices in the market would make delivery to the government difficult, and that large purchases may be required by private concerns producing for the government.

below the maximum.[43] In some cases, lists of "fair prices"—not compulsory—have also been published by the OPA.[44] Minimum prices have been resorted to in order to increase production of vital agricultural commodities.[45] Jobbers' profits have also been controlled in connection with numerous commodities.[46] Measures, collateral to price fixing, already experimented with in the first world war,[47] are regulations directed to eliminate speculative and inflationary trade practices, such as purchases for purposes of speculative resales at prohibited profits and fictitious price quotations,[48] raising margin requirements in a number of transactions,[49] and the suspension of trading in certain commodities.[50] Broad powers in this respect are provided for in the EPCA.[51] Moreover, the act authorizes the OPA to buy and sell commodities and to subsidize producers, if necessary to obtain the maximum required production.[52]

These various methods of price regulation proceed from different purposes and, consequently, they involve different procedural prob-

[43] Although maximum prices normally became fixed prices, yet during the first world war prices fell below the ceiling for such items as zinc, plates and sheets, rubber, and certain kinds of lumber. Another result flows from Bewly-Darst Coal Co. v. Chattanooga Gas Co., 142 Tenn. 460, 220 S. W. 1083 (1920), in which it was held that, when a contract is made at a price higher than the ceiling, and the ceiling is subsequently raised above the contract price, the seller can recover only the contract price.

[44] Copper and brass ingots, P.M. 317; rayon yarns and staples fibers, P.M. 1459.

[45] HENDERSON, HEARINGS BEFORE SENATE COMMITTEE ON AGRICULTURE AND FORESTRY ON FORMULA FOR DETERMINING PARITY PRICES, 77th Cong., 1st sess. (1941), pt. 1, p. 9. Similarly during the first World War, a minimum price was practically guaranteed for wheat, hogs and sugar beets. WAR INDUSTRIES BOARD, PRICE BULL. 3, pp. 589-590 (1920).

[46] Taft, brief filed with Senate Committee on Agriculture, 87 CONG. REC. 5653 at 5655 (1941), states that the most successful price fixing in the first world war was done by the Food Administration by fixing margins. The contrary view is given by Haney, "Price Fixing in the United States during the War," 34 POL. SCI. Q. 102 at 123 (1919).

[47] Cf. U. S. FOOD ADMINISTRATION, ANNUAL REPORT 11-12 (1917) (also H. Doc. 837, 65th Cong., 2d sess.)

[48] Secs. 1343.1 to 1343.4 of Schedule No. 25 on fats and oils, 6 FED. REG. 4491 (1941), lated revoked 7 FED. REG. 1496 (1942).

[49] E.g., cocoa and coffee, 2 DEFENSE, No. 23, p. 14, and No. 21, pp. 8-9 (1941).

[50] Trading in open positions of rubber futures was suspended by the New York Board of Exchange, at the OPA's request. P. M. 927, later modified, P. M. 1131.

[51] Sec. 2 (d).

[52] Sec. 2 (e). This authority, however, is not in derogation of the Reconstruction Finance Corporation Act, the Tariff Act, the Agricultural Adjustment Act, or the Commodity Exchange Act. Purchasing powers were included in the Lever Act, 40 Stat. L. 276, §§ 11, 25 (1917), and largely relied upon by the administration, particularly by the Sugar Equalization Board. WAR INDUSTRIES BOARD, PRICE BULL. 3, pp. 82-83 (1920). Price control by government competition has been upheld as constitutional also in ordinary times. Abel, "Price Control by Government Competition in Anglo-American Federations," 23 WASH. UNIV. L. Q. 459 at 487-488 (1938).

lems. Whereas producers can be expected to initiate the procedure leading to a minimum price[53] and can therefore be relied upon to take a major part in the complex operations of price fixing, a contrary situation arises in connection with the establishment of a maximum price. Here the interests of producers are, to some extent at least, antagonistic towards those of the government, and the industry should be left a minor part in the setting of ceilings.

Conversely, the interest of consumers needs to be organized in order to prevent a minimum price from being set too high, but as to a maximum price, the consumer interest is more likely to fall in line with that of the government.[54] Thus the independent position of the Bituminous Consumer Council on the one hand, and the merging of the Consumer Division in the OPA, on the other, appear to be both justified and desirable.

III

FACTORS BEARING UPON PRICE DETERMINATIONS

Requirements of administrative expediency and need for a simple procedure[55] are largely responsible for the adoption by World War II agencies of the single price rather than the multiple price system.[56] The single price or flat rate system involves the bulk-line principle of maximum prices fixed at the level necessary to include those high-cost producers whose output is necessary for defense requirements,[57] with exceptions for special cases.[58] This system has been criticized because it permits large profits by low-cost producers,[59] and other devices have

[53] Cf. Bituminous Coal Act, 50 Stat. L. 77 (1937), 15 U. S. C. (1940), § 833; Fair Labor Standards Act, 52 Stat. L. 1062, 1064 (1938), 29 U. S. C. (1940), §§ 205, 208 (a); TERBORGH, PRICE CONTROL DEVICES IN N. R. A. CODES 5 (1934).

[54] In some cases, however, maximum prices could be fixed at a very high level in order to reduce consumption, (as during the first world war in the case of building materials, WAR INDUSTRIES BOARD, PRICE BULL. 3, p. 331 (1920), and in England in the case of railroad rates, FAIRLEE, BRITISH WAR ADMINISTRATION 170 (1919) (Carnegie Preliminary Economic Studies of the War, No. 8).

[55] Baruch, testimony before the War Policy Commission, H. Doc. 271, 72nd Cong., 1st sess. (1932), p. 14.

[56] This policy has been decided by the Price Fixing Committee, after all but one of the experts consulted had agreed upon it. WAR INDUSTRIES BOARD, PRICE BULL. 3, p. 241 (1920). Doubts had also been expressed on the constitutionality of fixing different prices for the same product. Id.

[57] Taussig, "Price Fixing as Seen by a Price Fixer," 33 Q. J. ECON. 205 at 219 (1919): "as a rule a price was fixed which would protect 4/5ths or 9/10 of the entire output."

[58] HARDY, WARTIME CONTROL OF PRICES 132, 134 (1940).

[59] Moulton, "War-Time Price Control," 7 VITAL SPEECHES 90 at 91 (1940). The excess profits tax is inadequate to take care of these profits. Cf. PRICE-CONTROL HEARINGS, pt. 1, pp. 105, 232.

been advocated to keep alive the production of high-cost industries necessary for defense purposes, e.g., granting of subsidies,[60] or permitting a government agency to purchase products at prices above the ceiling, as has been done in the copper schedule.[61] The present policy officially states that the bulk-line principle has been abandoned,[62] but of the schedules issued before the passage of the EPCA the multiple-price system has been applied only in the copper schedule. Ample authority is now available to the OPA to buy commodities and subsidize producers.[63]

As during the first world war, so now differentials are being based on such objective factors as territory on one hand,[64] and grades or types on the other.[65] The tendency of a price-fixing agency is to determine prices for the minimum possible number of items, in order to reduce administrative difficulties and, as a price executive candidly put it, to avoid opportunities for mistakes.[66] It is obvious, however, that nonfeasance may be as noxious as misfeasance, in matters of differentials. The EPCA authorizes "classifications and differentiations" as "necessary or proper in order to effectuate the purposes of this Act."[67]

These factors are considered in the determination of production cost, to which a certain percentage or margin is added as the recognized profit for the industrialist. In this connection it may be noted that price fixing is not taking property away, so as to require judicial ascertainment of the just compensation.[68] The difference between these two

[60] Moulton, "War-Time Price Control," 7 VITAL SPEECHES 90 at 91 (1940).

[61] Schedule No. 15, § 1309.51 to 1309.53, 6 FED. REG. 4008 (1941). Purchases were subsequently made by the Procurement Division of the Treasury. P. M. 1414. See also P. M. 2160.

[62] HENDERSON, PRICE-CONTROL HEARINGS, pt. 1, p. 104: "we have not adopted the bulk line principle. . . ."

[63] Subsection 2 (c) authorizes exceptions to maximum prices, and subsection 2 (d) gives the administrator direct authority to buy and sell commodities and to subsidize producers.

[64] Early attempts during the first world war to fix a single price for a large area within which production costs varied widely aroused much criticism and led to a more accurate and fair process of price determination. Haney, "Price Fixing in the United States during the War," 34 POL. SCI. Q. 102 at 122 (1919). Some schedules of the OPA had to be modified in order to meet similar needs; e.g., Schedule No. 4 on iron and steel scrap, amended in order to establish additional basing points. 6 FED. REG. 3985 (1941). According to Perkins v. Lukens Steel Co., 310 U. S. 113, 60 S. Ct. 869 (1940), the reviewability of geographical areas will be strictly circumscribed.

