Subject Index.

	Page
Opinions below	1
Jurisdiction	2
Statutes and regulations involved	2
Statement of the case	2
Specification of errors	4
Summary of argument	4
Argument	7
Point I	7
Point II	9
Point III	30
Point IV	34
Conclusion	38

Table of Authorities Cited.

Cases.

Bailey v. Alabama, 219 U.S. 219	34
Binderup v. Pathe Exchange, 263 U.S. 291	35
Bolles v. Outing Co., 175 U.S. 262	9
Bowles v. United States, 319 U.S. 33	27
Brown v. Wyatt Food Stores, 49 F. Supp. 538	8
Buder v. First Nat. Bank in St. Louis, 16 F. (2d) 990; cert. den. 274 U.S. 743	25
Callan v. Wilson, 127 U.S. 540	30, 31*n.*, 32*n.*
Capital Traction Co. v. Hof, 174 U.S. 1	30, 32
Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459	21
Clinkenbeard v. United States, 21 Wall. 65	8
Coe v. Armour Fertilizer Works, 237 U.S. 413	20
Commonwealth v. Anthes, 5 Gray (Mass.) 185	33*n.*, 37
Crowell v. Benson, 285 U.S. 22	7
Dartmouth College Case, 4 Wheat. 518	18
District of Columbia v. Clawans, 282 U.S. 63	30

	Page
District of Columbia v. Clawans, 300 U.S. 617	30, 31
District of Columbia v. Colts, 282 U.S. 63	30
Dowdell v. United States, 221 U.S. 325	34
Euclid v. Ambler Realty Co., 272 U.S. 365	25
Foltz v. St. Louis & S.F. Ry. Co., 60 Fed. 316	35
Freeman v. United States, 227 Fed. 732	32
Hodges v. Easton, 106 U.S. 408	32
Hopkins v. Commonwealth, 3 Met. 460	35
Hovey v. Elliott, 167 U.S. 409	29
Kansas City Southern Ry. Co. v. Ogden Levee District, 15 F. (2d) 637	17
Krichman v. United States, 256 U.S. 363	9
Kuhnert v. United States, 36 F. Supp. 798; aff. 124 Fed. (2d) 824	36
Lisenba v. California, 314 U.S. 219	10
Lockerty v. Phillips, 319 U.S. 182	8, 24
Londoner v. Denver, 210 U.S. 373	21, 23
Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129	27
McGrew v. Industrial Commission, 96 Utah, 203	21
McVeigh v. United States, 11 Wall. 259	28
Merrill v. Sherburne, 1 N.H. 199	37
Michaelson v. United States, 266 U.S. 42	36
Morgan v. United States, 298 U.S. 468	21
Morgan v. United States, 304 U.S. 1	18, 23
Morrow v. Corbin, 122 Tex. 553	36
Munn v. Des Moines National Bank, 18 F. (2d) 269	14, 16
Muskrat v. United States, 219 U.S. 346	36
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41	13, 22, 25
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1	7
Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292	22, 23

	Page
Opp Cotton Mills v. Administrator, 312 U.S. 126	21
Patterson v. United States, 2 Wheat. 221	32
Patton v. United States, 281 U.S. 276	31*n*, 32
Payne v. Griffin, 51 F. Supp. 588	16
People v. Ryan, 267 N.Y. 133	27
Peterson, Ex Parte, 253 U.S. 300	34
Prentis v. Atlantic Coastline Co., 211 U.S. 210	13
Rogers v. Peck, 199 U.S. 425	29
Roller v. Holly, 176 U.S. 398	20
St. Joseph Stock Yards Co. v. United States, 298 U.S. 38	18, 24
Schick v. United States, 195 U.S. 65	30
Soto v. United States, 273 Fed. 628	34
Southern Ry. Co. v. Virginia, 290 U.S. 190	20, 24
State v. Retowski, 6 W.W. Harr. (36 Del.) 330	27
Thompson v. Utah, 170 U.S. 343	32
Tot v. United States, 319 U.S. 463	33, 34
United States v. Eaton, 144 U.S. 677	26
United States v. Klein, 13 Wall. 128	36
United States v. Moreland, 258 U.S. 433	32
United States v. Slobodkin, 48 F. Supp. 913	9
United States v. Sosnowitz & Lotstein, 50 F. Supp. 586	11
Viereck v. United States, 318 U.S. 236	27
Windsor v. McVeigh, 93 U.S. 274	28
Wong Wing v. United States, 163 U.S. 228	31

Constitution, Statutes, Etc.

U.S. Constitution, Art. III, Sec. 1	34, 35
U.S. Constitution, Art. III, Sec. 2	36
U.S. Constitution, 5th Amendment	4, 5, 9, 17
U.S. Constitution, 6th Amendment	4, 6, 30

Page

Emergency Price Control Act of 1942 (Act of Jan. 20, 1942, 56 Stat. 23, 50 U.S.C., App., Supp. II, Sec. 901 et seq.) 2 et seq.

