

tion for further consideration by Congress.<sup>136</sup> These provisions proposed to shift enforcement to the Department of Justice, and a detailed statement of all activities was to be placed on public record, together with copies of all propoganda material. The loophole left by inability to punish associations was closed by making their officials responsible for their registration. However, the possibility remained of a sudden expansion of activity within the categories still exempted, such as "private, non-political . . . bona-fide trade", "bona-fide . . . academic or scientific pursuits", or foreign relief.<sup>137</sup> The veto message indicated the further dangers of embarrassing the representatives of associated nations in the war. But if the President's recommendations for broader discretion to the Attorney General are accepted, a vigorous administration of the Act<sup>138</sup> along these lines can contribute to a careful evaluation of American relations with all foreign governments. The breakdown of public tolerance may distract energy into a revived witch-hunt; but a careful application of existing legal techniques can protect military recruiting and morale, and yet provide the information and the atmosphere necessary for intelligent public discussion of the issues of the war and the peace.

## LEGAL AND ECONOMIC ASPECTS OF WARTIME PRICE CONTROL

### PERSPECTIVE ON INFLATION AND PRICE FIXING

DIRECT price fixing<sup>1</sup> is one of a series of governmental measures<sup>2</sup> designed to prevent the social and economic evils accompanying wartime inflationary expansion of money income. Wartime inflation is an economic plague partly because all prices and all incomes do not rise together. A doubling of prices, for example, threatens the structure of American society by imposing a disproportionate burden on recipients of fixed incomes from salaries, wages, insurance, annuities, savings accounts, pensions, trust funds and testamentary

136. See 88 Cong. Rec., Feb. 9, 1942, at 1174.

137. See 87 Cong. Rec., Dec. 19, 1941, at 10325.

138. See also 54 STAT. 1201, 18 U. S. C. §§ 14-17 (1940), requiring registration of organizations subject to foreign control or affiliation and engaged in either revolutionary or civilian military activity.

1. The Emergency Price Control Act of 1942, Pub. L. No. 421, 77th Cong., 2d Sess. (hereinafter cited by section numbers only) became law on January 30, 1942. Section 1(a) contains a statement of the broad objectives of the Act phrased in terms of preventing the social and economic effects of wartime inflation. While the Act is also intended to restrict rent increases, rent control is not considered in this Comment.

2. For example, control of installment buying. See Regulation W of the Board of Governors of the Federal Reserve System (1941) 27 FED. RES. BULL. 840, as amended, *id.* at 974, 1088. Also the raising of reserve requirements by the Board of Governors of the Federal Reserve System. See N. Y. Times, Oct. 26, 1941, § 3, p. 1, col. 5.

dispositions.<sup>3</sup> Yet, certain groups are enriched through price increases, profiteering, hoarding, manipulation and speculation. Concomitantly, the morale of the nation is undermined with attendant social unrest and, often, shifts in political power. Furthermore, if a high price level is reached, there are strong reasons for anticipating deflation following the war, whereas if prices are controlled the necessity for such a readjustment, always painful, may in part be avoided. Moreover, high prices after the war may make the postwar problem of trade and exchange adjustment even more acute than otherwise. Still another objective for price control is to reduce the cost of the war. It has been estimated that were it not for spiraling costs this country might have spent about thirteen billions less on our last war expenditures;<sup>4</sup> unless the prevailing rate of price advance is checked the cost of our present victory program may be increased by at least fifty billions,<sup>5</sup> or about a third,<sup>6</sup> a matter of moment in measuring the ultimate burden of interest on the national debt.

The mechanics of the inflation process are readily understandable in terms of the operation of prices and the effect of the war on them. In more or less competitive markets price movements determine to a large extent the kind and quantity of goods produced, by allocating factors of production to manufacture of the relatively higher priced commodities. Likewise, when there are unemployed resources, as in a depression, an increase in the quantity of money distributed as income — resulting from the creation of new money to pay for a soldier's bonus, for example, or a public works program or a new industry — can force an increase of prices and profits, making new production attractive and thus stimulating employment and increasing the quantity of goods in the market. However, in periods of almost full employment of resources, like the present, an increase in the quantity of money income cannot evoke corresponding increased output.<sup>7</sup> It can only have the effect of

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3. See BRESCIANI-TURRONI, *THE ECONOMICS OF INFLATION* (1937) 404; HARDY, *WARTIME CONTROL OF PRICES* (1940) 36-38; J. H. ROGERS, *PROCESS OF INFLATION IN FRANCE, 1914-1927* (1929); *Hearings before House Committee on Banking and Currency on H. R. 5479* (superseded by H. R. 5990), 77th Cong., 1st Sess. (1941) 146 (hereinafter cited as *House Price Control Hearings*); Speech by Mr. Leon Henderson, Price Administrator, on Sept. 29, 1941, OPA Release No. PM-1267.

4. The estimate is by Mr. Bernard Baruch. *N. Y. Times*, Jan. 8, 1942, p. 17, col. 5.

5. Estimate made by Mr. Leon Henderson. *N. Y. Times*, Dec. 10, 1941, p. 28, col. 1.

6. The victory program at that time was estimated to require an expenditure of about one hundred and fifty billion dollars. See *N. Y. Times*, Dec. 14, 1941, § 4, p. 7, col. 3.

7. In fact, in numerous instances rapidly rising prices encourage speculation and hoarding, thus operating to reduce instead of to increase supply. Moreover, it is not possible to depend solely on higher prices as an incentive for an increase in supply through capital expansion since often risks are so great that the government must assume them. For a good discussion of why price breaks down as an efficient allocator, see Henderson & Nelson, *Prices, Profits and Government* (1941) 19 *HARV. BUS. REV.* 389. See also HARDY, *WARTIME CONTROL OF PRICES* (1940) 69; *House Price Control Hearings* at 469. Yet as late as November, 1941, Walter D. Fuller, President of the

bidding up prices as buyers compete for scarce goods.<sup>8</sup> Under such pressure, price rises, no longer operating to increase production, have the grave social and economic consequences already mentioned. The society is suffering from virulent inflation: its money income is increasing out of all relation to increases in its real income, comprised of the total output of goods and services available for consumption.

To control wartime inflation and prevent its social and economic consequences price fixing alone is not enough, for the level of prices is but a function of the amount of money income expended in the market and the quantity of goods and services available for purchase with that money. In addition, therefore, several other types of legal control are required, notably, taxation, publicity, credit control and control over production. And proper correlation of these controls requires comprehension of the paramount economic problem presented by the war. War needs require a large sector of American plant, manpower and productive capacity. To win the war that fraction of economic potential must be so great as to impose absolute reductions on civilian consumption. This is true even if capacity is increased by reemployment of the unemployed, by employment of women, children and old people and by lengthening working hours. At the same time these cuts in production for civilian use are taking place, the Government is expanding purchasing power by spending three to four billions a month for war; yet what is produced for that money is not available for purchase by those whose incomes have been expanded. In order to prevent dangerous price rises under these circumstances the money available to consumers for spending should be kept down, more or less in proportion to the quantity of goods available for their needs.<sup>9</sup> To accomplish this it is essential that both the demand and supply sides of the market be manipulated.<sup>10</sup>

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National Association of Manufacturers, said: "There is no better antidote for inflation than the free working of the law of supply and demand." N. Y. Times, Nov. 19, 1941, p. 35, col. 3.

8. The most complete and graphic presentation of recent price behavior is found in *Hearings before Senate Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess. (1941) 17-71* (hereinafter cited as *Senate Price Control Hearings*). For a study of contrasts with World War I see radio speech by Mr. Leon Henderson, as reported in N. Y. Times, Oct. 7, 1941, p. 25, col. 2. See also Nelson and Joy, *Prices and the War* (1941) 52 MONTHLY LABOR REVIEW 49; Mills, *Prices and Cost of Living in Two World Wars* (1942) 19 ACAD. POL. SCI. PROC. 431. The fear, largely unwarranted, of inflation which followed devaluation in 1934 is thrown into its true perspective by comparison with the present threat. See ROGERS, *CAPITALISM IN CRISIS* (1938) c. 5.

9. See Rogers and Chandler, *Inflation and Deflation* (1932) 8 ENCYC. SOC. SCIENCES 28; *House Price Control Hearings* at 36, 781; Henderson & Nelson, *Prices, Profits and Government* (1941) 19 HARV. BUS. REV. 389, 392. It is estimated that in 1942 people will have eighty billions to spend, but there will be only sixty-five billions in goods to buy. See address by Mr. Galbraith of OPA, OPA Release No. T-24524, Feb. 18, 1942.

10. Price Administrator Henderson has categorically denied that price fixing is sufficient. See *House Price Control Hearings* at 181, 469. The necessity for indirect

On the demand side of the market upward pressure on prices can be relieved both by reducing the amount of purchasing power and by curbing inflationary buying methods. To achieve the former result, several important policies should be pursued simultaneously. Absolutely indispensable to an effective plan of price control is a much more drastic tax policy than we have yet developed.<sup>11</sup> The necessary wartime complement to taxation, Government borrowing, should be supported wherever feasible from current income instead of from savings or bank credit if it is to be most effective as an income absorbent.<sup>12</sup> Furthermore, credit control must be re-designed to check spending without impeding the war or essential civilian purposes.<sup>13</sup> Capital flotations must be scrutinized for their bearing on the war effort. Thrift, a curse of depressions, should be revived as a virtue, and a sane wage policy is, of course, a prerequisite to controlling inflation.<sup>14</sup> Finally, such inflationary buying methods as installment purchasing<sup>15</sup> must be regulated, and in private sales, speculation must be curbed where it is a recurrent factor in needlessly raising prices. In addition to these controls over the demand side of the market, the Government, since it is such a large buyer, can exercise a directly depressive influence on prices by using a well-planned purchasing policy,

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price controls is stressed in the following sources: HARDY, *WARTIME CONTROL OF PRICES* (1940); S. E. HARRIS, *THE ECONOMICS OF AMERICAN DEFENSE* (1941); HART & ALLEN, *PAYING FOR DEFENSE* (1941); MENDERSHAUSEN, *THE ECONOMICS OF WAR* (1940); PIGOU, *THE POLITICAL ECONOMY OF WAR* (2d ed. 1941); Grether and Davisson, *Tax Policy and Price Fixing as Economic Controls for Defense Mobilization* (1941) 214 *ANNALS AM. ACAD. OF POL. AND SOC. SCI.* 148; Williams, *Economic and Financial Aspects of the Defense Program* (1941) 19 *ACAD. OF POL. SCI. PROC.* 301.

