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Price Control and the Emergency Price Control Act

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PRICE CONTROL ACT

INTRODUCTION

WHEN the United States Government launched its great defense and Lend-Lease programs it also unwittingly launched the nation on the road to a disastrous inflation. In ordinary times price keeps supply and demand in equality with each other. It also brings about increases or decreases in production and regulates the distribution of goods. During a period when the financial resources of the Government are thrown onto the market, however, and when the Government will purchase irrespective of price, the demand both for goods and labor will exceed the supply. The ordinary laws of economics cannot cope with such an unnatural situation. Price remains no longer a deterrent to demand for either goods or services. The result is an ever spiraling inflation.

The first to suffer from this unnatural condition is the person on a fixed income or salary. Included in such a group must be those whose income, in whole or in part, is from interest on savings or from endowments. In a very true sense anyone with life insurance is also a sufferer.

The next to be penalized by this inflation is the Government, which is indirectly everyone. A nation at war must have arms and supplies. Price can be but of a secondary consideration. Government with its virtually unlimited purchasing power will purchase what it needs regardless of the astronomical figures to which prices have ascended. What does this mean? It means that every billion dollars raised by taxation or by the sale of bonds will purchase less of the things necessary to wage war. It means our national debt will be unnecessarily high. It means a debt which arose when money is cheap but which will be paid when money is dear.

Serious though the results of such an inflation may be during the war, the results will be more serious still after the war. When the demand for goods of destruction ceases we will face a dangerous lull.

This was true after the last war, and today, with a much higher percentage of the nation geared to a wartime economy, it will be even more true. A study of business recessions will
show that the greater the inflation, the greater the depression to follow.

To aid in preventing this inflation Congress on January 30, 1942, passed the Emergency Price Control Act of 1942. In order to understand better this Act, its more salient sections will be briefly summarized.

Section 1 (a) sets out the purposes of the act as being to stabilize prices, prevent speculative, unwarranted and abnormal increases in prices and rents; to prevent hoarding, profiteering, and other disruptive practices resulting from abnormal market conditions; to prevent dissipation of defense appropriations by excessive prices; to prevent undue hardships on those dependent upon set incomes; to assist in securing adequate production and to prevent a post emergency collapse.

Section 2 (a) in general empowers the Administrator to control prices whenever in his judgment the price of a commodity has risen or threatens to rise to such an extent as to defeat the purpose of the act. Such prices shall be such as shall in his judgment be generally fair and equitable. The administrator, in setting a price, shall give due consideration to the price prevailing between October 1 and October 15, 1941. This section requires that a maximum price regulation be accompanied by a statement of the considerations involved in its issuance, and permits the issuance of temporary maximum price regulations, effective for no more than 60 days, which may freeze the prices prevailing for any commodity within five days prior to the date of issuance of the regulation.

Section 2 (b) empowers the administrator to set rentals and makes April 1, 1941, the base date upon which he, as nearly as practicable, should set the rates.

Section 2 (e) empowers the administrator to, whenever he determines that the maximum necessary production of the commodity is not being obtained, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such a manner as he deter-
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mines to be necessary to obtain the maximum necessary production.

Section 3 (a) limits the administrator in setting prices on farm products.

Section 201 creates an office of Price Administration and empowers the President to appoint an administrator.

Section 202 authorizes the administrator to make studies and investigations and to obtain such information as he considers necessary in prescribing any regulation or order; to require any person engaged in the business of dealing with any commodity or in the rental of housing accommodations to furnish all necessary information, to keep records and make reports.

Section 203 provides for the manner of protesting a regulation set-up by the administrator.

Section 204 provides for an Emergency Court of Appeals. This court is to be made up of three or more judges appointed by the Chief Justice of the United States Supreme Court and from among the judges of the United States district and circuit courts.

Section 205 provides for the penalties and methods of enforcing the provisions of this Act.

Because of the revolutionary nature of this Act serious questions as to its constitutionality of price control in general, and of the Emergency Price Control Act in particular.