[65] E.g., amendment to Schedule No. 9 on hides, 6 FED. REG. 5428 (1941).

[66] "The fewer prices set the fewer mistakes we make." Address by the price executive of the lumber and building material section of the OPA, on September 30, 1941. P. M. 1262.

[67] Sec. 2 (c).

[68] Judicial notice that the prices fixed by the War Industry Board had become

administrative measures has been emphasized by the courts,[69] and the EPCA expressly provides that the act does not compel anybody to sell.[70]

The need for detailed standards set by Congress for price determinations to be made by the executive proceeds from constitutional requirements. Indeed, one provision of the Lever Act,[71] declaring it unlawful for any person wilfully to make any unjust or unreasonable rate or charge for handling or dealing in necessaries, was held to violate the Fifth and the Sixth Amendments, as too uncertain and indefinite.[72] Not only has the invalidity of this provision been declared in criminal cases as well as in civil suits, but Cardozo's opinion, while on the New York bench, almost anticipating *Panama Refining Co. v. Ryan*,[73] held that such a statute could not confer any authority upon the President to fix his own standard, and that a presidential proclamation fixing prices could not save the statute but was itself invalid.[74] On the other hand, the detailed provisions of the Lever Act, which set a definite standard for the determination of the price for coal,[75] were held constitutional.[76]

After the first world war, a new type of standard was applied in

the market prices was taken in Clements v. Cook, 112 Wash. 217 at 229, 191 P. 874 (1920); Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., (Mo. App. 1924) 257 S. W. 840. The Supreme Court has repeatedly declared that "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." United States v. New River Collieries, 262 U. S. 341 at 343-344, 43 S. Ct. 565 (1923) (no price had been previously fixed by the government), quoted Davis v. George B. Newton Coal Co., 267 U. S. 292 at 301, 45 S. Ct. 305 (1925). The Court in the first case went on to say: "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation." The decision referred to Vogelstein & Co. v. United States, 262 U. S. 337, 43 S. Ct. 564 (1923), decided on the same day, which upheld the findings of the Court of Claims that the price fixed by the War Industry Board was the market price. Cf. also Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 S. Ct. 314 (1929).

[69] Morrisdale Coal Co. v. United States, 259 U. S. 188, 42 S. Ct. 481 (1922); Pine Hill Coal Co. v. United States, 259 U. S. 191, 42 S. Ct. 482 (1922). See also E. I. DuPont de Nemours & Co. v. Hughes, (C. C. A. 3d, 1931) 50 F. (2d) 821.

[70] Sec. 4 (d).

[71] 40 Stat. L. 276, § 4 (1917).

[72] United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298 (1920).

[73] 293 U. S. 388, 55 S. Ct. 241 (1935).

[74] Standard Chemical & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566 (1921).

[75] 40 Stat. L. 286, § 25 (1917): "In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit. In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

[76] Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 S. Ct. 314 (1929).

various countries, namely, price freezing at a certain date and determination of certain factors to be considered by the executive in making adjustments. Apart from rent legislation and from cases in continental Europe, recent examples are given by the British Prices of Goods Act of 1939,[77] and by the Canadian laws.[78] Some schedules of the OPA have applied this system;[79] and similar standards are set by the EPCA. Prices must be "generally fair and equitable" and "effectuate the purposes of this act." "So far as practicable" "due consideration" must be given to the prices prevailing between the dates of October 1 and 15, 1941, while adjustments are further specified.[80] A special minimum standard has been provided for agricultural commodities.[81]

It is submitted that these standards will meet the Court's requirements, as recently elaborated in *United States v. Rock Royal Co-Op.*[82] and in *Sunshine Anthracite Coal Co. v. Adkins.*[83]

IV

PROCEDURE LEADING TO THE ADMINISTRATIVE DECISION

Price-fixing procedure concerns the methods followed by the agency (1) to collect the information needed; (2) to evaluate such information; and (3) to formulate and give publicity to the decision.

A. *The Collection of Information*

The present price-fixing procedure, as well as that used by the World War I agencies is characterized by a high degree of informality.

[77] 2 & 3 Geo. 6, c. 118 (1939). However, §§ 5 and 6 of the Goods & Services (Price Control) Act, 1941 (4 & 5 Geo. 6, c. 31) confer authority upon the Board of Trade to fix the date at which the basic price is ascertained, and to modify the cost factors included in the schedule.

[78] Regulations of the Wartime and Trade Board of Nov. 1, 1941, P. C. 8527, 2 EMERGENCY LAWS, ORDERS AND REGULATIONS OF CANADA 28-1.

[79] Schedule No. 39 on upholstery furniture fabrics, 6 FED. REG. 5750 (1941), fixed maximum prices at 105% of those in effect September 10, 1941.

[80] EPCA, § 2 (a). The administrator has discretion to choose the nearest two-week period, if there are no prevailing prices between such dates, or if they are not representative because of abnormal market conditions or other reasons. A different base period prevails for rents. Sec. 2 (b). Adjustment factors, of general applicability, include speculative fluctuations, general decreases or increases in costs of production and transportation, and general increases or decreases in profits earned by sellers during and subsequent to the year ended Oct. 1, 1941.

[81] EPCA, § 3. Maximum prices on agricultural commodities must not be established below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: 110% of parity, the market prices prevailing on Oct. 1, 1941, or Dec. 15, 1941, or the average price during the period 1919-1929.

[82] 307 U. S. 533, 59 S. Ct. 993 (1939).

[83] 310 U. S. 381, 60 S. Ct. 907 (1940). Cf. also Opp Cotton Mills v. Administrator, 312 U. S. 126, 61 S. Ct. 524 (1941).

Speed is required by the subject matter, and flexibility is necessary because of the different situations involved and of the various degrees of organization of the interests affected.[84] These factors outweigh other considerations which would lead to a formal type of procedure, such as the importance of the economic groups affected and the need for a careful balancing of the interests involved.[85]

No hearings are held now,[86] and none were held by World War I agencies under procedures which have been upheld by the Supreme Court.[87] Price fixing is rule making,[88] and rule-making procedures have been distinguished from adjudications for procedural purposes.[89] The Supreme Court "has not actually held that particular procedural requirements are mandatory in rule making under any kind of statute, except for the single matter of findings."[90] Moreover, the emergency increases the sphere of administrative discretion.[91]

[84] It is enough to compare the widely scattered scrap iron trade with the concentrated automobile industry.

[85] For an excellent discussion of the general problem, see Fuchs, "Procedure in Administrative Rule-Making," 52 HARV. L. REV. 259 (1938).

[86] Taft, brief filed with the Senate Committee on Agriculture, 87 CONG. REC. 5653 (1941).

[87] Sec. 25 of the Lever Act, 40 Stat. L. 286 (1917); Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 S. Ct. 314 (1929); United States v. Macintosh, 283 U. S. 605, 51 S. Ct. 570 (1930). See also Ford v. United States, (C. C. A. 6th, 1922) 281 F. 298, reversed on other grounds, 264 U. S. 239, 44 S. Ct. 300 (1924).

[88] Cf. § 202 of the Attorney General's Committee Minority Bill, S. 674, 77th Cong., 1st sess. (1941).

[89] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 53 S. Ct. 350 (1933); United States v. George S. Bush & Co., 310 U. S. 371 at 379, 60 S. Ct. 944 (1940). See Fuchs, "Procedure in Administrative Rule-Making," 52 HARV. L. REV. 259 (1938). Cf. GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENT 360-361 (1940).

[90] ADMINISTRATIVE PROCEDURE, FINAL REPORT 111, note 69; Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441, 36 S. Ct. 141 (1915); Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504 at 522, 179 A. 116 (1935): "Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the fourteenth amendment imposes no such requirement; and, for obvious reasons, the like clauses in the state constitution bear the same construction." Similarly as to notice, State v. Quattropani, 99 Vt. 360 at 362, 133 A. 352 (1925). Opp Cotton Mills v. Administrator, 312 U. S. 126, 61 S. Ct. 524 (1941), stands for a liberal interpretation of statutory requirements. Cf. Feller, "Administrative Law Investigation Comes of Age," 41 COL. L. REV. 589 at 597 (1941).