11. See HART & ALLEN, *PAYING FOR DEFENSE* (1941); PAUL, *THE EMERGENCY JOB OF FEDERAL TAXATION* (1941) 27 *CORN. L. Q.* 3; Riches, *Who Shall Pay for the War? An Analysis of the Keynes Plan* (1941) *STUDIES IN WAR ECONOMICS* by I. L. O. (Studies and Reports, Series B, No. 33) 42; Comment (1942) 55 *HARV. L. REV.* 477.

12. See HARDY, *op. cit. supra* note 10, at 8. The movement of the price level and the success of the war program are perhaps the primary standards by which to judge both credit and fiscal policy rather than by focusing attention on the size of the government debt or the absolute amount of credit outstanding. See HARDY, *op. cit. supra* note 10, at 42. Those who are worried over the increasing size of the government debt will find a brighter side in BURNS & WATSON, *GOVERNMENT SPENDING* (1940). The notion that future generations will be loaded with a heavy burden by present borrowing is refuted in ROGERS, *CAPITALISM IN CRISIS* (1938) 48.

13. During the year ending in October, 1941, bank loans had increased by 50% or about \$3,000,000,000. *N. Y. Times*, Oct. 29, 1941, p. 1, col. 6; Eccles, *Financial Problems of Defense* (1941) 27 *FED. RES. BULL.* 506. While price control, priorities, increased reserve requirements and the SEC are restraining influences in credit expansion, a more explicit and coordinated policy might well be in order. The conflict between the restriction of credit and the convenience of the Treasury should not block a united attempt to control credit extension.

14. See p. 826 *infra*.

15. See Regulation W of the Board of Governors of the Federal Reserve System (1941) 27 *FED. RES. BULL.* 840, as amended, *id.* at 974, 1088. For imposition of more drastic control over installment credit see *N. Y. Times*, Mar. 9, 1942, p. 1, col. 3.

although it is doubtful whether the Administrator under the Act may resell to reduce prices.<sup>16</sup>

On the supply side a variety of methods should be employed to increase the quantity of goods available in the whole market. Absolute expansion of productive facilities is one approach to the problem, and where necessary it should be done at Government expense or under Government supervision. Since, however, factors of production are limited and preference must be given to war needs, conversion from normal to wartime production is essential in many lines. Consequently to maximize over-all production sub-contracting must be fully utilized, and at the same time priorities must be employed to minimize the tendency of the shift in production to drive up prices. Another aid to enlarged supply involves training more skilled labor.<sup>17</sup> Nor should the patent laws remain static since it has become painfully apparent that patents have been persistently employed as devices to restrict production.<sup>18</sup> In addition, encouragement of imports and relaxation of tariffs can free domestic factors of production for other tasks at the same time that exports are supervised to prevent outward flow of vital materials.<sup>19</sup> Also important is the serious reduction in immediate supply caused by hoarding and various inventory practices. On the other hand, conservation and use of substitutes have a beneficial effect on supply.

Important as are these varied techniques in cutting down money income and enlarging real income, it is certain that, without more, prices cannot be effectively controlled. For it is plain that the Government is not undertaking anything like an adequate program on all crucial fronts. Something is being done to cut down income, to enlarge the working force and to increase output. But we have not achieved an adequate income tax rate.<sup>20</sup>

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16. See p. 837 *infra*.

17. This might well be done as part of a coordinated government program to aid labor in adjusting to war conditions.

18. Although the complete story of restriction of production by use of patents in many important commodities has not been disclosed, anti-trust indictments to date already indicate that the patent, which has been presumed to be a stimulus to technological development, has been converted into an instrument to restrain production. To free war production, provision for compulsory licensing at a reasonable price should be made a part of the patent statute. See HAMILTON, TNEC REP., PATENTS AND FREE ENTERPRISE, Monograph 31 (1941).

19. See HARDY, *op. cit. supra* note 7, at 47-49. The Board of Economic Warfare is now controlling the export of every article except goods exported under Lend-Lease.

20. It is estimated that in 1942 people will have eighty billions to spend, but there will be only sixty-five billions in goods to buy. OPA Release No. T-24524. Likewise, economists of the Commerce Department estimate that national income in 1942 will increase eighteen and a half billions or about 19.6 per cent over 1941. They also predict a rise in the general price level of twelve per cent. N. Y. Times, March 8, 1942, § 1, p. 39, col. 4. Some of this excess income may be taken up with higher taxes. See the tax measure proposed by Secretary of Treasury Morgenthau, N. Y. Times, March 4, 1942, p. 1, col. 1. However, the greater part of the increased income giving rise to

We have not undertaken withholding taxes, nor forced savings.<sup>21</sup> Moreover, we persist in financing our deficits by borrowing money in a way which increases current income and does not cut it down.<sup>22</sup> Much reliance must therefore be put in direct price fixing under the Emergency Price Control Act if prices are to be kept within manageable bounds. And the magnitude of the job for price fixing and its enforcement is measured roughly by the inadequacies of application of other controls<sup>23</sup> and the resultant unbalance of money income and physical output.

While the immediate objective in fixing prices is to aid in preventing the social consequences of inflation, this policy must of course be subordinated to the paramount goal of the war effort—maximization<sup>24</sup> of necessary production. It is essential that industrial mobilization be given precedence, even at the risk of more inflation. Ineffective as price may be in some situations of inelastic supply, it still functions generally as a potent mobilizer of resources into those uses where need is greatest. Thus, in the subordination of inflation control to stimulation of war production, the price fixing authority should

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danger of inflationary spending is in the hands of the lower and middle income groups. It is unlikely that the major part of the increased income held by these groups will be reached by any tax program presently contemplated. See Drucker, *How to Pay for the War* (March, 1942) 184 HARPER'S MAGAZINE 346. See generally, ANDERSON, TNEC REP., TAXATION, RECOVERY, AND DEFENSE, Monograph 20 (1940) 242 *et seq.*

21. The proposed tax measure suggested by Secretary of Treasury Morgenthau provides for a withholding tax of ten per cent. N. Y. Times, March 4, 1942, p. 1, col. 1. More drastic is the proposal to collect two years' income tax in the current year, one for 1941, the other for 1942; and thereafter to collect income taxes during the year in which income was earned. See generally, HART & ALLEN, PAYING FOR DEFENSE (1941). Plans for forced savings on the part of the lower income groups are typified by the suggestion of J. M. Keynes. KEYNES, HOW TO PAY FOR THE WAR (1940). For a criticism of such proposals, see Drucker, *supra* note 20, at 354; ANDERSON, *op. cit. supra* note 20, at 242, 249. Secretary of the Treasury Morgenthau has expressed his opposition for the present to forced savings plans. See N. Y. Times, March 7, 1942, p. 7, col. 3.

22. Too small a percentage of the Government deficit is met with Defense Bonds bought out of income and too large a percentage is financed by the creation of additional bank credit. Other factors also make for an increase of effective money income. In a time of boom all incomes circulate more rapidly than otherwise, especially under fear of inflationary price rises. Furthermore, the usual responses of our elastic banking system are now permitting an enormous expansion of business incomes, entirely apart from the effects of Government financing. See Reid and Hatton, *Price Control and National Defense* (1941) 36 ILL. L. REV. 255, 265 *et seq.*; Comment (1942) 55 HARV. L. REV. 429, 477 *et seq.*

23. See *House Price Control Hearings* at 200-01; Galbraith, *The Selection and Timing of Inflation Controls* (1941) 23 REV. ECON. STATISTICS 82.

24. Section 1(a). The particular words are: "to assist in securing adequate production of commodities and facilities". What is adequate in a war economy may be nothing short of the maximum. Also see PIGOU, THE POLITICAL ECONOMY OF WAR (2d ed. 1941) 128-33.

perhaps have power to put a floor on prices as well as a ceiling.<sup>25</sup> No doubt the argument for a higher price on the grounds of greater productivity is subject to abuse, but its prime significance will make it a recurring issue.<sup>26</sup> It should not be forgotten, however, that while maximization of war production may conflict with price fixing, on the whole, the two are complementary.

#### OVER-ALL VERSUS SELECTIVE PRICE CONTROL

Once necessity for price fixing is agreed upon, and its task defined, attention focuses on methods to be employed. The Baruch plan, which Congress rejected, called for ceilings on the price of labor as well as on farm and all other products. Under this proposal, prices would be frozen as of a chosen date; but they would be free to drop below that level and exceptions would be made to permit increases necessary.<sup>27</sup> The selective price control system finally adopted not only excludes wages, and provides but very limited controls for agricultural prices, but also grants to the Price Administrator discretion in selecting certain commodities for price ceilings.<sup>28</sup>

Aside from the issue of wages and farm prices, in actual practice administration under either plan might well produce similar results. With almost unlimited power to pick and choose commodities under the selective system, it is possible for the price administrator to act quickly on a wide front without waiting to evaluate closely a particular market. Graphically illustrating this flexibility is the issuance of a price schedule which purports to

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25. In effect the Price Administrator can set actual prices or minimum prices through the use of his power to buy and sell. The agricultural provisions of the Act do not automatically set minimum prices for farm products.

26. Mr. Bernard Baruch, in referring to his experience in the last war, remarked: "We never found a reduction of prices ever brought a lowered production of goods . . ." See *House Price Control Hearings* at 232.

27. For a concise statement of the over-all plan which has been popularized in this country by Mr. Bernard Baruch, see Baruch, *Priorities, the Synchronizing Force* (1941) 19 HARV. BUS. REV. 261; testimony of Mr. Baruch in *House Price Control Hearings* at 989-1045. The Baruch plan was substantially incorporated into the bill introduced by Representative Gore on Oct. 6, 1941, H. R. 5760. The over-all plan has been used abroad, particularly in Germany, which has had the longest experience with price control among countries with highly developed economies; see Dameratzky, *Price Control in Germany—Policy and Technique* (1941) 1 INTER. REF. SERV. NO. 19 at 1; REVELLE, *THE SPOIL OF EUROPE* (1941) 215-20.