EMINENT DOMAIN

In considering the constitutionality of price fixing one must first determine whether it is being predicated upon the Government's power of Eminent Domain or upon the Government's power to regulate. If price fixing can be said to arise under the power of Eminent Domain the problem of "due process" is immediately encountered. To determine which doctrine has been followed on the question of price fixing we must turn our attention to Government fixing of public utilities rates. In Smyth v. Ames 2 it was held that while the state

2 169 U.S. 466, 42 L. Ed. 819 (1898).
could fix rates for intrastate railroads these rates must yield a fair return. The courts have generally followed this decision in dealing with rate fixing of public utilities.

Thus while rate making is in one sense considered a regulation and is usually construed to be a right arising from the commerce clause 3 the courts have nevertheless insisted on a fair return. In this respect rate making has assumed an aspect of eminent domain proceedings. In Acker v. United States, 4 however, it was held that a uniform rate on an entire group would be valid if compensatory to a reasonable number. While theory of a reasonable return may have application in the case of public utilities there is a serious question as to its application to price fixing generally or to businesses not cloaked with a public interest. In Hegeman corporation v. Baldwin, 5 Justice Cardoza distinguished between a public utility and a competitive business in that while the utility must continue at a loss the private business may withdraw.

In Nebbis v. New York 6 a case arising over a New York statute setting prices on milk the court emphasized the right of regulation, and asserted that due process merely demanded that the law should not be unreasonable, arbitrary or capricious, and that the means selected should have a real and substantial relation to the object sought to be obtained. In this decision the court refuted the contention that control of prices is per se unreasonable and unconstitutional. In this decision the court refers back to one of the oldest decisions of price fixing, Munn v. Illinois. 7 It was in this case that the theory of regulation was fostered, but it was in the dissenting opinion of Justice Field that the doctrine of "reasonable return" was established. It has been due to the following of this doctrine that the power of regulation has in many cases become confused with the right of a "fair value" under eminent domain.

There is a clear distinction between control wherein the effort is directed on at lowering price and control which is

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3 U. S. Constitution, Art. 1, Sec. 8, Par. 3.
5 293 U. S. 163, 79 L. Ed. 259 (1934).
7 94 U. S. 113, 20 L. Ed. 77 (1877).
directed at the havoc to the economy of the nation resulting from distorted prices.\(^8\) The former is directed at the profits of a business. In the latter, the effect upon a business is indirect and unintentional. Such regulation by both the State and Federal Governments has been upheld in recent years.\(^9\)

While there is an element of the theory of Eminent Domain when the Government sets prices on the goods of which it is to be a purchaser, there can be no such corollary when the Government is fixing prices generally. The government gains nothing by the transactions among individuals. We must conclude therefore that if the Government has the power to fix prices it must be contingent upon one or several of the Government's regulatory powers.

**War Powers**

When we consider price fixing as a regulatory function of Congress we must consider under just what power of Congress this regulation can be upheld. The power under which price fixing can be most easily maintained appears to be under the "War Powers." The War Powers are contained in Article I, Section 8 of the Constitution. Clause 1 of this section states that Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States. Clauses 11 to 17 empowers Congress to "declare war, grant letters of marque and reprisal and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. Clause 18 empowers Congress to

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8 Price Control in War and Emergency, 90 Univ. of Penn. Law Review 675.
“make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.”

The Federal Government is a government of delegated powers. If it is to regulate it must do so by the exercise of one of these powers. The war power is the most far-reaching of all powers delegated to Congress. It is an authority which is always present but which can only operate in an emergency. This power in no way abrogates the restrictions of the Constitution, but it, like the commerce clause or any other power given to Congress, makes possible legislation which without this grant of power would be unconstitutional. We must investigate, however, the extent to which Congress can go in the exercise of the War Powers. In United States v. MacIntosh, a case arising under the Lever Act of the last war, Justice Sutherland in giving the opinion of the court stated:

From its very nature the war powers, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of International Law. In the words of John Quincy Adams, ‘this power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.’ To the end that war may not result in defeat, freedom of speech may, by Act of Congress, be curtailed or denied so that the morale of the people and the spirit of the Army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, therefore under the protection of the Constitution, seized without process and converted to the public use without due process of law in the ordinary sense of the world; prices of food and other necessities of life fixed or regulated; railroads taken over and operated by the government; and other powers wholly inadmissible in time of peace, exercised to meet the emergencies of war.