[91] Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163, 39 S. Ct. 507 (1919); United States v. Chemical Foundation, 272 U. S. 1 at 12, 47 S. Ct. 1 (1926); United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 57 S. Ct. 216 (1936); Shimola v. Local Board No. 42, (D. C. Ohio, 1941) 40 F. Supp. 808. That is not to say that the guaranty of the Fifth Amendment is inoperative in wartime. United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298 (1920);

Tying up the present discussion with the initial remarks in this paper, it may be concluded that hearings in emergency price-fixing procedure are not required by law and would definitely paralyze administrative action.[92] To meet these practical considerations, it has been suggested that the hearing requirements be modified by permitting interim administrative action, to be followed by hearings within a thirty-day period.[93]

It seems, however, that the impetus of inflationary situations would enlarge the proposed exception to the ordinary practice. Moreover, hearings could not be held within the thirty-day period, and the market would be held in a position of uncertainty which would create abnormal conditions and bring transactions to a practical standstill. Indeed, this was the result when the OPA considered the revision of existing ceilings.[94]

In the collection of the factual background necessary for the administrative decision, the OPA has relied upon a twofold channel of information, one based upon the collaboration of the affected interests, and the other upon independent sources.

On the one hand, the affected interests, whether previously organized or not, are normally consulted before any decision is taken. Conferences are held in the field and in Washington to which representatives of the various branches of the trade, which make and pay the price, are called to confer with the OPA individually and in groups. These conferences are open to any member of the trade who may be interested; when the size of the industry makes individual notice impossible, the agency resorts to press releases. In some cases the industry has been requested to submit cost data to the OPA in advance of a meeting, in order that the agency may have opportunity to study them.[95] This practice should be extended in the interests of administrative expediency and of making the conferences more profitable to both parties. It has been noted that the practice of consulting with private interests leads easily to the establishment of temporary or permanent advisory committees drawn from an industry,[96] and already a num-

United States v. New River Collieries, 262 U. S. 341, 43 S. Ct. 565 (1923). Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 at 426, 54 S. Ct. 231 (1934), states further: "While emergency does not create power, emergency may furnish the occasion for the exercise of power."

[92] See supra, pp. 937-939.

[93] Taft, brief, 87 CONG. REC. 5653 (1941), p. 538. The Taft bill, proposed as a substitute for H. R. 5990, extended the period to sixty days.

[94] E. g., rayon greige goods, N. Y. TIMES, Sept. 19, 1941, p. 34.

[95] See, e.g., 2 DEFENSE, No. 38, p. 10 (1941), and P.M. 1184.

[96] ADMINISTRATIVE PROCEDURE FINAL REPORT 103.

ber of panels and committees have been formed to advise the OPA in particular fields.[97]

Independent investigations by the OPA are of primary significance, for they precede the consultation with the industry and influence all the stages of the procedure. For this purpose the OPA makes use both of its own staff of experts and of other fact-finding agencies. Continuous studies of critical items are conducted by the OPA's commodity sections,[98] and data are gathered from other federal agencies, whose collaboration is expressly provided for by the Executive Order establishing the OPA[99] and by the EPCA.[100] Thus the Bureau of Labor Statistics,[101] the Tariff Commission and the Federal Trade Commission are mainly relied upon, and the latter two are also requested to carry on special investigations in particular industries or situations.[102] Other agencies utilized in this connection are the Office of Production Management[103] and the Securities and Exchange Commission.[104]

Although the investigatory powers of the agency are strengthened by the EPCA, which confers upon it additional authority to administer oaths and subpoena witnesses,[105] the general lines of the procedure followed so far do not seem to be greatly affected, for the act does not require hearings or other formal procedure to be complied with before the issuance of a ceiling. The administrator is merely required to consult with industry representatives "so far as practicable."[106]

B. *Valuation of the Facts*

The preliminary investigations by the agency and the information furnished by the trade generally precede any action taken by the OPA. Even mere warnings to refrain from price increases require study of

[97] Information supplied by courtesy of the assistant administrator.

[98] Cf. supra, note 31.

[99] Executive Order No. 8734, § 2, 6 FED. REG. 1917 (1941).

[100] Sec. 201 (a).

[101] HENDERSON, PRICE-CONTROL HEARINGS, pt. 1, p. 56: "we have an arrangewith the Bureau of Labor Statistics in the Department of Labor to do our price work for us and call our attention weekly to prices that are getting out of line."

[102] E.g., the Federal Trade Commission's investigation on prices, costs and profits of the furniture industry, 2 DEFENSE, No. 26, p. 6 (1941), and the Tariff Commission's investigation of the pulp producing costs, P. M. 1327.

[103] Cf. Price Schedule No. 1 on second-hand machine tools, 6 FED. REG. 1021 (1941).

[104] Its Trading and Exchange Division provides the OPA daily reports on the commodity markets. 2 BULL. DEFENSE, No. 25, p. 14 (1941).

[105] Sec. 202 (b) (c). Cf. decisions upholding the constitutionality of similar powers conferred upon other federal agencies cited in 26 WASH. UNIV. L. REV. 531 at 534, note 31 (1941).

[106] Sec. 2 (a).

the cost items involved in a particular situation. Warnings accompanied by a request not to increase prices without previous notification or consultation with the OPA often lead to individual or collective agreements with the trade.[107]

A more elaborate procedure is followed in connection with price schedules. After the investigatory and the consultative phases have been completed, the competent commodity section prepares an economic brief, which discusses "in detail the economic aspects of the problem and the reasons for recommending a particular line of action."[108] This brief, together with a brief prepared by the legal division, and the proposed schedule are reviewed by the responsible department heads. Final decision, however, rests with the administrator, who *may* submit the schedule to the Price Administration Committee, according to the provisions of the Executive Order.[109] This step is not mandatory, and of the schedules issued before the enactment of the EPCA, only four stated that consultation with the committee had taken place.[110] Anyhow no such requirement is included in the EPCA. Ceilings on commodities which bring the OPA to interfere with the jurisdiction of other agencies have been preceded by consultation with them.[111] The approval of the Secretary of Agriculture is now provided for by the EPCA as a prerequisite of price regulations on agricultural commodities.[112]

The order of procedure discussed above is subject to alteration in the cases in which prompt action is required. In these instances full investigation and cost study have been postponed until the schedule was already in operation.[113] Express provision to this effect is contained in the EPCA.[114] This method of using interim orders to meet particular

[107] E. g., agreements stabilizing prices of organic and inorganic dye colors, P. M. 1639.

[108] Hamm, deputy administrator of the OPA, address, Sept. 30, 1941, P. M. 1254, p. 3.

[109] Sec. 4, Executive Order 8734, 6 FED. REG. 1917 (1941).

[110] Price Schedules Nos. 6 (iron and steel), 7 (combed cotton yarn), 9 (hides) and 11 (cotton grey goods). 6 FED. REG. 2004, 2561, 2909, 3180 (1941). Informal consultation has replaced the former regular meetings of the committee with the administrator.

[111] E. g., Schedule No. 22 (Pennsylvania grade crude oil) issued after consultation with the Office of the Petroleum Coordinator for National Defense, 6 FED. REG. 4324 (1941); and Schedule No. 25 (fats and oils) issued after consultation with the Commodity Credit Corporation, the Department of Agriculture, the Tariff Commission, and the Department of Commerce. P. M. 1040, 6 FED. REG. 4491 (1941).

[112] Sec. 3 (e).

[113] E. g., Schedules Nos. 6 (iron and steel) and 7 (cotton yarn), 6 FED. REG. 2004, 2561 (1941).

[114] Sec. 2 (a).

situations was successfully used by the President during the first world war,[115] and is familiar also to peacetime procedure.[116] Temporary regulations have preceded a hearing even in cases in which hearings are required by statute, as under the Fair Labor Standards Act.[117] Adoption of the temporary rate order procedure which is used by public utilities with the approval of the Supreme Court[118] has been advocated under the Packers and Stockyards Act.[119] Similar provisions in state statutes have been upheld under the "due process" clause, both of the state and of the federal constitutions.[120]

C. *The Formulation and Publication of the Decision*

Price schedules have not been issued by the agency along a uniform pattern, but they vary with the circumstances of the particular situations involved. Most schedules, however, state (a) the authority, (b) the grounds, and (c) the source of the information upon which they purport to be based. The schedules state whether information has been secured by the OPA or from other agencies[121] and whether independently or with the collaboration of the trade.[122] Special mention is made of previous agreements between the OPA and the industry and of the violations which made the schedule necessary.[123]

The EPCA requires each regulation to state the considerations involved in its issuance,[124] in order "to afford those subject to a maximum price regulation an adequate opportunity to know the basis for

[115] Addy Co. v. United States, 264 U. S. 239, 44 S. Ct. 300 (1924) (provisional bituminous coal price schedule, issued by the President, pending further investigations).

[116] See GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENT 382-389 (1940), who greatly favors the application of this method.