28. Sections 2(a), 302(c). Arguments in favor of over-all price control usually start with the premise that since all prices constitute a more or less interrelated seamless web, fixing of only some prices will not stop inflation. For it is contended that the moment one price is fixed it is almost immediately out of date since all its components are rising at the same time. From the contrary point of view, support for selective action hinges primarily on directing attention to disadvantages of an all-inclusive ceiling. First, it is urged that a blanket ceiling on all prices is inequitable since different industries may be at different stages in price inflation. In addition, to the extent that variations are allowed in the blanket ceiling the administrative problem of handling countless complaints is claimed to be too large and unwieldy.

cover approximately 1,800 different fats and oils.<sup>29</sup> The statement of considerations prompting broad action can be generally stated, and the burden of adducing evidence then shifts to the one who objects to the price, a procedure paralleling the attempt to vary a price set under a general price-stop order.

In lengthy debates over the alternatives, the role of wages and agricultural prices were major points of controversy. It is evident that stabilization of wage costs is essential to general price stability, although political considerations have here worked against economic realities. It is also apparent that partly checked farm prices will continue to exert an upward pressure on wages by increasing the cost of living, in spite of measures undertaken by OPA in other fields. Although this lack of effective control over agricultural prices<sup>30</sup> or wages handicaps any attempt to combat inflation by price fixing, it is true that freezing all wages would probably stifle the flow of workers into war production, in the absence of a power to conscript and mobilize workers for industry and a technique for transferring them.<sup>31</sup> Now that war has pushed some political considerations into the background, price spiraling through wage increases may be dealt with more realistically. OPA, however, is hardly the mechanism to use since factors considered in fixing wages are not necessarily the same as those involved in establishing commodity prices.<sup>32</sup>

#### STRUCTURE AND POWERS OF PRE-STATUTORY PRICE FIXING

Prior to passage of the EPCA the President by executive order established administrative machinery directly to control prices.<sup>33</sup> The order bestowed

29. OPA Price Schedule No. 53, Fats and Oils, 3 C. C. H. 1941 War Serv. ¶ 43,253.

30. The present power over agricultural prices is dealt with on p. 839.

31. So far our most efficient means of effecting a transfer of workers has been the high wages prevailing in defense industries. While labor has voluntarily agreed to refrain from stopping production, and machinery has been set up to resolve disputes, it is disappointing to find that no provision has been made thus far to stabilize wages. We can no longer dodge issues which are "too hot" to handle. See Schlechter, *Needed Immediately* (1941) 30 SURVEY GRAPHIC 632. The Gallup poll showed that 67% of the people approve of wage as well as price control modeled after Canada's price control law. N. Y. Times, Nov. 9, 1941, p. 42, col. 2.

32. Price Administrator Henderson has maintained that price inflation cannot be curbed if wages or any other cost is allowed constantly to rise. *House Price Control Hearings* at 143. Opposition by OPA to wage control was ostensibly based on the conviction that rising wages had not been a dominant pressure on established price ceilings, that wages were trailing living costs, that the staff of OPA was not qualified to handle the specialized problems of wage negotiation and that fixing prices would be a powerful deterrent to wage increases. See N. Y. Times, Dec. 4, 1941, p. 39, col. 2; testimony of Mr. Lubin in *House Price Control Hearings* at 1840.

33. Executive Order No. 8734, 3 C. C. H. 1941 War. Serv. ¶ 43,151. For contrast with price control in the last war see Stewart, *Government Price Control in the First World War* (1941) 52 MONTHLY LABOR REVIEW 271; Reid and Hatton, *Price Control and National Defense* (1941) 36 ILL. L. REV. 255, 259.



a broad grant of power on an Administrator with directions to prevent price increases by publishing and enforcing maximum prices, commissions, margins, fees and charges. Aside from a statement of purposes, the only standard specified was that the prices be deemed "fair and reasonable" by the Price Administrator. Sanctions in the order included the stigma of publicity and the threat of the President's power of requisitioning and commandeering given him under existing statutes.<sup>34</sup>

OPA, acting under the Presidential order, first applied maximum schedules to volatile, basic raw materials of our economy. Commodities thus affected were usually characterized by rising prices stemming from actual shortage, heavy forward buying, hoarding, increased costs and profiteering.<sup>35</sup> The only sanction exercised to date has been that of publicity, and even there the use has been relatively slight;<sup>36</sup> but these other sanctions may still be available for use now that the Act is passed if it be reasoned that the statutory grant supplements, but does not entirely displace, the executive order.

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34. The statutes providing for exercise of these various powers are specifically enumerated in the Executive Order No. 8734, 3 C. C. H. 1941 War Serv. ¶43,151; see Comment (1942) 55 HARV. L. REV. 477, 483. The Price Administrator may recommend to the President commandeering of plants in cases where there is a refusal to fill a government defense order, or a refusal to give the government a preference at a reasonable price. He may also recommend to the President requisitioning of materials denied export. In addition, he can suggest that the Chief Executive invoke the emergency power over transportation and thereby effect a priority in shipment of materials. Further, there is the power under three statutes to accumulate or dispose of reserve stocks of strategic and critical materials.

Authority for the President's action, in addition to his power under these statutes, was derived directly from war powers implied to the President in the Constitution. See SEN. DOC. NO. 133, 76th Cong., 2d Sess. (1939); *House Price Control Hearings* at 373. In addition, absence of specific statutory authority for much of the price fixing done in the last war is a significant precedent. But *cf.* *Standard Chemical & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 131 N. E. 566 (1921).

35. This is the order of frequency of factors causing price rises as revealed by a study made by OPA for the first 33 commodities on which formal ceilings were set. In some cases, several factors operated together. See *House Price Control Hearings* at 284. To focus only on the formal schedules, however, is to ignore equally significant voluntary agreements. Combination of formal and informal price fixing is estimated to affect more than 30% of the principal raw materials and primary manufactured goods. Speech by Mr. Leon Henderson, N. Y. Times, Oct. 7, 1941, p. 25, col. 2. Also see *House Price Control Hearings* at 58.

36. In only a few instances have the names of the violators been publicized. See N. Y. Times, Nov. 20, 1941, p. 45, col. 1.

Oddly enough the validity of price schedules was raised in connection with the liquidation of debtors' estates. In at least one case the court ordered a sale in equity to be conducted in conformity with the OPA price schedules. *The Pennsylvania Co. for Ins. v. Cincinnati & L. E. R. R.*, U. S. Dist Ct., S. D. Ohio, Sept. 19, 1941; *cf.* *Oliver Clyde Riggs*, U. S. Dist. Ct., E. D. Pa. Oct. 28, 1941. Here all articles sold above the fixed price were subject to confirmation of the court. In a bankruptcy proceeding, such as *In re Bender Body Co.*, 10 U. S. L. WEEK 2424 (N. D. Ohio 1942), the court could reason-

## CONSTITUTIONALITY OF STATUTORY PRICE CONTROL

Three possible sources of constitutional power can be relied upon to authorize wartime price control legislation: the war power,<sup>37</sup> the fiscal and currency power,<sup>38</sup> and the commerce power.<sup>39</sup> The first of these is the most obvious choice.<sup>40</sup> Contemporary history makes it bluntly plain that modern war means total war, and the critical effect of prices on domestic morale as well as on production has compelled every great nation at war to exercise control over its price structure.<sup>41</sup> Aware of this necessity, the Supreme Court directly as well as by dictum sustained statutory price fixing in the fields of food and fuel during the last war, and there is little doubt that the more comprehensive legislation of the present war would be equally valid.<sup>42</sup>

The fact, however, that the Act is probably not constitutionally vulnerable because of its purpose or scope does not automatically make it immune from unconstitutionality in regard to its execution or its separate parts.<sup>43</sup> Constitutional restraints on arbitrary action are still operative, but the necessity for an expansion of the scope of Congressional and executive action means a lessened compass for such restrictions. This narrowed concept of constitutional limitation provides the criterion for testing subsequently the constitutionality of different sections of the Act against the function and economic context of the particular provision.

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ably take the position that equity will enforce the schedules to effectuate the public interest during the emergency without passing on the constitutionality of the authority. In support of the power of equity to consider the public interest see *SEC v. United States Realty and Imp. Co.*, 310 U. S. 434 (1940).

37. See *Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253 (1929); *United States v. Macintosh*, 283 U. S. 605 (1931); cf. *Block v. Hirsh*, 256 U. S. 135 (1921); Memorandum by OPA in *House Price Control Hearings* at 63; *Senate Price Control Hearings* at 218; Ginsburg, *Legal Aspects of Price Control in the Defense Program* (1941) 27 A. B. A. J. 527; Hannah, *Some Legal Aspects of Price Control in Wartime* (1941) 27 CORN. L. Q. 21.

38. Prevention of inflation is an attempt to regulate the value of the national currency. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240 (1935); *Juilliard v. Greenman*, 110 U. S. 421 (1884); *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869).

39. See *United States v. Darby Lumber Co.*, 312 U. S. 100 (1941); *Sunshine Anth. Coal Co. v. Adkins*, 310 U. S. 381, 396 (1940); *United States v. Rock Royal Coop., Inc.*, 307 U. S. 533 (1939). Although Congressional power over commerce has been greatly extended in recent years, it is doubtful if intrastate prices could be controlled solely under the interstate commerce clause.

40. See Charles Evans Hughes, *The Fighting Powers of the United States Under the Constitution*, 55 CONG. REC. (1917) pt. 8, app. ix, 551, 553; *United States v. Macintosh*, 283 U. S. 605, 622 (1931).

41. For a survey of foreign price control experience see Memorandum in *House Price Control Hearings* at 88.

42. See note 37 *supra*.

43. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156 (1919).

## PRICE FIXING UNDER THE ACT

The problem of price fixing varies strikingly with the type of market in which prices are to be set. If the administrators are attempting to fix prices in competitive markets, their work will be almost impossible if the present pressure of expanding money income on a fixed or declining supply of goods remains effective. Insofar as priority control or direct allocations are used in significant areas of the economy, however, the job of price control becomes less difficult, and less important. The price term of a bargain settled by a priority or allocations order is a matter of bookkeeping and not of crucial importance in determining the allocation of resources and the distribution of income.