In Home Building and Loan Association v. Blaisdell, a case dealing with the Minnesota Moratorium Act, the court in speaking of the powers of the Federal Government stated:

10 283 U. S. 605, 75 L. Ed. 1302 (1931).
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The War Power of the Federal Government is not created by the emergency of war, but it is a power to meet that emergency. It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation.

The right of the Federal Government to regulate the price of coal during World War No. 1 was upheld in DuPont Co. v. Hughes 13 and by the Supreme Court in Highlands v. Russell Car and Snow Plow Co. 14 The Lever Act 15 under which these two cases arose gives us the best precedent for price fixing under the War powers. It also shows us that broad though the war powers be, they do not destroy constitutional barriers. 16

Section 4 of the Lever Act Stated:

That it is hereby made unlawful for any person wilfully—to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree or arrange with any other person—(e) to exact excessive prices for any necessaries.

In declaring this portion of the act unconstitutional in U. S. v. Cohen, the lower court stated:

Congress alone has power to define crimes against the United States. This power cannot be delegated to the juries of this country—therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standards of guilt, but leaves such standards to the variant views of the different courts and juries which may be called upon to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid.

Thus we can see that, though the War Powers gives Congress a broad leeway in enacting regulatory legislation, it cannot enact legislation, it cannot enact legislation prohibited by other sections of the constitution. This particular section set up no standards as was done in other sections of the state.

In view of the many cases decided under the Lever Act and in view of power of Congress to draft men for military ser-

13 50 Fed. 2d 821 (1931).
14 279 U. S. 253, 73 L. Ed. 688 (1929).
17 264 F. 218 (1920) affirmed 225 U. S. 82, 65 L. Ed. 516 (1921).
vice, to seize railroads, and to do nearly anything necessary to properly wage war under the War Powers there can be no question but that even a wide spread price fixing program can likewise be maintained.

CURRENCY POWER AND COMMERCE CLAUSE

Having determined that price control could be maintained under the War Powers, we now turn our attention to the possibility of its being maintained without asserting this War Power. In searching for another power of Congress upon which price fixing might be established it seems well to consider two oft-related powers, the Currency Power and the Commerce Clause.

The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers vested in it.

In the exercise of the Implied powers it has long been established that Congress is not limited to such measures as are indispensably necessary to give effect to its expressed powers, but, in the exercise of its discretion as to the means of carrying them into execution, may adopt any means appearing to it most feasible and appropriate, which are suited to the end to be accomplished, and consistent with the provisions of the constitution.

It was under the Currency power that the oft denounced United States bank was upheld. In the Legal Tender cases the right of Congress to make paper legal currency was upheld.

In the now famous Gold Clause cases of 1934 the cur-

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20 U. S. Constitution Art. I Section 8, Par. 5.
21 U. S. Constitution Art. I Section 8, Par. 3.
22 Article I Section 8, Par. 5 U. S. Constitution.
24 McCulloch v. Maryland 4 Wheat. 316, 4 L. Ed. 579 (1819).
25 12 Wall. 457, 20 L. Ed. 287; See also Dooley v. Smith, 13. Wall. 604, 20 L. Ed. 547 (1872).
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currency power was recognized as including the power to lower the metal content of the dollar in order to stimulate prices. "The value thereof" as a result of these cases came to mean "value" in the sense of purchasing power. If Congress can regulate the value of money then price control, which would assist in regulating the value of money, by preventing inflation and stabilizing purchase prices, would be a valid exercise of the regulatory power.