[117] 1941 ADMINISTRATIVE PROCEDURE MONOGRAPHS, pt. 1, p. 84, note 122. Since here a hearing was held, this situation must be distinguished from Saxton Coal Mining Co. v. National Bituminous Coal Commission, (App. D. C. 1938) 96 F. (2d) 517, in which the commission dispensed with a hearing and left the parties to enter a complaint. Only a temporary restraining order was granted, and final decision was withheld because the agency revoked the schedule. Cf. Truax-Traer Coal Co. v. National Bituminous Coal Commission, (C. C. A. 7th, 1938) 95 F. (2d) 218.

[118] Driscoll v. Edison Light & Power Co., 307 U. S. 104, 59 S. Ct. 715 (1939).

[119] 1940 ADMINISTRATIVE PROCEDURE MONOGRAPHS, pt. II, p. 22.

[120] Lion Oil Refining Co. v. Bailey, 200 Ark. 436, 139 S. W. (2d) 683 (1940).

[121] Cf. supra, at note 111.

[122] The uniform statement in the first schedules was: "on the basis of information secured by independent investigation . . . and information furnished through the cooperation of the trade." Price schedule No. 1, 6 FED. REG. 1021 (1941). Lately specific reference is made to conferences and panels discussions. Schedule No. 28, id. 4761.

[123] E. g., Schedule No. 30, id. 4822. Sec. 5 of the EPCA authorizes such agreements in order to remove the possibility of a conflict with the antitrust laws.

[124] Sec. 2 (a).

its adoption."[125] Since the act provides for certain standards,[126] it would appear that these also should be referred to in the schedule. It seems, therefore, that the constitutional requirement for findings, predicated on the Fifth Amendment,[127] would be met; the use of the word "findings" is not an essential factor.[128] It may be noted that the need for clarity in the administrative process requires price regulation to state their statutory basis, but failure to do so would be penalized only by remanding the case to the agency, and not by invalidating the regulation.[129]

The advocated requirement that regulations should not take effect until a certain period after the date of their publication in the *Federal Register*, for the double purpose of giving notice and opportunity of making representations to the affected interests,[130] in many instances cannot be met by price regulations. Necessity for speedy action to overcome these considerations has been recognized in the recent bills for revising federal administrative proceedings.[131] Moreover, several agencies have objected to the deferment of the time of application of administrative regulations. These agencies have also stated their occasional inability to meet even the delay caused by the fact that the *Federal Register* is not a daily publication.[132] On the basis of such considerations, it may be agreed that the OPA may find it necessary in some situations to issue schedules free from any publication delay. Yet of the first eighty schedules, thirty-four became effective before the

[125] S. Rep. 931, 77th Cong., 2d sess. (1942), p. 15.

[126] See supra, p. 947.

[127] Panama Refining Co. v. Ryan, 293 U. S. 388 at 431, 55 S. Ct. 241 (1935). But see Pacific States Box & Basket Co. v. White, 296 U. S. 176 at 186, 56 S. Ct. 159 (1935). Cf. LANDIS, THE ADMINISTRATIVE PROCESS 148-149 (1938). The tendency of the Supreme Court in Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936), toward rigid standards of procedure seems unlikely to endure. Fuchs, "Constitutional Implications of the Opp Cotton Mills Case," 27 WASH. UNIV. L. Q. 1 at 21 (1941).

[128] Lion Oil Refining Co. v. Bailey, 200 Ark. 436, 139 S. W. (2d) 683 (1940). But see OPA's general counsel (Ginsburg), PRICE-CONTROL HEARINGS, pt. 1, pp. 404-406, 616, stating that no findings of fact are or need to be made.

[129] A. E. Staley Mfg. Co. v. Secretary of Agriculture, (C. C. A. 7th, 1941) 120 F. (2d) 258; Twin City Milk Producers Assn. v. McNutt, (C. C. A. 8th, 1941) 122 F. (2d) 564; Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 61 S. Ct. 845 (1941), criticized by Timberg, "Administrative Findings of Fact," 27 WASH. UNIV. L. Q. 62 at 70 (1941), on the ground that it ignores "the all-important time variable."

[130] ADMINISTRATIVE PROCEDURE FINAL REPORT 114-115.

[131] See supra, notes 12-15.

[132] Statement by the Departments of War and of Agriculture, S. HEARINGS ON ADMINISTRATIVE PROCEDURE, pt. 1, pp. 43 and 70 ff.

date of publication, eighteen became effective on the same date of their publication, and only twenty-six after that date. This proportion suggests that, in some cases at least, the publication could have been allowed to precede effectiveness.

Publicity is particularly important in price regulation. First, the interests affected are wide, often scattered throughout the country, although representatives of the trade may have participated in the formulation of the schedules. Second, the degree of success of a price-fixing system depends to a very large extent upon the co-operation of both the trade and the public; such co-operation is conditioned—among other factors—on the effective publication and full understanding of the regulations.[133]

In fact, the OPA gives a large distribution to its releases, through mailing lists and publication in newspapers.[134] Moreover, the agency relies on the Regional Information Offices of the Office of Emergency Management,[135] while the co-operation of city mayors has also been enlisted to give publicity to maximum retail prices.[136] Recent schedules require dealers to post retail prices in a conspicuous place in their establishments.[137]

V

ENFORCEMENT PROCEDURE

Although a basic principle in price fixing is that the confidence and voluntary collaboration of all affected interests must be furthered by all available means,[138] and although appeal to patriotism will attain a greater degree of success during an extreme emergency than in ordinary times,[139] yet sanctions are necessary to prevent price violators from undermining the whole price-fixing system. This conclusion is sup-

[133] The importance of "accessibility and publicity" of price regulations is stressed as one of the three main lessons of the British World War Food Control by BEVERIDGE, SOME EXPERIENCES OF ECONOMIC CONTROL IN WAR-TIME 26-27 (1940).

[134] HENDERSON, PRICE-CONTROL HEARINGS, pt. 1, p. 886. An ingenious channel of information is represented by price "clinics" held by the OPA in various cities. P.M. 2566.

[135] 2 DEFENSE, No. 32, p. 23 (1941).

[136] Cf. P. M. 1053 (maximum fair prices for gasoline).

[137] Price Schedule No. 63 (rubber tires and tubes), 7 FED. REG. 35 (1942).

[138] BARUCH, AMERICAN INDUSTRY IN THE WAR 18 (1941); HENDERSON, PRICE-CONTROL HEARINGS, pt. 1, p. 350. The greater extent to which voluntary co-operation was enlisted in World War America than in England is pointed to as a major difference between the two price-fixing systems by GRAY, WAR TIME CONTROL OF INDUSTRY 275 ff. (1918).

[139] BACKMAN, WAR TIME PRICE CONTROL 6 (1940).

ported by the experiences of America in World War I,[140] of Great Britain in the present conflict,[141] as well as by the results of the recent efforts of the OPA.[142] A successful enforcement of a price-fixing program rests upon two conditions: (1) an efficient investigating machinery, and (2) speedily available sanctions.

A. *Investigating Machinery*

The OPA has organized a threefold channel of information regarding compliance with its price schedules. It relies upon: (a) information supplied by the trade, (b) official investigations, and (c) complaints from the public.

Provisions are made for all persons concerned to send reports regarding sales, purchases, and prices during a given period.[143] More recently, sworn statements of compliance with the price regulations are also required from the industry.[144]

One of the administrative problems arising in this connection concerns the amount of data to be requested from the trade. This should be kept to the strict minimum and the simplest forms should be used, in the interest not only of the trade but also of the agency.[145]

The industry is furthermore required to keep records of the transactions made within the period of one year,[146] to be open to inspection by OPA's officials. In the third place, the schedules request persons having evidence of violations of the ceiling to communicate with the

[140] BARUCH, AMERICAN INDUSTRY IN THE WAR 440 (1941): "Let us make no mistake about it: we fixed prices with the aid of potential Federal compulsion and we could not have obtained unanimous compliance otherwise." Similarly, U. S. FOOD ADMINISTRATION, ANNUAL REPORT 10 (1917) (also H. Doc. 837, 65th Cong., 2d sess.).

[141] "Official persuasion and public opinion are not enough to prevent profiteering." 136 ECONOMIST 599 (1939).

[142] A significant example is the open refusal by an automobile firm to comply with the OPA's request to withhold a price increase, thus compelling the OPA to withdraw analogous requests to firms which had already agreed to them. 2 DEFENSE, No. 26, p. 6 (1941). On the other hand, the threat of sanctions was sufficient to induce some brokers and dealers in iron and steel scrap to refund charges collected in excess of the ceiling. P. M. 1337, 1469, 1608.

[143] Some schedules require weekly reports, e.g., No. 1, 6 FED. REG. 1021 (1941), others monthly, e.g, No. 2, 6 FED. REG. 1593 (1941).

[144] E. g., schedule No. 14 on silk, 6 FED. REG. 3893 (1941). This requirement has been later removed. P. M. 2679.