Before searching for norms of price fixing, it is well to suggest the varying approaches possible in price regulation. For while most emphasis to date has been placed on setting maximum prices through issuance of schedules, this is only one method. In some instances, the government may deem it necessary to stimulate supply by setting a minimum or actual, instead of a maximum, price. To achieve this, the provision in the Act giving the Government power to buy and sell commodities<sup>44</sup> may be employed to good advantage. Then, too, it is quite likely that in some fields of price control, particularly on the retail level, margins instead of definite prices will be used. These margins may specify either a fixed sum to be added to the unit cost or a percentage addition correlated with cost, sales or investment. In addition, in setting a margin or price limit, the price authority may prefer to freeze the margin or price as of a prior date, saving time and initiative necessary to establish a sequence of new price relationships.<sup>45</sup>

Usually, however, fixing prices will involve reference to more or less well defined standards. And it is essential that these standards be established and applied as part of a unified price fixing policy. Lack of such a policy was a major defect of the World War price control program. In the main, price fixing then was a "trading proposition". After price control became more firmly established it was desired to replace the higgling process by "scientific principles", but these never materialized.<sup>46</sup> Similarly in England during the last war, food pricing proceeded by way of "costings, conference, and compromise".<sup>47</sup> Thus use of definite standards is vitally important in the mechanics of price fixing, and it is around these norms, particularly over

44. Section 2(c). See discussion of high cost marginal producers *infra* at pp. 836-37.

45. An example is OPA Price Schedule No. 67, New Machine Tools, 3 C. C. H. 1942 War Serv. ¶43,267.

46. See Haney, *Price Fixing in the U. S. During the War* (1919) 34 POL. SCI. Q. 104, 262, 434 at 446; STEIN, GOVERNMENT PRICE POLICY IN THE U. S. DURING THE WORLD WAR (1939) 97.

47. Baster, *Control of Food Prices* (1941) STUDIES IN WAR ECONOMICS BY I. L. O. (Studies and Reports, Series B, No. 33) 105; cf. Taggart, *The Cost Principle in Minimum Price Regulation* (1938) 8 MICH. BUS. STUDIES No. 3 at 221.

the role of costs and profits, that most of the controversy will rage. However, the infinite variety of the American economy will defy rigid adherence to any set of a priori principles or advance promulgations.<sup>48</sup>

In the Act,<sup>49</sup> two fairly broad norms are first laid down: one that the ceiling be generally fair and equitable, and two, that the price order effectuate the purposes of the Act.<sup>50</sup> Then, so far as practicable, the Administrator shall give due consideration to the prices of the commodity prevailing between October 1 and October 15, 1941. Without purporting to be all inclusive the bill suggests, as other relevant factors, speculative fluctuations, costs of production and transportation and profits.<sup>51</sup> Each ceiling must be accompanied by a statement of considerations which were involved in its issuance.<sup>52</sup>

Reference to the purposes of the Act is also made in setting up still other standards. The Administrator is explicitly granted authority to issue ceilings with such classifications and differentiations and to provide for such adjustments and exceptions as are necessary or proper to carry out the purposes of the Act.<sup>53</sup> In addition, as was true in the last war and under the NRA, effective price control entails control over trade practices, and the bill provides that speculative or manipulative practices, and selling, marketing or inventory practices are subject to regulation where they are inconsistent with the purposes of the Act. Changes in form or quality of the product and hoarding are specific examples singled out for special mention.<sup>54</sup>

Thus it is apparent that the purposes of the Act will be of significance in determining in the courts the validity of any particular action taken by the Administrator. The conflict between the objectives of peak output and prevention of price increases results in an apparent inconsistency in the purposes of the Act, and may subject it to attack as not meeting the constitutional test of definiteness.

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48. One of the characteristics of the relatively successful German price control experience has been its chameleonlike flexibility. See Domeratzsky, *Price Control in Germany* (1941) 1 INTER. REF. SERVICE No. 19 at 1; SWEETZ, *THE STRUCTURE OF NAZI ECONOMY* (1941).

49. Section 2(a). Contrast peacetime standards in WALLACE AND OTHERS, *TNEC REP., ECONOMIC STANDARDS OF GOVERNMENT PRICE CONTROL, Monograph 32* (1941) 475-78; for a competent discussion of the possible effects of price reductions see *id.* at 494-95.

50. See pp. 1-2 *supra* for discussion of purposes.

51. Section 2(a). Note the important temporal limitation on profit increases or decreases which the Administrator may consider in fixing prices. This was lacking in the original bill.

52. *Ibid.*

53. Section 2(c). If "adjustments" be construed in its broad sense to mean changes in a schedule upon reconsideration of the data of the industry, this provision could conceivably be used to modify significantly a previously existing schedule without having to abide by the criteria in § 2(a) except the one referring to the purposes of the Act.

54. Section 2(d).

The purposes, however, are capable of partial reconciliation since, although higher prices usually stimulate greater production, a point is reached in wartime where, with all factors of production employed, higher prices will not elicit greater output. With this in view, it is probably true that the standards set forth are definite enough for constitutional requirements.<sup>55</sup> The fact that the Administrator has practically unlimited discretion in weighing various factors is not a constitutional defect.<sup>56</sup>

While the Act provides a frame of reference for price policy, it is essentially a skeleton which has to be filled in. Fortunately, we have not only the experience of World War I on which to draw for comparison, but a considerable corpus of opinion and experience which has already accumulated in this country since the outbreak of the present conflict. Thus, it seems special attention will be paid to the maintenance of a price which will act as a stream along which commerce flows.<sup>57</sup> Enormously detailed cost analysis has been repudiated as a basis for price,<sup>58</sup> but if cost changes are great enough a revision in the ceiling will be made.<sup>59</sup> So far, in setting prices, rather heavy reliance has been placed on past or prevailing prices. Furthermore, it appears that how much profit will be considered reasonable, and how far back in time the analysis will go, will vary with the particular industry.

Highly significant as a statement of future policy is the "hands off" rule which Mr. Henderson has declared and followed regarding industrial trade practice and which is now incorporated into the Act.<sup>60</sup> Without giving legal approval to such practices as the basing point system, the various schedules are framed on the assumption that these prior trade customs will continue. Hence, instead of altering or reforming industrial mores, successful enforcement of price ceilings is sought through freezing previous trade practice. Of course, where the manner of sale patently conflicts with the effort to suppress price advances, changes can be expected.

To what extent there will be adherence to these basic tenets of price control in the future is problematical. Prior to our entrance into the war, business palatability and administrative convenience were of major importance in framing price schedules. In addition, internal studies by OPA reveal a

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55. See *Sunshine Anth. Coal Co. v. Adkins*, 310 U. S. 381 (1940); *United States v. Rock Royal Coop., Inc.*, 307 U. S. 533 (1939). Contrast *United States v. Cohen Grac. Co.*, 255 U. S. 81 (1921). In addition, it may be argued that all of the stated purposes were not meant to apply to each of the functions of the Price Administrator—for instance, that the purpose of maximization of production applies only to use of the buy and sell power.

56. See *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1941); *Hampton, Jr. & Co. v. United States*, 276 U. S. 394 (1928).

57. See *House Price Control Hearings* at 487.

58. *Id.* at 440.

59. *Id.* at 461, 487.

60. Section 2(h); see *House Price Control Hearings* at 439-40.

rather easy acceptance of prevailing price as a controlling norm.<sup>61</sup> Now, however, that war has solidified public opinion, perhaps less emphasis will be placed on profit and more on patriotism.

*Cost.* Although cost analysis was given a somewhat subordinate position by Mr. Henderson in the legislative hearings, it is probably inevitable that as price control matures cost will be increasingly used as a norm for price setting. In the early stages of price-fixing, especially when the price authority feels insecure, not too much attention is paid to cost. But as pressure on prices continues and requests for revision grow more numerous, cost analysis will often be decisive. Admittedly, to predicate prices on cost has numerous drawbacks which should be mentioned by way of caveat. Yet for all their shortcomings, accounting and cost techniques will be used by both Government and business.

As a matter of fact, cost data even at this late date is sometimes lacking. In such instances, chief reliance can probably be placed on restricting total profits to a fixed ratio of total investment. Even assuming existence of cost information, we cannot infer that accounting is uniform despite stimulated development of trade associations during the last war and during the NRA.<sup>62</sup> With cost determination largely a matter of arbitrary choices or business convenience it is not surprising to find accountancy characterized as an art-science,<sup>63</sup> or worse. The sheer variety and complexity of industry defies adherence to fixed rules which are uniformly applicable.

In some instances utility of accounting analysis is severely limited or irrelevant largely because price of one commodity is not independent of the price of others.<sup>64</sup> Determination of cost for one of two commodities, both the result of a single process, is apt to be arbitrary within a wide range. Instead of dealing only with a single joint-cost commodity in fixing prices, it may be necessary to set prices for all products of the joint process. There are many other examples of the interrelation of commodities which upset simple price-cost relations. For instance, where two commodities both use the same raw material and the aim is to favor one of the two for military

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61. Memorandum in *House Price Control Hearings* at 277, 280. The fact that a price advance has occurred does not necessarily mean that the new price represents "economic value on the market" and is therefore justified.

62. PEARCE, *TNEC REP., TRADE ASSOCIATION SURVEY*, Monograph 18 (1941) 258-81, 292.

63. MACK, *THE FLOW OF BUSINESS FUNDS AND CONSUMER PURCHASING POWER* (1941) 215-16, 213. "As the apostle would put it, accountancy is all things to all men. It is at once a picture, a scheme of notation, a language, a technique, a ritual, an instrument, and a social institution." Hamilton, *Cost as a Standard for Price* (1937) 4 *LAW & CONTEMP. PROB.* 321, 323; HAMILTON, *PRICE AND PRICE POLICIES* (1938) *passim*; see Taggart, *The Cost Principle in Minimum Price Regulation* (1938) 8 *MICH. BUS. STUDIES* No. 3 at 173, 269; Taggart, *Minimum Prices under the NRA* (1936) 7 *MICH. BUS. STUDIES* No. 3 at 385 (Bibliography, pp. 462-73).