Probably no clause in the Constitution has been broadened in the meaning to the extent that the "Commerce Clause" has, particularly in recent years. In one of the first important cases to arise under the Commerce Clause Chief Justice Marshall said:

"Commerce undoubtedly is traffic, but it is something more—it is intercourse."

Chief Justice Marshall stated further that "among the states" meant "that commerce which concerns more states than one." It does not, therefore, merely mean interstate commerce as distinguished from intrastate commerce. For many years after this decision the commerce clause had been narrowly construed to apply to little more than transportation. A shift away from this narrow interpretation commenced with Swift and Company v. United States and is becoming more definite with each passing year. In a frequently quoted dissenting opinion in the Carter v. Carter Coal Co. case Justice Cardoza stated that the Bituminous Coal Conservation Act of 1935 which regulated prices on bituminous coal was within the power of the Central Government insofar as it provides for minimum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or indirectly affected. While this Act was declared unconstitutional due to an invalid tax, a substitute measure was quickly passed and was upheld in Sunshine Anthracite Coal

28 Article I, Section 8, Par. 3 U. S. Constitution.
29 Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824).
30 Constitution and What it Means Today.
31 United States v. E. C. Knight Co. 156 U. S. 1 39 L. Ed. 325 (1894).
32 195 U. S. 375, 49 L. Ed. 518 (1905).
33 298 U. S. 238, 80 L. Ed. 1160 (1936).
34 Bituminous Coal Act of 1937.
Co. v. Adkins.\textsuperscript{35} Price Control is one of the means available to the States or to Congress within its domain for the protection and promotion of the welfare of the economy.\textsuperscript{36}

In U. S. v. Darby Lumber Company \textsuperscript{37} the court overthrew the famous Hammer v. Dagenhart decision \textsuperscript{38} and held that Congress could prohibit Child Labor in Interstate Commerce. In Virginia Ry. Co. v. System Federation No. 40,\textsuperscript{39} the court held that under the Commerce Clause Congress could require collective bargaining between interstate carriers and their employees. Under the National Labor Relations Act \textsuperscript{40} this right was extended to all engaged in interstate commerce.

When we observe the price control that has been upheld in the case of bituminous coal and when we observe further that under the power to regulate commerce Congress has prohibited child labor, set wage and hour standards, and set up a system of collective bargaining there can be virtually no question but that Congress could regulate prices under the "commerce clause."

Upon determining this we must observe, however, that if price control were to be predicate upon the commerce power it would be more limited in scope than if it were to be predicated upon the commerce power it would be more limited in scope than if it were to be predicated upon the War Powers or Currency control powers. On the other hand we must likewise observe the ever expanding scope of the commerce clause. We must particularly observe the interpretation of interstate commerce found in Labor Relations and wage and hour cases.

In National Labor Relations Board v. Jones and Laughlin Steel Company,\textsuperscript{41} the court stated:

The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a flow of interstate or foreign commerce. Burdens and obstructions may be due to injur-

\textsuperscript{35} 310 U. S. 381, 84 L. Ed. 1263 (1939).
\textsuperscript{36} 291 U. S. 502, 78 L. Ed. 940 (1934).
\textsuperscript{37} 312 U. S. 100, 85 L. E. 609 (1941).
\textsuperscript{38} 247 U. S. 251, 62 L. Ed. 1101, (1918).
\textsuperscript{39} 300 U. S. 515, 81 L. Ed. 789 (1937).
\textsuperscript{40} 29 U. S. C. A. §151.
\textsuperscript{41} 301 U. S. 1, 81 L. E. 893 (1936).
IOUS actions springing from other sources. The fundamental principle is that the power to regulate interstate commerce is the power to enact all appropriate legislation for its protection and advancement. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

The court also stated in this case that:

Such injurious action burdening and obstructing interstate commerce may spring from labor disputes irrespective of the origin of the materials used in the manufacturing process. The place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce.