[145] Cf. WAR INDUSTRIES BOARD, PRICE BULL. 3, p. 147 (1920). See also statement by the OPA's general counsel (Ginsburg): "unless you need current information, it is a thing to avoid like the plague, because it keeps on coming in." PRICE-CONTROL HEARINGS, pt. 1, p. 672.

[146] Some schedules, however, provide for a five-year period, as the schedule No. 15 on copper. 6 FED. REG. 4008 (1941).

agency,[147] but the recent experience of Great Britain[148] shows that this method alone cannot be expected to be very successful.

To prevent evasions, most schedules expressly warn against indirect methods of circumventing ceilings, such as additional charges for repairs and reconditioning;[149] discounts, premiums, and tying-agreements;[150] unusual charges for extending credit or early delivery; and similar methods.[151] Furthermore, the agency resorted to the publication of interpretative regulations which brought certain subterfuges into light.[152]

Other important factors in the policy of preventing abuses and evasions are the definition of standards for consumer goods[153] and the simplification of types, which facilitate discovery of violations on the part of the public and investigators.

The EPCA confirms these powers and practices of the agency, and adds authority to issue subpoenas[154] under the double safeguard of the immunity provisions of the Compulsory Testimony Act, and of insuring secrecy for all information obtained by the agency.[155] A further provision

[147] See § 6 of Schedule No. 1, 6 FED. REG. 1021 (1941).

[148] 137 ECONOMIST 460, 501-502 (1939); 138 id. 115 (1940).

[149] E. g., § 1 of Schedule No. 1, 6 FED. REG. 1021 (1941).

[150] E. g., § 5 of Schedule No. 2, 6 FED. REG. 1593 (1941).

[151] Sec. 1312.28 of Schedule No. 19, 6 FED. REG. 4142 (1941). Combination sales have been held greatly responsible for evasions of grain prices during World War I. Haney, "Price Fixing in the United States During the War," 34 POL. SCI. Q. 102, 262, 434 at 444 (1919).

[152] 2 DEFENSE, No. 26, p. 3, and No. 28, p. 12 (1941) (warning to the textile industry against the practice of selling at a price above the ceiling with the understanding that the excess will be refunded to the buyer if the schedule be found valid). Similarly, "escalator" clauses, whereby buyers agree to pay a price above the ceiling if such a ceiling is raised before delivery, have been declared to violate the regulations. See P. M. 2661, 2664.

[153] P. M. 1253. A standard section has been set up by the Consumer Division, but the matter is also within the jurisdiction of the price division.

[154] EPCA, § 202 (c). As a means to enforce the act, these requirements will be upheld if the act is found constitutional. United States v. Darby, 312 U. S. 100 at 125, 61 S. Ct. 451 (1941). The unreasonable search and seizure clause of the Fourth Amendment is now being interpreted in a spirit of liberality toward administrative agencies. Fleming v. Montgomery, Ward & Co., (C. C. A. 7th, 1940) 114 F. (2d) 384, cert. denied, 311 U. S. 690, 61 S. Ct. 71 (1940). Cf. Notes, 26 WASH. UNIV. L. Q. 270 (1941), and 40 MICH. L. REV. 78 (1941).

[155] EPCA, § 202(g). Subsec. 202(h) provides that no information obtained under the act shall be disclosed if deemed confidential or requested to be treated as such unless the administrator "determines that the withholding thereof is contrary to the interest of the national defense and security." No sanction, however, is provided, except for wilful disclosure of information "otherwise than in the course of official duty," or wilful use thereof "for personal benefit." §§ 205 (b), 4(c).

in the EPCA authorizes licensing.[156] This represents the more efficient means of supervising business, especially if not highly concentrated, as is proved by the experiences of the Hoover Food Administration and of the present British price control.[157] The licensing authority of the administrator is limited in that he cannot refuse the issuance of a license to any person "unless such person already has such a license" (sic). Moreover, exceptions from the licensing requirement are provided for farmers, fishermen, and newspaper, book, motion picture and radio businesses.[158]

B. *Sanctions*

Sanctions to secure compliance with price regulations may be either (1) administrative or (2) judicial. A review of both types is necessary before discussing the factors which influence the agency in the choice of a particular measure.

1. *Administrative Sanctions*

The typical clause concerning enforcement provides that violators of maximum prices will be called to the attention of Congress and of the public, and that "the powers of the government" will be fully exerted.[159] Before the passage of the EPCA, this provision, interpreted in the light of statements made by OPA's officials, showed that the agency intended to rely on the sanctions used by the World War I agencies, such as requisitioning and commandeering.[160] But the importance of requisitioning seems to be overemphasized because, apart from the limited scope of its availability as compared with the wider area

[156] EPCA, § 205(f). This section restores, with certain limitations, a licensing provision which was included in the original administration bill, H. R. 5479, and had been rejected by the House, H. R. 5990.

[157] Cf. S. REP. 931, 77th Cong., 2d sess. (1942), p. 9: "where there are many sellers, as in retailing, for example, it is impossible to determine who is subject to control, much less enforce price regulations, without licensing." It is significant that the Hoover Food Administration during World War I felt it necessary to circumvent its statutory powers in order to control the retail trade. HIBBARD, EFFECTS OF THE GREAT WAR UPON AGRICULTURE IN THE UNITED STATES AND GREAT BRITAIN 152 (1919) (Carnegie Preliminary Economic Studies of the War, No. 11); WAR INDUSTRIES BOARD, PRICE BULL. 3, p. 135 (1920).

[158] EPCA § 205 (f). While the last limitation is due to a desire to avoid the constitutional issue, the first two exemptions are the result of a compromise with the farm block. It is further provided that licenses cannot contain any provisions which could not be prescribed under §§ 2 or 202 of the act.

[159] Sec. 6 of Schedule No. 1, 6 FED. REG. 1021 (1941).

[160] HENDERSON, 2 DEFENSE, No. 15, p. 3 (1941).

of the OPA's ceilings,[161] practical obstacles make its application of questionable advisability. The first world war offers significant illustrations in which it was necessary to disregard requisitioning, either because of the difficulty in industrial management, particularly strong for widely scattered industries,[162] or because of the enormous amount of capital required.[163] Moreover, cases in which use was made of requisitioning proved of doubtful success either because of the delay involved[164] or because of the higher expenses which were incurred by the Treasury.[165]

Although at present the government has already used its requisitioning authority to enforce defense policy,[166] yet in the light of the experiences during World War I, it seems very doubtful that requisitioning will ever become a primary sanction against price violators.

Governmental powers which were successfully and easily employed by the War Industry Board in the enforcement of price regulations were priorities and suspension of purchases on the part of the government purchasing services.[167] Some schedules of the OPA, particularly

[161] The requisitioning statutes apply only to goods necessary for the defense of the United States and would not authorize requisitioning for civilian purposes. Selective Service Act, 54 Stat. L. 885 (1940), 50 U. S. C. (1940), § 301; National Defense Act, 39 Stat. L. 213 (1916), 50 U. S. C. (1940), § 80; 54 Stat. L. 714, 1090 (1940), 50 U. S. C. (1940), §§ 701, 711-713; 55 Stat. L. 742 (1941), 50 U. S. C. A. (Supp. 1941), §§ 721-724. That the government powers to take over plants "relate to military supplies alone" was admitted by Mr. Knudsen at the HEARINGS BEFORE THE SENATE SPECIAL COMMITTEE INVESTIGATING THE NATIONAL DEFENSE PROGRAM, 77th Cong., 1st sess., (1941), pt. 1, p. 115.

[162] Baruch stated before the War Policy Commission, H. Doc. 271, 72d Cong., 1st sess. (1932), pp. 5-6: "I do not recall a single important industrial enterprise that was thus taken over." A proposal to take over a great plant "split on the rock of this argument: who will run it?" Is it advisable to "replace a proved expert management by a problematical mediocrity?" By the end of the war highly centralized industries, such as express, telegraph and railways had been taken over by the government. But "To get the wool in that way [commandeering] would have required the organization of a staff of hundreds of men, whose services in that hour of stress were sorely needed for other tasks." United States v. McFarland, (C. C. A. 4th, 1926) 15 F. (2d) 823 at 827.

[163] WAR INDUSTRIES BOARD, PRICE BULL. 3, p. 396 (1920).

[164] War Policy Commission Hearings, H. Doc. 271, 72d Cong., 1st. sess. (1932), p. 24. The Navy located some badly needed machine tools in April, 1917, and their possession was taken only in October.

[165] United States v. New River Collieries, 262 U. S. 341, 43 S. Ct. 565 (1923).

[166] E. g., Executive Order No. 8868, 6 FED. REG. 4349 (1941) (conferring authority on the Secretary of the Navy to take possession of the Federal Shipbuilding & Drydock Co. plant).