64. MILLS, *THE BEHAVIOR OF PRICES* (1927) 140-51, 213.

reasons, the price authority should raise the price on this one in order to give it the greater command over the common material. Existence of substitute products also plays havoc with cost figures as a basis for pricing.<sup>65</sup>

Other problems arise out of the fact that some cost increases may not justify price rises. Thus, an increase in wages may be offset by greater productivity per unit of output, leaving unchanged the prime factor—cost per unit of output. In addition, it generally would be unwise to raise prices to prepare for a cost increase which has not materialized; for example, this would result in an invitation to labor to ask for more wages and accelerate the cost-price spiral. Relatedly, selling and administrative costs increases should not be accepted without verification by concrete evidence, as in many cases such costs will remain constant or will decrease per unit now that war has made high pressure salesmanship largely an anachronism. Although it is contrary to the major orientation of a war economy, advertisers have been assured that their domain will be respected by allowing companies a deduction for advertising as a legitimate expense.<sup>66</sup> Perhaps clearer is the status of corporate income and excess profits taxes which are not a cost of production and should not be recognized as such for price purposes.

How long a firm will be expected to absorb increased costs will probably depend in part on the relation of price and costs at the time of the original price stabilization.<sup>67</sup> Most likely, to avoid furthering the spiral of cost and price, OPA will stave off price advances as long as possible; and then a new schedule applying to all in the industry can be issued with the provision that any firm may seek specific relief from undue hardship. But the question of the issuance of new ceilings must be viewed in the over-all perspective. Thus, if production of a firm is restricted because of priorities and if cost per unit advances,<sup>68</sup> pressure will be brought to bear to raise the price ceiling. But when it is realized that one of the purposes of priorities and allocations is to force a switch into war production, it becomes evident that price policy

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65. For discussion of these problems see Baster, *Control of Food Prices in I. L. O.*, STUDIES IN WAR ECONOMICS BY I. L. O. (Studies and Reports, Series B, No. 33) 100; Haney, *Price Fixing in the U. S. During the War* (1919) 34 POL. SCI. Q. 104, 262, 434 at 274. Another knotty problem concerns cost analysis for goods made to specifications. See OPA Price Schedule No. 67, New Machine Tools, 3 C. C. H. 1942 War Serv. ¶ 43,267.

66. See report of Speech by Mr. Leon Henderson to advertisers. N. Y. Times, Nov. 14, 1941, p. 35, col. 1. Reasons for advertising although oversold are listed in N. Y. Times, Nov. 19, 1941, p. 34, col. 1.

67. Clearly one of the most important statements of OPA price policy to date is an address by Mr. Joel Dean, OPA Price Executive, December 3, 1941, OPA Release No. PM-1683.

68. It would seem that the only justifiable ground for a request by a company that its ceiling be raised is that its variable or out-of-pocket costs have increased; increase in overhead cost per unit as production drops would seemingly not offer justification for a raise in the ceiling as long as the Government is not insuring that all firms make a profit during the war.

should not thwart this aim by making it profitable to continue in the same non-military pursuit. So in the absence of other considerations, price policy should not be used as a life-saver to rescue firms which might better be shut down or forced into war production.

*Profits.* Use of profits as a price fixing norm may render complex cost analysis superfluous as, for instance, where profit figures demonstrate on their face that the corporation or industry is prosperous.<sup>69</sup> Involved, however, in the use of profits as a criterion are many serious problems: what, for example, constitutes a reasonable profit or what is the proper Government attitude toward depressed industries?<sup>70</sup> Thus, some may urge a duty on the part of the Government to insure industry against loss. In addition, use of the norm of profits is complicated by the fact that profit analysis involves three separate units: the particular industry,<sup>71</sup> a single company in that industry, and a product of that company. Frequently, no doubt, adjustment of a price schedule will be urged by a single firm in relation to only one of its many<sup>0</sup>products. Under such circumstances there is great temptation for the reviewing body to concentrate solely on the cost, price, and profit position of the single commodity. This may lead to pitfalls since determining cost allocation for a single article in a multi-product process involves use of arbitrary accounting procedures. The administrative burden in determining profit for a single product, moreover, would be unduly severe. To the extent that profits are used as a criterion for price increases, it is preferable to examine the over-all profits of the corporate entity rather than the profit margins of individual products in the multiple-product firm. And perhaps even more important than corporate profit position is the profit status of the industry as a whole.

Insofar as a working general principle regarding profits can be laid down, price advances should not be granted for particular items unless out-of-pocket costs exceed existing prices and unless the industry as a whole cannot operate profitably. Although litigation may be instituted by a single firm, the court rather than stressing a particular corporation's profit should emphasize the profit position of the whole industry to which the price schedule was directed. Since the statute only requires the schedule to be "generally fair and equit-

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69. This raises the question of the accuracy and uniformity of corporate figures on income. Profits are sometimes concealed through accounting devices, including secret reserves and unwarranted depreciation deductions. Delicately fine lines concerning profits, however, probably need not be drawn since price fixing is not an anti-profiteering statute so much as it is anti-inflationary. *House Price Control Hearings* at 455. Cf. PIGOU, *THE POLITICAL ECONOMY OF WAR* (2d ed. 1941) 112-15.

70. Admittedly present conditions make an elastic demand unlikely, but it must not be forgotten that lower prices may yield greater profits under certain circumstances.

71. While the definition of an industry is presumed, in many instances marking the boundary lines will be an extremely difficult task.



able", probably a minority of firms may suffer losses without the order being held invalid for arbitrariness.<sup>72</sup>

Naturally any generalization in this field is subject to numerous exceptions. Thus, reliance on covering out-of-pocket costs as part of the test must be modified where there is possibility of shifting from one product to another within the firm's line. Moreover, if the firm or industry makes a practice of basing price on marginal cost, the cost of transporting the final twenty per cent of the product to market may be so much higher than the cost for the balance that average cost may be a superior and less inflationary basis of price than marginal cost.<sup>73</sup> Similarly, within an industry as a whole there is the question of the method for determining what constitutes a reasonable rate of profit. The answer is most easily obtained by reference for a base period to the average rate of return on investment in the industry before taxes are deducted.<sup>74</sup> Perhaps the base period should be varied from industry to industry in an effort to obtain a typical period. The statute unfortunately seeks to restrict profit and cost analysis to the period during and subsequent to the year ending October 1, 1941,<sup>75</sup> but it is plain that this is an inflationary restriction and that an intelligent judgment will often require consideration of a longer span of time.

A number of constitutional issues are raised by a scheme of setting prices for a single firm in terms of a standard based on profits for the industry. It is difficult to generalize in the absence of cases; the facts themselves will aid tremendously in resolving questions of arbitrariness. *A priori*, however, it is probably true that the fixing of a price which prevents an adequate profit to an individual firm is not a violation of the Fifth Amendment. For fixing maximum prices for an industry probably falls on the constitutional

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72. Practically all price schedules issued before the Act became effective provided for modification for hardship and inequity. This was designed to permit individual relief in extreme cases. The power to make exceptions under §2(c) is authority for the continuation of this practice even though the Act is not explicit about procedure for this type of matter. Under more recent ceilings, petition for amendment is the mode of relief. See OPA Temporary Maximum Price Regulation No. 6, Canned Fruit and Vegetables, 3 C. C. H. 1942 War Serv. ¶45,006, and OPA Procedural Regulation No. 1, 3 C. C. H. 1942 War Serv. ¶41,101.

73. Suppose that 80% of Grade X fuel oil is moved by tankers owned by the big oil companies from the Gulf to New York at a cost of 21 cents per barrel. The remaining 20%, however, must be shipped in chartered tankers at a rate set at 57 cents per barrel by the Maritime Commission. Even if the Maritime Commission cannot be induced to lower rates, it does not follow that the big oil companies which ship all of the oil should be allowed a price for the total shipments based on the cost of shipping the last 20%. Average cost would seem a much more reasonable standard. Moreover, since Grade X fuel oil is only one member of the petroleum joint products family, it may be preferable to consider over-all costs and profits of the industry rather than treat each component separately. Of course, a government subsidy for the final 20% is another alternative.

74. Simply because an industry has been enjoying a high rate of profits over the recent years does not necessarily entitle it to continue to earn the same return.

75. Section 2(a).

side of the line between a "regulation" and a "taking of property without just compensation".<sup>76</sup> In fact, the Fifth Amendment does not prohibit laws that indirectly result in harm or loss to individuals.<sup>77</sup> Therefore where a general regulation is directed to a legitimate end, it is not invalid because it may cause hardship in a particular case.<sup>78</sup> The statute, moreover, does not compel a producer to sell.<sup>79</sup> In recent cases involving fixing prices for an industry or a particular sector of an industry, the Supreme Court has approved reasonable administrative orders even though it recognized that fatal injury to some producers would follow.<sup>80</sup> To argue, furthermore, that every business corporation should enjoy the legal status of a public utility and thus be allowed a fair rate of return on its fair value would be to apply an unfortunate and confused body of legal opinions on valuation built around unique conditions of utility operation.

*High cost marginal producers.* How frequently the complaint of inadequate profits will occur depends in large part on what norms are used in treatment of high cost or marginal producers. During the last war, the general policy of the price authority was to establish only one maximum price; that single price was set high enough to encourage employment of the bulk, if not all, of available productive capacity. Today this bulk-line principle is in disrepute on the grounds that the single price has to be so high that inflation cannot be effectively controlled.<sup>81</sup> In this war, by words,<sup>82</sup> by statute<sup>83</sup> and by administrative action<sup>84</sup> the price authority is committed to a two-price system.

76. For contrast between "regulation" and "taking" see *Morrisdale Coal Co. v. United States*, 259 U. S. 188 (1922); *Pine Hill Coal Co. v. United States*, 259 U. S. 191, 196 (1922); *Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253 (1929); *Hamilton v. Kentucky Distill. Co.*, 251 U. S. 146 (1919); *Du Pont de Nemours & Co. v. Hughes*, 50 F. (2d) 821 (C. C. A. 3rd, 1931).

77. *Knox v. Lee*, 12 Wall. 457 (U. S. 1870).

78. See *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573 (1938); *United States v. Hudson*, 299 U. S. 498 (1937); *Bayside Fish Co. v. Gentry*, 297 U. S. 422, 427 (1936); *Fox v. Standard Oil Co.*, 294 U. S. 87 (1935); *Pierce Oil Co. v. City of Hope*, 248 U. S. 498 (1919); *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912).

79. Section 4(d).

80. *Morgan v. United States*, 304 U. S. 1, 20 (1938); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420 (1930); cf. *Acker v. United States*, 298 U. S. 426 (1936).

81. See *House Price Control Hearings* at 104-06; HARDY, *WARTIME CONTROL OF PRICES* (1940) 141.

82. *House Price Control Hearings* at 441.