In United States v. Darby Lumber Company the court stated that:

While manufacture is not of itself interstate commerce the interstate shipment of manufactured goods is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of Congress.

The power to regulate commerce is the power to prescribe the rules by which commerce is governed.

It extends not only to those regulations which aid, foster, and protect commerce but embraces those which prohibit it.

Considering the broad scope of interstate commerce as indicated by these recent decisions it is evident that a price control could be predicated upon the commerce clause which could regulate a high percentage of our commercial transactions.

Having determined that price control is within the powers of Congress we must determine if there is any restriction of the exercise of this control by Congress. Any legislation enacted by Congress is restricted by due process, but the power of Congress to pass legislation under its particular grants of power is curtailed by due process of law to no greater extent than are the states in the exercise of their police powers.

42 312 U. S. 160, 85 L. Ed. 609 (1941).
43 Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824).
44 Lottery cases, 188 U. S. 321, (1903).
45 Amendment V, U. S. Constitution.
power. In Nebbia v. New York\textsuperscript{46} the court in speaking of the restriction of due process stated:

The Fifth Amendment in the field of Federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exercise of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

A bill would not be unreasonable merely because the prices set made it impossible for one or a few in a certain business to continue to operate at a profit. The legislation is general and not specific.

In Highland v. Russell Car and Snow Plow Company,\textsuperscript{48} a case arising under the Lever Act\textsuperscript{49} of the first World War, it was held that price fixing of coal by congress may be exercised where the public interest requires such protection to prevent inflation. In Block v. Hirsch\textsuperscript{50} rent regulations for the District of Columbia established under the War Powers was likewise upheld.

Having determined that the end of price control is legitimate and legislation will not be contrary to due process if it is a reasonable means of attaining this end, we will now consider the specific legislative enactment which is now the law of the land.\textsuperscript{51}

**THE CONSTITUTIONALITY OF THE EMERGENCY PRICE CONTROL ACT**

The constitutionality of the Emergency Price Control Act of 1942 might, of course, be challenged upon many grounds. The most important of these are, however, under due process as to its reasonableness and as to procedure and under delegation of legislative power. At this writing the only case pertaining to the constitutionality of this law to be adjudicated

\textsuperscript{46} 291 U. S. 502.
\textsuperscript{48} 279 U. S. 253, 73 L. Ed. 688 (1929).
\textsuperscript{49} U. S. C. A Title 50, App Sec. 901.
\textsuperscript{50} 256 U. S. 135, 65 L. Ed. 865 (1921).
\textsuperscript{51} 60 U. S. CAA. App. § 901.
by the United States Supreme Court was disposed of upon a jurisdictional question and so the constitutionality of this measure was not determined by this body. Several lower court decisions, however, will be considered in viewing the constitutionality of this enactment.

The present price control statute is founded upon the war powers. This power, which in time of peace is dormant, becomes in time of war a strong legislative factor. Thus in Home Building and Loan Association v. Bladisdell the court said:

Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. The Constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

In Henderson v. Kimmel, a case arising under rent control sections of the present act the court in maintaining that the rent provision did not violate due process, note the similarity in wording between the present Act and the rent control sustained by the Supreme Court in Block v. Hirsh. The latter stated that the rent should be "fair and reasonable." In Helena Rubenstein, Inc. v. Charline's Cut Rates, Inc., a case arising under the current Act, it was stated that the war power of Congress may be exercised under a price fixing statute where the public interest in the preventing of inflation so demands.