[167] Haney, "Price Fixing in the United States During the War," 34 POL. SCI. Q. 102 at 115 (1919): "The administration of priorities proved to be a major element in the price-fixing program. . . ."

recent ones, provide for the application of these sanctions against price violators,[168] but the OPA showed a certain reluctance to resort to these measures, probably because of lack of well-defined statutory powers.[169] It must, however, be remarked that the withholding or cutting down of business is a very drastic penalty, particularly if applied as a first sanction.[170] A further enforcement measure provided for in the OPA's schedules is publicity of violations to be given both by reports to Congress and to the President,[171] and by newspapers, to mobilize public opinion against price violators.[172]

As a whole, these measures seem hardly adequate to supply the OPA with the necessary quick action.[173] This was finally provided for by the EPCA. The President has been empowered to delegate his priority and rationing powers to the OPA,[174] and this delegation has already taken place.[175] Moreover, a most effective type of sanction has been made available to the OPA through the licensing system. Indeed, suspension and revocation of licenses proved the backbone of the Food and Fuel Administrations during World War I.[176]

The authority of the OPA concerning licenses is far more limited than the one exercised by the Hoover Food Administration. Licenses cannot be revoked, but merely suspended for a maximum period of twelve months. Moreover, the power to suspend a license is vested

[168] E. g., see price schedules No. 69 (primary lead) and 70 (lead scrap), 7 FED. REG. 284, 286 (1942), as to priorities; price schedule No. 19 (southern pine lumber), 6 id. 4142 (1941), as to suspension of government purchasing; and price schedule No. 63 (new rubber tires and tubes), 7 id. 35 (1942), as to suspension of government selling.

[169] As of August 6, 1941, the OPA had never recommended the exercise of requisitioning or priority power to enforce its schedules. HENDERSON, PRICE-CONTROL HEARINGS, pt. 1, p. 58.

[170] In peace time, the withholding of government contracts to violators of the Walsh-Healy Act has been recognized as an exceedingly drastic measure and "has accordingly been little employed." 1940 ADMINISTRATIVE PROCEDURE MONOGRAPHS, pt. 1, p. 2.

[171] See, e.g., the report on the refusal by the Chrysler Corporation to comply with the OPA's request to withhold a price increase. 2 DEFENSE, No. 26, p. 6 (1941).

[172] Cf. P. M. 1212 (rents), and P. M. 1715 (iron and steel scrap dealers).

[173] It is significant that, after having ascertained the violation of a price agreement by a major zinc producer, the OPA merely suggested that "buyers of the zinc might well explore the possibilities of proceedings to recover the over-payment." P. M. 1615. In some instances, however, the OPA succeeded in securing refunds to buyers and even contributions to the United States Treasury of overpayments. P. M. 1836 and 3 VICTORY (formerly Defense), No. 4, p. 15.

[174] EPCA, § 201(b).

[175] Directive No. 1 of the WPB, issued with the approval of the President, on January 24, 1942, 7 FED. REG. 562 (1942).

[176] U. S. FOOD ADMINISTRATION, ANNUAL REPORT 10 (1917) (also H. Doc. 837, 65th Cong., 2d sess.).

in the courts,[177] and can be exercised only under the following safeguards: (1) the agency must send a warning by registered mail to the violator of the price regulations or of the conditions of the license, and (2) a new violation must have occurred thereafter.[178] These provisions represent an adequate safeguard for the business affected,[179] but some safeguards are desirable concerning the cutting off of supplies through the exercise of the priority powers of the administration.

2. *Judicial Sanctions*

Before the enactment of the EPCA, the OPA could rely only upon the antitrust laws, which, however, apply to a minor field of price violations.[180]

A threefold type of judicial sanctions is provided for by the EPCA: (a) injunction suit by the government,[181] (b) civil suit by buyers and government,[182] and (c) criminal prosecution.[183] Buyers not in the course of trade or business may bring an action either for fifty dollars or for the treble amount in excess of the maximum price.[184] If the buyer is not entitled to bring suit, then the administrator may sue within one year after the transaction was completed.[185]

[177] EPCA, § 205 (f)(2). Concurrent jurisdiction is exercised by state or territorial courts and by federal district courts, the jurisdiction of which is extended to cases involving a license to do business in more than one state, or whose gross sales exceed $100,000 per annum.

[178] EPCA, § 205 (f) (2).

[179] It may perhaps be argued that the court should ascertain also the violation prior to the administrative warning. The British Goods & Services (Price Control) Act, 1941, 4 & 5 Geo. 6, c. 31, § 16 (3)—which does not provide for licensing—empowers the courts to put a price violator out of business only at the third or subsequent time in which he has been found guilty.

[180] A special procedure has been worked out with the Anti-Trust Division of the Department of Justice. Letter from the Attorney General to the OPACS's administrator, on May 16, 1941, 9 U. S. L. W. 2687 (1941). A number of violations have been certified by the OPA to the division, which began investigations with the collaboration of the F. B. I. P. M. 862 (scrap iron and steel trade).

[181] Sec. 205 (a).

[182] Sec. 205(e). This provision will take effect six months after the date of enactment of the EPCA.

[183] Sec. 205(b).

[184] Precedents are found in § 16(b) of the Fair Labor Standards Act, 52 Stat. L. 1069 (1938), 29 U. S. C. (1940), § 216(b); and § 2 of the Walsh-Healy Act, 49 Stat. L. 2036 (1936), 41 U. S. C. (1940), § 36. The wording of the statute is directed to prevent the recurrence of United States v. Cooper Corp., 312 U. S. 600, 61 S. Ct. 742 (1941), denying a treble-damage action by the United States under the Sherman Act.

[185] The rule in pari delicto will deny recovery to a buyer in bad faith. Mancourt-Winters Coal Co. v. Ohio & Michigan Coal Co., 217 Mich. 449, 187 N. W. 408 (1922). This interpretation of the statute is supported by S. REP. 931, 77th Cong., 2d sess. (1942), pp. 9-10.

Responsibility for initiating a criminal prosecution rests with the administrator and, upon his certification of the facts, the Attorney General has discretion to proceed. Wilful violation of a price regulation, or of licensing, records or reports requirements, and false and material statements or entries therein is punishable by a fine not exceeding $5,000 or imprisonment for not more than one year. Criminal liability is extended to buyers in the course of trade or business.[186] The agency is entrusted only with prosecuting functions and adjudication is reserved for the ordinary courts.[187]

Immunity is granted for acts done in good faith in compliance with a regulation subsequently declared invalid,[188] thus following a most desirable statutory trend,[189] recently advocated on a larger scale.[190]

3. *Choice of Sanctions*

After a price violation has been ascertained by the OPA's field operation division, either in the course of a general survey or an investigation of a particular case, the price violator is called to a "compliance conference." Since the OPA has been clothed with adequate sanctioning measures, preliminary warnings have proved greatly effective.

Factors bearing upon the efficiency with which the various sanctions can be employed to enforce a price-fixing program center upon the following:

(a) *Speed.* An obvious psychological motive requires sanctions to fall upon violators without delay. This was one of the reasons for the enactment of the English Goods & Services (Price Control) Act, since the previous system was too slow, and thus created public dissatisfaction.[191] Similar reasons explain why, of the 8,676 cases in which the Food Administration during World War I took action to secure com-

[186] EPCA, §§ 4(a), 205(b). Imprisonment up to two years is provided for violations by government officials. Sec. 205(b), 4(c). Cf. supra, note 155. The combined provisions of §§ 205(b), 4(a) and 205(f) seem to make punishable also sales without a license.

[187] EPCA, § 205(c). Concurrent jurisdiction is given to district courts and to state or territorial courts.

[188] Sec. 205(d).

[189] Securities Act of 1933, 48 Stat. L. 908 (1934), 15 U. S. C. (1940), § 77k; Securities Exchange Act of 1934 as amended, 49 Stat. L. 1379 (1936), 15 U. S. C. (1940), § 78t.

[190] PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT REPORT 309-355 (1937); Walter-Logan Bill, H. R. 6324, § 2(d); Attorney General's Minority Bill, S. 674, § 204; and Groner Bill, S. 918, § 303(d) (cited notes 12, 14 and 15, supra).

[191] See supra, note 148.

pliance with its orders, only 72 involved criminal charges, and the agency relied primarily on its licensing powers.[192]

(b) *Cost.* Too costly sanctions will find little application, as is illustrated by the case of requisitioning.

(c) *Severity.* Unless the penalties attain a certain degree of severity, they are unlikely to attain any result. In fact, lighter penalties in Ireland during World War I proved to be far less efficient than more severe penalties in England for the same price violations.[193] It may be added that a plea for stricter penalties was recently made by a British Food Investigation Committee.[194]

VI

REMEDIES TO AFFECTED PARTIES

A twofold type of remedies, administrative and judicial, is available to the parties affected by a price regulation.