83. Section 2(e). Section 2(a)(7) in the original administration bill combined the idea of maximum production with the prevention of large profits to low cost producers. The change in the two drafts may not make a material difference since §2(e) is obviously designed to serve this function.

84. Among other similar actions, the Metals Reserve Co. is specifically exempted from adherence to the price schedules of some metals in order to facilitate government buying at a higher price from a marginal producer. See OPA Price Schedule No. 15, Copper, 3 C. C. H. 1941 War Serv. ¶43,215. Provision has been made for the Government to pay a higher price for the opening of additional mines and for added output from mines now operating.

By fixing a higher price for the essential marginal operator his profitable production is assured, and the low or average cost producers can make a substantial profit at the lower price.

But the differential price system will not be used in every industry where there is a variety of cost conditions. Where a few isolated producers have abnormal cost situations, OPA may negotiate with them individually and grant specific relief.<sup>85</sup> In other industries, the spread in costs may not be great enough to warrant undertaking the administrative difficulties involved in sifting and sorting the different components of the industry. Then, too, there is the danger that with too frequent use, the two-price system may degenerate into cost-plus pricing with its loss of incentive for efficient production and other accompanying abuses.

A major problem attending use of a two-price system concerns disposition of the higher price product. Even if private buyers are willing to pay the higher price because an urgent need for the product makes price a secondary consideration, this results in unequal cost conditions among buyers and leads to pressure for higher prices at subsequent stages of manufacture and distribution. There are, however, other alternatives. Thus, the Government's power to buy and sell commodities can be important in effecting a two-price system<sup>86</sup> despite the fact that authority for exercise of the power is divided and that it cannot be used to lower prices by dumping goods on the market. For the Government could absorb the loss by buying the output of the high cost producers and reselling it at the lower of the two fixed prices.<sup>87</sup> In addition, the Government might sidestep handling of the product and simply have high cost producers sell at the regular price with the Government paying the difference in the two prices as a subsidy to these producers. Such a bonus or subsidy system may be feasible where dollar values are not too great. However, where huge sums are at stake, the Government may prefer to buy the entire output at different prices and distribute it at one price which is less than higher cost producers demand yet sufficient to cover total expenditure by the Government trading corporation.<sup>88</sup> It is apparent from these alternatives that, for effective treatment of marginal producers through a dual price policy, the buy and sell power provided for in the price legislation is of major significance.<sup>89</sup>

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85. See *House Price Control Hearings* at 441. Also see grant of specific relief to Phoenix Iron Co., OPA Price Schedule No. 6, Iron and Steel, 3 C. C. H. 1941 War Serv. ¶ 43,206.25.

86. Section 2(e).

87. When the Government uses the product directly in the tasks of war or as a part of Lend-Lease shipments, the problem of uneven cost conditions to subsequent purchasers is avoided.

88. For previous experience in the application of these techniques see HARDY, *WARTIME CONTROL OF PRICES* (1940) 180; MULLENBORG, *HISTORY OF U. S. FOOD ADMINISTRATION* (1941).

89. Similar to the questions involved in handling high cost marginal producers are the problems arising out of differentials between foreign and domestic prices.

*Retail Prices.* Retail price fixing raises somewhat different problems from those confronted in setting prices for raw materials or manufactured goods. There is first the broad question of whether normal channels of retail trade should be preserved.<sup>90</sup> As the war progresses, it seems clear that these channels will to some extent require modification.<sup>91</sup> Furthermore, underlying all decisions concerning retail price setting is the thorny question whether to fix resale prices on the basis of costs of performing the various marketing functions; or whether to fix them in terms of the "customary differential" approach based on actual previous market prices.<sup>92</sup> Both cost and past price will no doubt be employed. The difficulty in applying the cost approach is that variations in distributive functions make it extremely hard to compute costs for an individual retailer. Finally, additional differences in the problem of retail price regulation are introduced by the multiplicity of items and the great diversity in types of retail outlets.<sup>93</sup>

Up to the present, retail prices have not been directly fixed except in a few special instances. To keep retailers in line, reliance has been placed on consumer education and cooperation with retail trade associations; also an effort has been made to eliminate scare advertising and to bring about standardization of products.<sup>94</sup> It is becoming increasingly apparent, however, that when prices are fixed for the pre-retail steps in the marketing process, prices must also be stabilized for the retail stages, if the retailer is

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Already OPA has experienced trouble when foreign prices of imported products rose above domestic ceilings. See OPA Price Schedule No. 8, Nickel Scrap, 3 C. C. H. 1941 War Serv. ¶43,208, for a provision encouraging imports. The present policy of the Board of Economic Warfare, in controlling exports by licensing, in effect enjoins any export sale where a price exceeds an official ceiling. See 54 STAT. 714, 50 U. S. C. § 701 (app.) (1940). The Board's Price Control Committee is endeavoring to establish fair differentials for the added cost of exporting goods. See generally Board of Economic Warfare Press Release No. 28, Feb. 2, 1942; Office of Export Control, Current Control Bulletin No. 7 (1942).

90. Section 2(h) provides that the powers in the Act shall not be used to compel changes in "methods, or means or aids to distribution" except to prevent evasion.

91. In the use of rationing, adequate enforcement may require changes in established methods of distribution. There is good reason to believe that rationing will be extended beyond automobiles, rubber products, typewriters and sugar.

92. Market prices, as indicative of consumer acceptability of the product, are functions of such factors as location, personal appeal, credit terms and cost differences. See KAULLA, *THEORY OF THE JUST PRICE* (1940) 213-14.

93. The pros and cons of this are discussed in Abramson & Phillips, *Retail Price Control* (1942) 20 HARV. BUS. REV. 184. This is one of the best statements of retail price fixing problems. See also MULLENDORE, *HISTORY OF THE U. S. FOOD ADMINISTRATION* (1941); P. W. GARRETT, *GOVERNMENT CONTROL OVER PRICES* (1920).

94. Standardization or simplification serves at least a four-fold function: (1) it makes the mechanics of price fixing easier; (2) price evasion by change of quality is reduced; (3) simplifying commodities makes for lower costs and hence lower prices; (4) where supply of material is limited, it fosters greater per capita distribution.

not to exact a toll for his strategic position. More adequate enforcement as provided in the new Act points the way toward extension of price fixing to the retail level.<sup>95</sup>

*Agricultural Prices.* Perhaps the most serious danger to successful control of prices is the provision in the statute governing setting of prices for farm products. While no floor is explicitly set under agricultural prices, no maximum price is to be established below the highest of four possible prices. These are: (1) 110 per cent of parity<sup>96</sup> price adjusted for grade, location and seasonal differentials;<sup>97</sup> (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929. Discouraging comparisons can be made between agricultural prices before the statute and what they might be assuming prices are set in terms of the highest of the four standards. Since parity increases with each increase in the price of items purchased by farmers, its use as a minimum standard accelerates the spiral of inflation. Of course the maximum prices can be set above any of these standards, and with action by OPA in the field of agricultural prices requiring final approval by the Secretary of Agriculture,<sup>98</sup> even these high levels may be disregarded. While food may win the war and write the peace,<sup>99</sup> it is apparent that politics is interfering with application of an intelligent and strategic food policy in the suppression of unwarranted price advances.

*Status of Contracts and Escalator Clauses.* Unless the pertinent schedule makes an exception, the Act invalidates an executory contract providing for

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95. As in the last war, enforcement and supervision of retail price fixing will largely be decentralized. Licensing and conspicuous posting of "fair price" lists by retailers will be revived.

96. Parity is not a dollar and cents figure but a formula expressing a relation between the price of what the farmer sells and what he buys. See Stein, *Parity: What is it?* (1941) 25 AGRICULTURAL SITUATION (U. S. Bur. Agr. Econ.) No. 9 at 11.

97. Section 3(a). But under § 3(b) the parity of any agricultural commodity other than the basic crops can be modified if the production and consumption of the commodity has so changed since the base period as to result in a price out of line with parity prices for basic commodities.

98. Section 3(e). The President can no doubt influence the use of the veto power. See statement of the President upon signing the act. N. Y. Times, Jan. 31, 1942, p. 26, col. 1. The Price Act does not prohibit the release of stocks held by the Commodity Credit Corporation; this power can be used to reduce some farm prices below any of these four possible levels. See joint statement of Secretary of Agriculture and the Price Administrator, OPA Release No. PM-2380, Feb. 3, 1942.

99. Wickard, *The Job of Northeastern Agriculture in National Defense*, U. S. Dep't of Agr., Sept. 24, 1941 (mimeographed); Wickard, *Food for War and Peace* (1941) 105 NEW REPUBLIC 818.

a price in excess of a ceiling established after the contract was made.<sup>100</sup> This confronts business with an added problem in forward pricing for future delivery. Normally management seeks some measure of protection in making forward prices; the general practise has been to use various types of escalator clauses ranging from those empowering the producer to raise the price at the time of delivery by any necessary amount, to those providing for adjustment of costs on the basis of Bureau of Labor Statistics indices of material prices and average hourly wages.

From the standpoint of controlling inflation, the escalator clause generally, and some forms in particular, faces several basic objections. It is likely to result in price increases in excess of cost increases, for the rates of wages and material prices prevailing at the time of delivery may not reflect actual costs during the course of manufacture due to the lapse of time. Secondly, the escalator clause may eliminate the incentive to economize and may furnish a means of padding costs. Third, the clause accelerates the vicious upward spiral which makes inflation exceedingly difficult to control. Under the emergency legislation, an escalator clause which operates to hoist price above the ceiling is invalid and unenforceable. A partial solution of the problem of forward pricing would be adjustment of the ceiling by OPA when cost experience has demonstrated that the old ceiling is no longer equitable. Sellers could then protect themselves in part by inserting a clause in the sales contract providing that if the ceiling is raised by OPA, the contract price could be revised upward, subject to the purchaser's right to cancel.<sup>101</sup>

*Procurement and Prices.* With the size of Government purchasing reaching astronomical proportions, failure on the part of the Government as a buyer to adhere generally to established price ceilings can nullify the beneficial effects of price fixing.<sup>102</sup> Fortunately, the inflationary tendency of

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100. Section 4(a). The priorities legislation is a clear indication of the Government's power to invalidate existing contract relations. As to the status of contracts before the Price Act see *Mawhinney v. Millbrook Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921); *Roxford Knitting Co. v. Moore & Tierney*, 265 F. 177 (C. C. A. 2d, 1920), *cert. denied*, 253 U. S. 498 (1920); *Boret v. Vogelstein & Co.*, 188 App. Div. 605, 177 N. Y. Supp. 402 (1st Dep't 1919), *aff'd*, 230 N. Y. 573, 130 N. E. 899 (1920); *Ross Lumber Co. v. Hughes Lumber Co.*, 264 F. 757 (C. C. A. 5th, 1920), *cert. denied*, 254 U. S. 635 (1920).