The question of due process may also arise over the problems of hearing and procedure. The Emergency Price Control Act does not provide for a hearing before a regulation is promulgated. Price control is a quasi-legislative function and

53 290 U. S. 398, 78 L. Ed. 413; 88 A. L. R. 1481 (1934).
57 28 Atlantic 2d 113; 132 N J. eq. 254 (1942).
thus it would seem that a hearing before enactment would not be necessary.\textsuperscript{58}

Another question of constitutionality arises over the peculiar mode of appeal provided for in the Act. The Act sets up an Emergency Court of Appeals. This Act also denies district or circuit courts the right to issue injunctions prohibiting enforcement of the statute pending litigation. This does not present a serious problem, however. Inferior courts receive their power and jurisdiction from Congress and by a like token Congress can curtail this power.\textsuperscript{59} Congress may at its discretion create additional tribunals. As to injunctions, a stay is not a matter of right even if irreparable injury might result and is merely an exercise of "judicial discretion" and the propriety of its issue ordinarily depends on circumstances.

In the recent case of Helena Rubenstein Inc. v. Charline's Cut Rates Inc.\textsuperscript{60} the complainant contested the Emergency Price Control Act on the grounds that it impaired the obligations of its contracts made under the New Jersey Fair Trade Act. There can be little consideration given to this contention for two very important reasons. The constitutional provision\textsuperscript{61} prohibiting the impairment of contracts is a prohibition upon the states only and where there is a conflict between a federal and a state statute the federal will prevail under the doctrine of federal supremacy.\textsuperscript{62}

A still more serious constitutional problem arises over the questions which may be judicially determined. The act states that

no such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order or price schedule is not in accordance with law or is arbitrary or capricious.\textsuperscript{63}

\textsuperscript{58} Bi-Metallic Investment co. v. Colo. 239 U. S. 441 (1915); Norwegian Nitrogen Prod. Co. v. U S. 288 U. S. 294 (1933).
\textsuperscript{59} Art. 3, Sec. 1 U. S. Constitution. See also Myers v. Bethlehem Ship-building Corp. 303 U. S. 41, 82 L. Ed. 638 (1938).
\textsuperscript{60} 132 N. J. eq. 254, 28 A. 2d 113 (1942).
\textsuperscript{61} Art. 1, Sec. 10 U. S. Constitution. See also Norman v. B & O R. R. Co. 294 U S. 240, 79 L. Ed. 885 (1935).
\textsuperscript{62} Art. 6, Sec. 2 U. S. Constitution.
\textsuperscript{63} 50 U. S. C. A. App. Sec. 901-946.
It would seem that any objection to this review would be based upon the frequently discussed case of Ohio Valley Water Co. v. Ben Avon Borrough.\textsuperscript{64} The courts have applied this rule, however, only in public utility rate cases where the previously discussed problem of a "fair return" is involved. The more applicable rule in circumstances such as those presented by the Emergency Price Control Act is that pronounced in American Telephone and Telegraph Company v. United States \textsuperscript{65} where the court stated:

This court is not at liberty to substitute its own discretion for that of administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or wisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental accounting,'\textsuperscript{66} as to be an expression of a whim rather than an exercise of a judgment.

The most serious constitutional question to arise under the Emergency Price Control Act arises under the problem of delegation of legislative power. A survey of recent decisions discloses two Federal district courts which have arrived at opposite decisions on this point.\textsuperscript{67} Both of these litigations arose over the rent control feature of the Act and one is now before the United States Supreme Court.

The problem of delegation of power arises from the doctrine of separation of powers. The framers of our Constitution were strongly influenced by Montesquieu and Locke. As a result of this the belief that the legislative, executive and judicial functions of government should be separate was firmly implanted in our governmental structure. This is true not only in the federal government but also in the state governments.\textsuperscript{68} This doctrine of separation must be correctly understood. Authority to perform ministerial functions may be delegated

\textsuperscript{64} 253 U. S. 187, 64 L. Ed. 908 (1920).
\textsuperscript{65} 299 U. S. 232, 81 L. Ed. 142 (1936).
\textsuperscript{68} Constitutions of twenty-eight states implicitly provide for separation and it is found by implication in constitutions of the other states.
to administrative agencies without constitutional difficulty, as these acts are not of legislative or judicial nature.

In considering the true test as to whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the law, Justice Ranney stated:

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of law. The first cannot be done. To the latter no valid objection can be made.