A. *Administrative Remedies*

A price regulation may affect individuals either temporarily because of the impact of the maximum price upon pre-existing commitments,[195] or permanently because of lasting effects.

The first situation has been dealt with by the agency through the granting of permission to carry on contracts, entered upon before the issuance of the schedule, at a higher price, if certain requirements are met.[196] Some price schedules permit adjustments by postponing the effectiveness of the ceiling.[197]

With slight difference of form, the price schedules contain a pro-

[192] WAR INDUSTRIES BOARD, PRICE BULL. 3, p. 145 (1920).

[193] BEVERIDGE, BRITISH FOOD CONTROL 235-236 (1928).

[194] 140 ECONOMIST 585 (1941).

[195] Whereas OPA's schedules do not respect existing contracts, a different policy was followed during World War I. See BARUCH, AMERICAN INDUSTRY IN THE WAR 81, 122 (1941); Lever Act, 40 Stat. L. 286, § 25 (1917). Cf. Rock v. Deason & Keith, 146 Ark. 124, 225 S. W. 317 (1920); Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566 (1921); Addy Co. v. United States, 264 U. S. 239, 44 S. Ct. 239 (1924), which leaves open the question whether a different policy would be unconstitutional. However, in the light of more recent decisions, it seems likely that § 4 of the EPCA, subordinating existing contracts to price regulations, will be upheld. Cf. Norman v. Baltimore & O. R. R., 294 U. S. 240, 55 S. Ct. 407 (1934); Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231 (1933); Brown Holding Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465 (1921); Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458 (1921).

[196] The most common requisite is that the goods necessary to fulfill contracts preceding the ceiling be already in stock. Schedule No. 8, § 1308.3, 6 FED. REG. 2654 (1941).

[197] See, e. g., Schedule No. 29 (coke), published in 6 FED. REG. 4821 (1941), on September 20, 1941 and effective on October 1.

vision to the effect that persons complaining of inequity in the operation of the schedule may apply to the OPA for approval of any modification thereof.[198] Individual complaints are examined by the accountants and technicians of the agency, and a field investigation is often resorted to. Relief has been granted by general modifications of ceilings, to exempt from their operation particular categories of producers,[199] types of products,[200] to add differentials and consuming points,[201] or to permit import duty to be added to the maximum price.[202] Furthermore, specific exemptions have been granted in individual cases.[203] This procedure is now regulated by the EPCA, which makes it necessary for the administration to appoint an industry advisory committee, upon request of the industry affected by a price regulation. The committee will make recommendations to the administrator with respect to form, classifications, differentiations and adjustment of the price regulation.[204] Moreover, the EPCA provides for a speedy determination of individual complaints. Protests against price regulations must be filed within sixty days from the issuance[205] of the regulation complained of, unless new grounds for the protest arise subsequently.[206] A hearing is not of right, and the agency can limit the proceedings to written evidence only. Although a similar type of procedure has been advocated by administrative experts,[207] it seems open to doubt

[198] Recent schedules [see No. 38 on glycerin, 6 FED. REG. 5488 (1941)] require compliance with the schedule as a condition for considering the application.

[199] Amendment to schedule No. 1 (bituminous coal) granted relief to miners who reopened their mines under a retroactive wage agreement. 6 FED. REG. 1987 (1941).

[200] Higher prices for export have been allowed, e.g., for iron and steel scrap. 6 FED. REG. 2004 (1941).

[201] E. g., the iron and steel scrap schedule was amended to add new grades and consuming points (from 13 to 34). 6 FED. REG. 2335 (1941).

[202] E. g., in the case of paperboard brought in from Canada. P. M. 1363.

[203] 2 DEFENSE, No. 28, p. 13 (1941) (iron and steel scrap producers); P. M. 1516 (ethyl alcohol producer). Sec. 2(c) of the EPCA confers on the administrator power to grant reasonable exceptions.

[204] EPCA, § 2(a). See infra, p. 968.

[205] EPCA, § 203(a). The word "publication" rather than "issuance" would seem proper. Price schedules issued before the act must be published within 10 days from the date of appointment of the administrator, but take effect from this moment, and can be attacked within 60 days therefrom. §§ 203, 206.

[206] Nothing is stated as to grounds arising after the publication and before the expiration of the sixty days, but a reasonable construction would allow the sixty-day period to run from the date at which the new grounds have arisen.

[207] GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 114-115 (1941). When there is the consent of the parties, the Interstate Commerce Commission resorts to a similar procedure, which amounts to 1/3 of all formal complaints. 1941 ADMINISTRATIVE PROCEDURE MONOGRAPHS, pt. 11, p. 23.

whether the courts will recognize "due process" in the absence of a hearing.[208] Morever, the EPCA empowers the administrator to take official notice of economic facts, including those found by him in the course of his investigations.[209] No provision, however, requires the OPA to make any such facts available to the complainant, except in the decision of denial.[210] It may be hoped that some provisions to this effect will be contained in the regulations which the administrator is authorized to issue.[211] Indeed, this omission in the act is particularly relevant, because neither objections nor evidence which were not before the agency can be considered by the reviewing court.[212] Within thirty days after the filing of the complaint, the administrator must "either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith."[213] This provision is not very effective because no further time limit is fixed within which final action must be taken.

B. *Judicial Remedies*

Prior to the passage of the EPCA, no judicial remedy was provided for by the price schedules of the OPA, but this does not authorize the conclusion that no such remedy was open to the affected parties. Injunction lies when no statutory remedy is created,[214] and other forms of collateral attack were also available.

The EPCA has instituted a highly specialized system of judicial review. The Emergency Court of Appeals has been established[215] for the purpose of expediting the handling of the complaints and furthering uniformity of decisions.[216] Against its decisions a petition for certiorari may be filed in the Supreme Court.[217]

[208] See also Reid and Hatton, "Price Control and National Defense," 36 ILL. L. REV. 255 at 289 (1941).

[209] Sec. 203(b).

[210] Sec. 203(a). But S. REP. 931, 77th Cong. 2d sess. (1942), p. 7, states that: "If the administrator wishes to introduce additional written evidence into the record, the protestant must be afforded an opportunity to answer it."

[211] EPCA, § 203(a). See infra, p. 968.

[212] EPCA, § 204(a). The reviewing court, however, may order evidence to be presented to the administrator if it "could not reasonably have been offered to the Administrator" in the administrative proceedings.

[213] EPCA, § 203(a).

[214] Shields v. Utah, Idaho Central R. R., 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). Cf. American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 60 S. Ct. 300 (1940).

[215] EPCA, § 204(c). This court is composed of three or more judges designated by the Chief Justice from judges of the district courts and circuit courts of appeals.

[216] Henderson, P. M. 1318; S. REP. 931, 77th Cong., 2d sess. (1942), p. 7.

[217] EPCA, § 204(d).

The jurisdiction of the Emergency Court of Appeals is subordinate to the exhaustion of the administrative remedies.[218] Only a person who complained before the OPA *and* who is "aggrieved by the denial or partial denial of his protest" may appeal to the special court of appeals against the regulation or order. But no aggrieved interest is required as a requisite to filing a protest with the administrative agency, for the only provision is that complainant be a "person subject to any provision" of a regulation or order.[219] It follows that a complaint against a price regulation may be filed by a person who does not have an adverse interest thereto. The question therefore arises whether there is the requisite "case" or "controversy" essential to jurisdiction of the Supreme Court.[220] Since the jurisdiction of the Emergency Court of Appeals is carved out of the jurisdiction of inferior constitutional courts and its functions are otherwise typically judicial, an argument may be made that the emergency court itself is a constitutional court.[221] Therefore it may be suggested that, in order to support rather than defeat and to avoid the issue of constitutionality,[222] the courts may interpret the provision, that a "person subject" to a regulation is entitled to protest to the agency, be read as "person adversely affected by" a regulation.

Apart from this constitutional question, the right to apply for review is accorded to the industry whose products are placed under ceiling,[223] and to consumers, since their protection is one of the primary

[218] EPCA, § 204(a). Cf. Armour & Co. v. Alton R. R., 312 U. S. 195, 61 S. Ct. 498 (1941); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459 (1938).

[219] EPCA, § 203(a). See infra, p. 968.

[220] Muskrat v. United States, 219 U. S. 346, 31 S. Ct. 250 (1911); Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445 (1923); Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930); Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 S. Ct. 282 (1927). But see Nashville C. & St. L. R. R. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933); Electric Bond & Share Co. v. Securities & Exchange Commission, 303 U. S. 419, 58 S. Ct. 678 (1938). A somewhat similar situation under the Walter-Logan Bill is discussed in Jaretzki, "The Administrative Law Bill: Unsound and Unworkable," 2 LA. L. REV. 294 at 308 (1940).