101. See OPA Price Schedule No. 67, *New Machine Tools*, 3 C. C. H. 1942 War Serv. ¶ 43,267; OPA Temporary Price Regulation No. 6, *Canned Fruits and Vegetables*, 3 C. C. H. 1942 War Serv. ¶ 45,006.

102. Where there is a price ceiling in operation, it is inconsistent with a policy of price control for a seller whose goods have been requisitioned to obtain a price higher than the ceiling. The price to be paid for requisitioned goods is defined as a fair compensation based on market value, and it is determined by the requisitioning authority subject to judicial review. See 55 STAT. 742, 50 U. S. C. A. § 721 (Supp. 1941). In some past cases courts in arriving at a fair market value have given little weight to domestic price schedules. See *United States v. New River Collieries*, 262 U. S. 341 (1923). Today in view of the greater finality accorded administrative determinations,

numerous uncoordinated Government purchasers which featured the last war effort has been largely avoided. But even assuming an integrated buying organization, the pressure to spend prodigious sums of money in a hurry and necessity for speedy procurement creates a situation in which some neglect of price ceilings may be inevitable.<sup>103</sup>

There are, however, a number of techniques in procurement that can be employed to lower prices or to restrain their rise. Under normal conditions considerable reliance is placed on open competitive bidding. However, while open competitive bidding has certain advantages, it is not the equivalent of competition as an effective regulatory device.<sup>104</sup> Consequently it is frequently preferable now to use open market purchases or negotiated contracts.<sup>105</sup> In addition, incentives to minimize the cost of performance of a contract are useful, if the bonus or penalty clauses are based on estimates better than sheer guesswork. Upward movement of prices can be restrained, moreover, by strategic timing of invitations to bid and of delivery dates, or by increasing the number of suppliers and by modifying specifications. Other savings can be accomplished by utilizing existing stocks, by rejecting bids of speculators, and allowance of split awards. Relaxation of tariffs and "Buy American" campaigns, and development of new methods for control of storage and distribution are also means to the same end. Finally, a premium is placed on the maintenance of an honest, well-informed purchasing staff with an adequate auditing system at its disposal.

*Price and Priorities.* Price and priorities are alternate methods of allocating materials to different parts of the economy. With war production demands paramount, price tends to break down as an effective regulator. However, by establishing price ceilings buyers are to some extent placed on a uniform level as to price,<sup>106</sup> and priorities then assume the major functions of allocation.

It is plain from this that price ceilings tend to avert the constant pressure to evade priorities which would otherwise exist if buyers were free to bid

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it is doubtful that the courts will follow prior decisions which in effect approve wartime profiteering. See Comment, *Mobilization for Defense* (1940) 50 YALE L. J. 250, 278.

103. The Price Act is not altogether clear as to whether a government agency is subject to the price ceilings. See § 302(h). It is desirable that the Government adhere to price ceilings in its purchases, but where exceptions need to be made, speedy machinery should be available to gain clearances. For this purpose, the appeal procedure of Procedural Regulation No. 1 is probably too slow. 3 C. C. H. 1942 War Serv. ¶ 41,101.

104. See Henderson & Nelson, *Prices, Profits and Government* (1941) 19 HARV. BUS. REV. 389, 396-97; Comment (1942) 55 HARV. L. REV. 427, 433.

105. By order of the War Production Board all military supply contracts must now be placed by negotiation rather than by competitive bidding. For this order and for a statement of factors which shall govern placing of contracts see (1942) 10 U. S. L. WEEK 2577. Where government demand is so large as to absorb a substantial fraction of the capacity of the industry there may be little choice of method of purchase. See Pub. L. No. 354, 77th Cong., 2d Sess. (Dec. 18, 1941) § 201.

106. Baruch, *Priorities: The Synchronizing Force* (1941) 19 HARV. BUS. REV. 261.

up the price. To the extent, however, that specific allocation of goods replaces priorities, price will probably be even less significant in obtaining goods. On the other hand, priorities regulations provide that the seller need not accept defense orders unless the price and terms of sale are those "regularly established".<sup>107</sup> This has been construed to mean that the current price for goods sold under priority rating cannot be higher than the price ceiling. In other words, for the duration of price regulations, a bootleg price will not be recognized on sale of commodities under priority.<sup>108</sup> Finally, as noted before, price policy should not conflict with priorities where the latter are designed to convert normal into wartime production.<sup>109</sup> If decreased production due to priorities results in higher unit costs,<sup>110</sup> the price ceiling should not be manipulated to offset this where it is desirable to force the firm to cease operations or to switch into essential production.

#### EVASION

By and large the character of compliance with price regulations so far has been closely correlated with the nature of the industry. Where the total number of sellers is few or where sales are primarily concentrated in the hands of a relatively small number of sellers even though the total number is large, the record of compliance is generally satisfactory. It is probably true that if compliance is obtained from the largest majority of dealers covering, for instance, ninety per cent of all transactions by volume, inflation can be kept within controllable limits.<sup>111</sup> Unquestionably the fear of non-compliance in some businesses has been a deterrent to forceful OPA action. The history of prohibition enforcement and the NRA both demonstrate convincingly that as violations increase, as the evasions of the unscrupulous minority become contagious, the respect for government and the willingness to comply diminish in more than proportionate measure. Moreover, it seems clear that without effective measures designed to control volume of money income expended, including particularly a drastic tax policy, it will be impossible to prevent wholesale evasion of the Act.

A catalogue of the devices that can be employed to evade price schedules would run to many pages. To cope with the many possibilities for evasion requires both skill in formulating schedules and the use of enforcement machinery that can police prices on a large scale. Since a price which violates a schedule is so easy to detect, dodges are likely to be concealed in the

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107. Priorities Regulation No. 1, § 944.2(b)(2), 3 C. C. H. 1942 War Serv. § 30,901.11.

108. Communication to YALE LAW JOURNAL from OPM, Nov. 26, 1941.

109. See pp. 833-34 *supra*.

110. See note 68 *supra*.

111. See *House Price Control Hearings* at 765. In England, women detectives have been appointed to tour shops and to haunt hairdressing establishments to gather gossip on food violators. See *House Price Control Hearings* at 760.



terms of the bargain or in other changes of normal trade practice.<sup>112</sup> The fiction of the quoted price<sup>113</sup> and the numerous possible concealed modifications of it provide a ready method of evasion. The major outline of the technique of control adopted by OPA is usually to insist on the freezing of prior trade practice; in this way, a ready-made frame of reference is available for comparison. Among specific evasion techniques in recent experience are upgrading and unofficial markets<sup>114</sup> for resale and barter. Then, too, introduction of new products not covered in the schedule is another attempted avenue of escape from regulation. In fact, the impact of the war in forcing reductions of quality and the use of substitute articles will make this form of evasion widespread and difficult to check. Finally, as long as price fixing is limited to the lower levels of the flow of goods, there is some tendency where feasible to retain raw materials and sell them in finished or semi-finished form in order to place the product outside the reach of price schedules.<sup>115</sup>

#### ENFORCEMENT

To secure compliance, a variety of enforcement techniques are available in the Act. These include criminal penalties, injunctions, damages, licensing, investigatory powers,<sup>116</sup> publicity, requisitioning, priorities and rationing,<sup>117</sup> and cooperation with procurement or other government departments. The criminal sanction is applicable to any person who wilfully violates any provision of a regulation or order, or who makes any statement or entry false in a material respect in a required report or document.<sup>118</sup> By willfulness is sometimes meant intentional disregard of a statute or regulation

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112. Literally fifty-seven varieties of "unfair" marketing practices which were forbidden under the NRA codes setting minimum prices can now operate to defeat maximum price regulation. See TERBORGH, *PRICE CONTROL DEVICES IN NRA CODES (1934)* 33; SWEZEY, *STRUCTURE OF NAZI ECONOMY (1941)* 101.

113. See Till, *The Fiction of the Quoted Price (1937)* 4 *LAW & CONTEMP. PROB.* 363.

114. See *N. Y. Times*, Oct. 10, 1941, p. 33, col. 2 (chemicals); *N. Y. Times*, Oct. 16, 1941, p. 31, col. 2 (pharmaceuticals); *N. Y. Times*, Oct. 24, 1941, p. 33, col. 2 (ethyl alcohol); *N. Y. Times*, Oct. 29, 1941, p. 33, col. 3 (paint-makers). In Germany intrusion of unnecessary middlemen called "Kettenhandel" presented a problem for price fixers, and the same situation is not unknown here. See Domeratzsky, *Price-Control in Germany—Policy and Technique (1941)* 1 *INTER. REF. SERV. NO.* 19 at 2-3. Licensing was the technique employed to curb this practice. Cf. OPA Price Schedule No. 19, Southern Pine Lumber, 3 C. C. H. 1941 War Serv. ¶43,219.

115. Haney, *Price Fixing in the U. S. During the War (1919)* 34 *POL. SCI. Q.* 104, 262, 434 at 276 *et seq.*; see *N. Y. Times*, Sept. 6, 1941, p. 25, col. 7 (cloth mills).

116. Section 202.

117. Under §201(b), the President is authorized to transfer any of the powers and functions relating to rationing to OPA. Operating in the opposite direction is the broad power in the President to transfer power and functions from OPA to any other agency having functions relating to the commodities in question. *Ibid.*

118. Section 205(b).

or plain indifference to it; malice toward any of the parties or toward the Government may not be required, but good faith is expressly made a defense in a criminal or civil action for penalties or damages.<sup>119</sup> The United States District Courts have concurrent jurisdiction with state and territorial courts<sup>120</sup> of enforcement proceedings.