The most important case to arise under the question of delegation of power is the famous "Sick Chicken case" but the Panama Refining Co. v. Ryan case was the first case to declare unconstitutional an Act of Congress solely on the grounds of improper delegation of power. In this case the sole question evolved around the right of Congress to authorize the President to prohibit the transportation in interstate commerce of petroleum produced in excess of a state-fived quota. Here both the majority opinion by Justice Hughes and the minority opinion by Justice Cardoza agreed as to the necessity for administrative law and as the necessity for standards set up by Congress. They disagreed as to whether there actually were such standards. The majority opinion looked only to the section authorizing the President to act and found no standards. Justice Cardoza, however, looked to the entire statute and found what he thought was sufficient standard implied from the title section which stated that the President was to prohibit such transportation when he believes it is necessary to eliminate unfair competition, to conserve natural resources or to promote the fullest possible utilization of the present productive capacities of industries.

In the Schlechter case which declared the National Recovery Act unconstitutional by a unanimous court it was found that the only attempt by Congress to set up a standard was that the President was authorized to establish codes of

69 Cincinnati, W & Z R. Co. v. Clinton Co. Commissioners, 1 Ohio St. 77 (1852).
71 293 U. S. 398 79 L. Ed. 446 (1935).
72 15 U. S. C. A. Sec. 709 (c).
73 295 U. S. 495; 79; 79 L. Ed. 15.0 (1935).
"fair competition." The court ruled that this was not such a standard as to constitute a proper delegation of power.

Another important case, and one evolving the question of price control, is Carter v. Carter Coal Co.\textsuperscript{74} wherein the Bituminous Coal Conservation Act of 1935 was declared unconstitutional. By this Act, Congress delegated to the producers of two-thirds of the tonnage and to one-half the miners the power to fix maximum hours for the entire industry. This bill also contained a price fixing provision which the majority of the court refused to separate from the labor provision. Justice Hughes while concurring as to the unconstitutionality of the labor provision felt the two provisions were separable while Justice Cardoza, with Justices Stone and Brandeis concurring, wrote a frequently-quoted dissent upholding the constitutionality of both provisions.

Having examined the more important decisions which ruled various attempts by Congress to set up standards as being insufficient we must now view other equally important and later cases in which similar standards were upheld. In Sunshine Anthracite Coal Co. v. Adkins,\textsuperscript{75} a case arising under the Bituminous Coal Act of 1937, the court held there was not an illegal delegation of power where the Act provided that the Commission could fix rates when in the public interest it is necessary to protect the consumer against unreasonably high prices. Under the Act these maximum prices had to be fixed at a uniform increases above minimum prices so that in aggregate they will yield a reasonable return above the weighted average total cost of the district; and no maximum price shall be established for any mine which will not yield a fair return on the fair value of the property. In this case the court stated that

the standards which Congress has provided for exceeds in specificity others which have been sustained. Certainly in the hands of experts the criterial which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which does not comport with the requirements of administrative process.

\textsuperscript{74} 298 U. S. 238; 80 L. Ed. 1160 (1936).
\textsuperscript{75} 310 U. S. 381; 84 L. Ed. 1293 (1940).
Probably the most important recent decision upholding a rather broad delegation of power is the Opp Cotton Mills Inc. v. Administrator.76 Under the Fair Labor Standards Act the administrator is authorized to fix minimum wages between 30 and 40, cents per hour. The Act states that the policy of the statute is to 40-cents-per-hour limit "as rapidly as economically feasible without substantially curtailing employment" and in each industry the standards of the administrative action applicable to the Administrator are those made applicable to the Industrial Committee of that industry which it is provided, "shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not curtail employment in the industry." The statute states that in making their determination the committee and the Administrator must consider "among other relevant factors" competitive conditions as affected by transportation, living and production costs, and the wage scale for comparable work established by collective bargaining labor agreements, and by employers who voluntarily maintain minimum wage standards in the industry. In upholding this delegation of power the court stated:

The essentials of the legislative function are the determination of the legislative policy and its formation as a rule of conduct. These essentials are preserved when Congress specifies the basic conclusions of facts upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.