[221] Cf. Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933); O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933); Ex parte Bakelite Corp., 279 U. S. 438, 49 S. Ct. 411 (1929); Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 (1930).

[222] United States v. Delaware & Hudson Co., 213 U. S. 366 at 407, 408, 29 S. Ct. 527 (1938); Addy Co. v. United States, 264 U. S. 339 at 345, 44 S. Ct. 300 (1924); Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 S. Ct. 466 (1935).

[223] Cf. as to competitors, Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693 (1940), noted 26 WASH. UNIV. L. Q. 121 (1940).

purposes of the act,[224] and since their capacity to proceed in court has been sustained in similar situations.[225] But persons who took out a license may be deemed to have consented by their voluntary action to the regulations contained in the license.[226]

The complaint must be filed within thirty days after the denial of the administrative protest.[227] The agency is expressly empowered to modify or rescind the regulation complained of, even during the pendency of appeal.[228] Since the effectiveness of the judgment of the Emergency Court of Appeals is postponed for thirty days or until the final decision of the Supreme Court, if a writ of certiorari is filed within that period, it seems that a temporary relief could not be granted. The argument for prohibiting a stay of execution has been very strongly pressed by the administration, on the ground that leaving a price unregulated could further inflationary tendencies.[229] It seems, however, that the contrary case is stronger.[230] To keep an arbitrary price in force until final determination by the Supreme Court may mean irreparable destruction of business. The Emergency Court of Appeals should be trusted to exercise its discretion in the equitable balance of the conflicting interests, and to enter a temporary restraining order only when

[224] EPCA, § 1(a).

[225] Saxton Coal Mining Co. v. National Bituminous Coal Commission, (App. D. C. 1938) 96 F. (2d) 517. See Fuchs, "The Formulation and Review of Regulations under the Food, Drug and Cosmetic Act," 6 LAW & CONTEMP. PROB. 43 at 66-67 (1939).

[226] United States v. Smith, (D. C. Mass. 1922) 285 F. 751 at 754; Daniels v. Tearney, 102 U. S. 415 at 421 (1880); Hamilton v. Dillin, 21 Wall. (88 U. S.) 73 (1874).

[227] Peacetime statutes provide for longer periods within which an administrative regulation may be attacked before the courts. Sixty days are set by the Fair Labor Standards Act, 52 Stat. L. 1065 (1938), 29 U. S. C. (1940), § 210(a); ninety by the Food, Drug and Cosmetic Act, 52 Stat. L. 1055 (1938), 21 U. S. C. (1940), § 371(f). Between three and six months have been proposed by the Report of the British Committee on Ministers' Powers 62 (1932) (Cmd. 4060). It may, however, be noted that here the action is in the nature of an appeal.

[228] The doctrine that the administrative agency is free to enforce the policy of the act administered, after an error has been corrected by the courts, has been upheld in Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 59 S. Ct. 301 (1939), and Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 60 S. Ct. 437 (1940); and extended in Evans v. Federal Communications Commission, (App. D. C. 1940) 113 F. (2d) 166, to deny a restraining order against the agency from modifying the act complained of, in the pendency of judgment.

[229] Statements of OPA's officials, PRICE-CONTROL HEARINGS, pt. 1, pp. 337, 616.

[230] Doubts concerning the constitutionality of the provision are expressed by Reid and Hatton, "Price Control and National Defense," 36 ILL. L. REV. 255 at 284 (1941). But cf. Scripps-Howard Radio, Inc. v. Federal Communications Commission, (U. S. 1942) 62 S. Ct. 875.

the *fumus boni juris* of the applicant is based on substantial grounds.

The scope of the review by the Emergency Court of Appeals is the traditional one, for a regulation can be set aside only if it "is not in accordance with law, or is arbitrary or capricious."[231] The review is strictly limited to the record of the proceedings before the agency and the transcript shall include "as far as practicable" the economic data and other facts of which the administrator has taken official notice.[232]

The procedure set up under the act is exclusive of any other form of review, and any court other than the emergency court is expressly precluded from taking jurisdiction over controversies involving the validity of provisions of the act and of regulations or orders made under it.[233] Courts have agreed that injunction would not lie when a statutory remedy is available to the parties,[234] and the doctrine of election of remedies has been opposed to a party who had unsuccessfully taken a statutory appeal[235] in spite of the different questions which may be involved in the two types of suit.[236] The statutory appeal, however, is expressly given the effect of barring in enforcement suits any defense based upon the invalidity of the regulations, and to some extent at least of the EPCA itself.[237] Although this further step may un-

[231] EPCA, § 204(b). See Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15 at 32, 1 A. (2d) 775 (1938): "We do not determine, nor should we be called upon to do so, in the first instance, what elements are proper factors in price fixing. That is a legislative matter for the Commission to decide. Its conclusion should not be disturbed by us unless the inclusion or exclusion of material items is arbitrary or capricious. . . ." But Ginsbug, PRICE-CONTROL HEARINGS, pt. 1, pp. 161, 336, 406, contends that the scope of the review provided for by the EPCA is broader than the ordinary. Contra, S. REP. 931, 77th Cong., 2d sess. (1942), pp. 7-8, 23-24.

[232] EPCA, § 204(a). Additional evidence may be introduced if rejected by the administrator or if it could not reasonably have been offered before.

[233] EPCA, § 204(d).

[234] Sykes v. Jenny Wren Co., (App. D. C. 1935) 78 F. (2d) 729, cert. denied 296 U. S. 624, 56 S. Ct. 147 (1936); Monocacy Broadcasting Co. v. Prall, (App. D. C. 1937) 90 F. (2d) 421; America Sumatra Tobacco Corp. v. Securities & Exchange Commission, (App. D. C. 1937) 93 F. (2d) 236. Moreover, Levering & Guarrigues v. Morrin, (C. C. A. 2d, 1934) 71 F. (2d) 284, cert. denied, 293 U. S. 595, 55 S. Ct. 110 (1935), upheld the Norris-La Guardia Act withholding the power to issue injunctions against certain labor activities.

[235] United States v. Oregon Lumber Co., 260 U. S. 290, 43 S. Ct. 100 (1922).

[236] Fuchs, "The Formulation and Review of Regulations under the Food, Drug and Cosmetic Act," 6 LAW & CONT. PROB. 43 at 68 (1939).

[237] EPCA, § 204(d): "Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

doubtedly cause hardship to private parties, it has received some judicial support even in peacetime.[238]

VII

ADDENDA

This paper was completed immediately after the passage of the EPCA. Of the various developments which took place thereafter, the following appear to be particularly worth mentioning:

The OPA has issued regulations[239] which set forth the procedure for hearings which the administrator may hold prior to the issuance of a price regulation. Of the rules concerning review, rule 9 limits the right to protest to persons whose action has been required or prohibited by a price regulation. This provision would seem to meet the objection to the broad language of the act mentioned above.[240] Rule 21 provides for "reasonable opportunity" to be given to the protestant to present evidence in rebuttal of that of the administrator. This rule, however, does not completely remedy the omission of the EPCA[241] in that it does not apply to an oral hearing. The regulations have also established a special procedure concerning petitions for amendment[242] and for adjustments or exceptions.[243] As of April 21 only seventy-seven protests had been received by the OPA. Of these nine have been voluntarily withdrawn and sixty-seven are pending, while relief has been granted in one case.[244]

Enforcement has been tested in the courts, and some injunctions have already been granted to restrain violations of price regulations[245] as well as rationing regulations.[246] The administrative sanction of suspending all deliveries of new tires and tubes was applied for the first time on March 14, 1942.[247]

[238] Collateral attack has been denied because of the availability of the statutory remedy in Commonwealth v. Ziegler Dairy Co., 139 Pa. Super. 224, 11 A. (2d) 669 (1940) (consideration by the price-fixing board of evidence not placed on the record at hearing); Commonwealth v. Jackson, 146 Pa. Super. 328, 22 A. (2d) 299 (1941) (reasonableness of the price fixed). In these cases, however, the price regulations were preceded by a hearing in which the complainant could take part.

[239] Procedural Regulations No. 1, 7 FED. REG. 971 (1942).

[240] Supra, p. 965.

[241] Supra, p. 964.

[242] Rules 35-37.

[243] Rules 38-41.

[244] 10 U. S. L. W. 2700 (1942).

[245] 10 U. S. L. W. 2531 (1942).

[246] Henderson v. Smith-Douglass Co., (D. C. Va. 1942) 10 U. S. L. W. 2598, decided March 6th.

[247] P.M. 2693.