On the civil side there is the remedy of injunction which is only bestowed on the Administrator.<sup>121</sup> In addition there is a private remedy, available to the buyer, for \$50 or treble the amount by which the consideration exceeded the maximum price, whichever is greater. This remedy, however, is restricted to those who buy the commodity for use or consumption other than in the course of trade; if the buyer is disqualified, the Administrator can bring a similar action within a year after delivery.

To further effectuate the purposes of the Act and assure compliance, the Administrator may issue licenses and require them as a condition of selling a commodity or commodities affected by any regulation or order issued under the Act.<sup>122</sup> No license, however, shall contain any provision which could not be prescribed by regulation under other sections of the Act. On petition of the Administrator a court may suspend the license if it finds that a violation of the license or regulation or schedule occurred after a warning notice by registered mail had been received. The result of suspension of a license is the withdrawal of authority to sell the commodity involved or any commodity covered by price schedules, in which the license is a condition of selling. Within thirty days an appeal may be taken in the regular way, and upon good cause, any order of suspension may be stayed in accordance with applicable practice.

#### PROCEDURE

The unique nature of the administrative problem involved in fixing prices determined to a large extent the character of the procedural framework set up by the Act. Because schedules apply to large numbers of persons and because of the necessity of immediate action to check rapidly rising prices, the holding of a formal hearing is not required by the Act in the process of setting ceilings. In addition, in considering a protest by any person subject to the regulation the Administrator need not hold a formal hearing;<sup>123</sup>

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119. Section 205(d). See *United States v. Illinois Cent. Ry.*, 303 U. S. 239, 243 (1938).

120. Section 205(c). But in licensing proceedings, the Federal District Courts only take jurisdiction if the licensee does business in more than one state or if his gross sales exceed \$100,000. See § 205(f) (2).

121. Section 205(a).

122. Section 205(f).

123. The proceedings at the stage of considering a protest may be limited to a written hearing in the form of affidavits, or other written evidence, and the filing of briefs. Section 203(c). OPA Procedural Regulation No. 1, 3 C. C. H. 1942 War Serv. ¶ 41,101, provides for the details and variations on procedure. Since the Act is not explicit about

but if he denies the protest, he is required to inform the protestant of the grounds for his decision.<sup>124</sup> Any person aggrieved by denial of any part of his protest may file a complaint with the newly created Emergency Court of Appeals. The Administrator, when a complaint has been served upon him, certifies and files with the court a transcript of proceedings in connection with the protest including a statement indicating the economic and other facts of which he has taken official notice.<sup>125</sup> Treating the price order as quasi-legislative action the court is directed to set aside the order in whole or in part if it is not in accordance with law, or is arbitrary or capricious.<sup>126</sup> From the decision of this court a petition for writ of certiorari may be filed in the Supreme Court of the United States.<sup>127</sup>

In addition to this general framework of procedure there are miscellaneous provisions designed to facilitate speed and unity of action in dealing with problems of price fixing. For example, neither the Emergency Court nor any other court shall have jurisdiction to stay the effectiveness of any ceiling order.<sup>128</sup> Furthermore, the jurisdiction of the Emergency Court over the question of validity of price orders is to be exclusive.<sup>129</sup> Thus, by the terms of the statute, the defendant in an enforcement proceeding in the state or district courts may not raise as a defense invalidity of the price order.

While the procedural innovations in the Act present a number of interesting questions, the most serious constitutional problem would seem to hinge on whether Congress can go so far as to deprive the District Courts of power to pass on the validity of price orders in enforcement proceed-

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procedure for obtaining individual adjustments and exceptions as provided for in §2(c), it may be argued that the right to have an exception made in behalf of an individual can be withdrawn by the OPA. But because of the possibility of error in formulating a ceiling or because economic warfare or Government purchasing require exceptions in special cases, there should be quick relief available without challenging the validity of the order as it applies to the majority of firms. See note 72 *supra*. Absence of a requirement of notice and hearing preparatory to exercise of delegated legislative power is probably not unconstitutional, although a number of Federal statutes have required it. See *Bi-Metallic Investment Co. v. Colorado*, 239 U. S. 441 (1915); *Buttfield v. Stranahan*, 192 U. S. 470 (1904).

124. Section 203(a). This change from the original bill adds a judicial tone to the hybrid procedure which partakes of both judicial and legislative qualities.

125. Section 203(b). See Gellhorn, *Official Notice in Administrative Adjudication* (1941) 20 TEX. L. REV. 141, on the general problem.

126. Section 205(b). See *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935). Any hearings or proceedings held in connection with the formulation of a schedule or the protest to it are said to resemble legislative hearings. See *House Price Control Hearings* at 336; *Senate Price Control Hearings* at 243.

127. Section 204(d).

128. Sections 204(c) & (d). It would be highly impractical to permit widely scattered courts to create haphazard geographical price disparities by use of the injunction. See *Lauf v. E. G. Skinner & Co.*, 303 U. S. 323 (1938). But see *Mountain States Power Co. v. Pub. Serv. Comm. of Mont.*, 299 U. S. 167 (1936).

129. Sections 204(a) & (d).

ings. Although Congress may place exclusive jurisdiction of certain proceedings in special tribunals, here there is the difference that jurisdiction is given to a district court for some causes of action, yet the important, related judicial function of passing on the validity of the order is denied to these same courts.<sup>130</sup> It may be argued that an adequate remedy for a violator exists in the Emergency Court; but even there, since validity of a schedule depends on facts concerning an entire industry, a single violator in that industry may be in no position adequately to contest a price order.<sup>131</sup> In any event, denial to a violator of the defense of invalidity of the price order may be a serious impairment of his defenses.

#### CONCLUSION

In discussing inflation, it should be emphasized that inflation itself, in the sense of an arbitrary increase in the supply of money, is not an evil, but a powerful weapon for increasing employment and real income. From the point of view of the bottom of a depression, all recovery is inflationary. Inflation becomes a social danger only after recovery has proceeded to a point of high employment and shortages of labor and materials.

It is quite apparent that inflation in this latter sense has not been prevented, and it remains to be seen whether the stresses of a war economy can be so cushioned as to avoid its more extreme effects. Perhaps a recurrence to some of the mistakes made during the last war may throw light on the probabilities of present success. Marked by belated action, by lack of unified authority and by crude weapons of enforcement, non-statutory price fixing was severely handicapped.<sup>132</sup> Too frequently the costs of high cost producers were determinative in setting prices for a whole industry. Also inflationary was the competition among governmental and military buyers for the material of war. Moreover, the failure to coordinate fiscal and credit controls with price policy was a fundamental impediment to more effective price fixing. By no means the least of the errors was the removal of price

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130. Note that under § 204(d) the regular courts still have power to pass on the constitutionality of the terms of the statute. See *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803); *Lent v. Tillson*, 140 U. S. 316 (1891); *Kuhnert v. United States*, 36 F. Supp. 798 (D. C. Mo. 1941); cf. *Myers v. Bethlehem Shipbldg. Co.*, 303 U. S. 41 (1938); see McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 CALIF. L. REV. 129.

131. The present court has been particularly solicitous of the rights of a criminal. See *Walker v. Johnston*, 312 U. S. 275 (1941); *Weiss v. United States*, 308 U. S. 321 (1939); *Nardone v. United States*, 302 U. S. 379 (1937).

132. For description of the weaknesses see Haney, *Price Fixing in the U. S. During the War* (1919) 34 POL. SCI. Q. 104, 262, 434 at 446; HARDY, *WARTIME CONTROL OF PRICES* (1940) 210; Taussig, *Price Fixing as Seen By a Price Fixer* (1919) 33 Q. J. ECON. 205.

fixing upon the cessation of hostilities; this alone led to a 23 per cent increase in prices.<sup>133</sup>

Some of these defects have been avoided thus far; others still threaten our ability to cope with runaway prices.<sup>134</sup> Somewhat encouraging has been the manner in which metals and industrial chemicals have been relatively orderly and stable in the recent past by contrast with the very serious price problem they created in 1916.<sup>135</sup> While farm prices have risen more than in the last war they were already at the parity level at the inception of World War I. But the weak statutory control over farm prices and the failure to stabilize wages are not reassuring.<sup>136</sup> It remains to be seen whether the inadequacies of our tax policy, financing policy and production policy are so great as to put an impossible burden on our price fixing plans. Certainly if consumers' money incomes are twenty per cent greater in 1942 than in 1941,<sup>137</sup> and if the quantity of goods available for consumers remains constant or declines somewhat, the pressure for price increases will be hard to resist and price ceilings almost impossible to enforce.<sup>138</sup> It is plain that present plans are not adequate for the problem and that if prices are to be effectively controlled more drastic means of reducing the amount of income available for consumption should be instituted immediately.<sup>139</sup>

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133. See *House Price Control Hearings* at 345.

134. Under existing conditions jurisdictional disputes among and within Government agencies have no more justification than their counterpart in organized labor. See STONE, *BUSINESS AS USUAL* (1941).

135. In the first World War, metals rose 54 per cent within a few months; OPA has succeeded in keeping metal prices from rising more than 11 per cent. Food costs have already gone up 21 per cent. See OPA Release No. PM-2312, Jan. 26, 1942; N. Y. Times, Nov. 9, 1941, § 4, p. 8, col. 3. For a comparison of price rises in commodities and foods between the last war and this one see charts in Special Report on 1942 Revenue Bill, C. C. H. Standard Federal Tax Serv. at 17.

136. See p. 826 *supra*.

137. Economists of the Commerce Department estimate that national income in 1942 will reach 113 billion, an increase of eighteen and a half billion, or about 19.6 per cent over 1941. They also predict a rise in the general price level of twelve per cent. See N. Y. Times, March 8, 1942, § 1, p. 39, col. 4.

138. Rationing offers an additional, more drastic control. See Drucker, *We Must Accept Rationing* (1941) 184 HARPER'S MAGAZINE 1. Great Britain has adopted a program of rationing. Crowther, *How Britain Fights Inflation* (1942) 106 NEW REPUBLIC 74.

139. This means that the chances for success in our efforts to control inflation depend not upon the Office of Price Administration alone, but also in part upon the 1942 Tax Statutes. If they penalize consumer incomes, in favor of corporate and individual savings, and do so in a forthright way, we will be allowed to hope that war financing will not be an unmixed economic evil. See Letter to Editor from Gustav Stolper, N. Y. Times, March 15, 1942, § 4, p. 8, col. 5.