While it perhaps is true that in the more recent of these decisions the court has taken a more friendly attitude toward administrative agencies, nevertheless we can note a clear distinction between the standards set up in the National Recovery Act and those set up in the Fair Labor Standards Act. This distinction is simply that the legislature cannot delegate its power to make a law, but it can make a law wherein it delegates a power to determine some fact upon which the law intends to make its own action depend. We can now examine

76 312 U. S. 126; 85 L. Ed. 624 (1914).
80 50 U.S.C.A. App. Sec. 901.
the Emergency Price Control Act and determine if it conforms to this principle.

In Roach v. Johnson. A Case arising over the rent control provision of the Emergency Price Control Act the court in declaring the act unconstitutional stated that the order of the Administrator contained no finding of facts and on the further that the act while authorizing the Administrator to make “such studies and investigations and to obtain such information as he deems necessary” does not compel him to do so and that in the particular case he did not in fact do so. The order of the Administrator is quasi-legislative. It is not necessary that a hearing be given before the order is originally promulgated. The Act does provide for a hearing after an order of the administrator has been set down. These hearings are quasi-legislative and need not meet the constitutional requirements that are necessary in a quasi-judicial hearing. Further the statute sets up as a standard a certain date period upon which the administrator is to base his present orders. The administrator can make exceptions to this when it would be inequitable to follow this standard. The bill provides that any aggrieved party may file a protest with Administrator. The Administrator must then either grant or deny the protest, notice the protest for hearing or provide opportunity for presenting further evidence. If the protest is denied the Administrator must inform the protestant of the grounds upon which the denial is based. A party denied their protest may appeal to the Emergency court of Appeals provided for in the Act.

In Henderson v. Kimmel the court takes a more practical and modern view of the problem. In this case the court emphasized the similarity of the Standards used in this case and those provided for in a Rent Control Act for the District of Columbia which was upheld in Block v. Hirsh. The court further based its opinion on the recent United States v. Rock

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84 Bi-Metallic Investment Co. v. Colorado 239 U.S. 441, 60 L. Ed. 372 (1915).
85 47 F. Supp. 635 (1942).
86 256 U.S. 135, 65, L. Ed. 865 (1921). The present act states rent fixed shall be generally “fair and equitable. The prior act stated the rent should be “fair and reasonable.”
Royal Co-operative Inc.\textsuperscript{87} and Opp Cotton Mills, Inc. v. Administrator \textsuperscript{88} wherein the court stated that if Congress states the purpose to be accomplished and the standards by which the purpose is to be attained with sufficient exactness to be understandable by those affected it need specify only so far as is reasonably practicable. In view of past price-control legislation, the weight of judicial authority and the realization of the growing need of administrative agencies it would seem that the court in Henderson v. Kimmell arrived at the more satisfactory conclusion.

After considering the various possible constitutional problems to be encountered in Emergency Price Act there seems little question that the Act as it is at present written is within constitutional bounds.

CONCLUSION

In summarizing the problem of Price Control one observes in the past price control was only attempted in times of emergency. In recent years, however, both the state and national government have attempted to regulate prices in particular fields and on limited scale irregardless of the normality of the periods. The present emergency has resulted in the establishment of the broadest-price control program ever attempted in this country; While this program receives its authority from the War Powers clause and examination of the Constitution discloses that such a program could be predicated upon other clauses of the Constitution.

While Price Control in ordinary times might seem like a drastic departure from a program of "free enterprise" we have already by other methods of control made many such departures. With the ever increasing complexities of our problems even more drastic departures are not unforeseeable. Price Control as a permanent policy of government might well be one of these steps from the simple, uncontrolled economy of the past.

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\textsuperscript{87} 307 U.S. 533, 83 L. Ed. 1446 (1939).  
\textsuperscript{88} 312 U.S. 126, (1941).