Judicial Code, sec. 240(a) as amended by Act of Feb. 13, 1925 2

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) 2, 3, 4

Hearings before the Committee on Agriculture, House of Representatives, 78th Cong., 1st Sess., Oct. 26, 1943 27*n.*

Hearings before the Committee on Banking and Currency, House of Representatives, 77th Cong., First Sess., on H.R. 5479 12, 17*n.*

Hearings before the Committee on Banking and Currency, U.S. Senate, 77th Cong., 1st Sess., on H.R. 5990 15, 17

Hearings before the Select Committee to Conduct a Study and Investigation, House of Representatives, 78th Cong., 1st Sess., on H.R. 18, Part 5 (Unrevised) 26*n.*

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Report of Attorney General's Committee on Administrative Procedure, Senate Doc. No. 8, 77th Cong., 1st Sess., 406 23

Second Intermediate Report of the Select Committee to Investigate Executive Agencies, House of Representatives, 78th Cong., 1st Sess. 16, 24*n.*

Third Intermediate Report of the Select Committee to Investigate Executive Agencies, House of Representatives, 78th Cong., 1st Sess., Nov. 29, 1943 24*n.*, 27*n.*

Page

TEXTBOOKS.

Administrative Features of the Emergency Price Control Act, 28 Va. L. Rev. 991 13, 21, 30*n.*

American Economic Mobilization, 55 Harv. L. Rev. 427 13

Application of Constitutional Guarantees of Jury Trial to the Administrative Process, 56 Harv. L. Rev. 282 31, 33*n.*

Berger, Raoul, Exhaustion of Administrative Remedies, 48 Yale L.J. 981 14

4 Blackstone's Commentaries, 350 37

Davis, The Requirement of Opportunity to be Heard in the Administrative Process, 51 Yale L.J. 1093 20

Frankfurter and Corcoran, Petty Federal Offenses and Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 30

Freund, Administrative Powers Over Persons and Property 20

Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259 21

Gellhorn, Administrative Law — Cases and Comments 25

Judicial Review of Price Orders Under the Emergency Price Control Act, 37 Ill. L. Rev. 256 11

Legal and Economic Aspects of Wartime Price Control, 51 Yale L.J. 819 24, 34

Nathanson, The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review, 9 Law and Contemporary Problems, 60 12

Note, 114 A.L.R. 435 32

Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts, 51 Harv. L. Rev. 1251 11*n.*, 25

Page

Rava, Procedure in Emergency Price Fixing, 40 Mich. L. Rev. 937 23

Reid & Hatton, Price Control and National Defense, 36 Ill. L. Rev. 255 23

Schwenk, The Administrative Crime, 42 Mich. L. Rev. 51 27

Stason, Timing of Judicial Redress from Erroneous Administrative Action, 25 Minn. L. Rev. 560 10, 14, 15, 25

Validity of Federal Departmental Regulations Involving Criminal Responsibility, 35 Harv. L. Rev. 952 26

Supreme Court of the United States.

October Term, 1943.

No. 374.

ALBERT YAKUS, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

PETITIONER'S BRIEF.

Opinions Below.

No opinion was rendered by either the District Court for the District of Massachusetts or by the Circuit Court of Appeals for the First Circuit in this case. Their rulings on the questions here presented were governed by respective opinions filed in the case of *Benjamin Rottenberg and B. Rottenberg, Inc.*, which arose in the same District, was tried separately in the District Court, but on appeal was heard together with this case in the Circuit Court, and is now before this Court on writ of certiorari (*Rottenberg* v. *United States*, No. 375, present term), having been consolidated with this case for argument. The memorandum opinion of the District Court in the *Rottenberg* case is

reported in 48 F. Supp. 913, and appears at pages 59 to 67 of the record in that case. The opinion of the Circuit Court in that case is reported in 137 F. (2d) 850, and appears in the present record at pages 42 to 56.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered on August 23, 1943 (R. 56). The petition for a writ of certiorari was filed in this Court on September 22, 1943, and allowed on November 8, 1943. Jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

Statutes and Regulations Involved.

The case involves the Emergency Price Control Act of 1942 (Act of January 20, 1942, 56 Stat. 23, 50 U.S. Code, Appendix, Supp. II, Sec. 901 *et seq.*), as amended by the Act of October 2, 1942 (56 Stat. 765, 50 U.S. Code, Appendix, Supp. II, Sec. 961 *et seq.*), and Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), issued thereunder on December 10, 1942.

Copies of the Emergency Price Control Act and the Act of October 2, 1942, are contained in the Appendix.

Statement of the Case.

The petitioner seeks a review of a judgment of the Circuit Court of Appeals for the First Circuit (R. 56), which affirmed a judgment of conviction against the petitioner in the District Court for the District of Massachusetts (R. 12-13) under an indictment charging sales of wholesale cuts

of beef at prices above the maximum prices determined under Revised Maximum Price Regulation No. 169, as amended (R. 1-5).

At various appropriate stages in the proceedings in the District Court the petitioner challenged the constitutionality of the Act and the validity of the Regulation as follows:

(1) Motion to quash the indictment (R. 5-10);
(2) Amended motion to quash the indictment (R. 10-12);
(3) Offer of proof through the testimony of Prentiss M. Brown, Price Administrator, that the Regulation did not provide an equitable margin of profit, thereby violating the Inflation Control Act of 1942 (56 Stat. 765) (R. 18-19);
(4) Offer of proof of detailed economic data designed to show that the Regulation was arbitrary and capricious and would require the defendant, in the efficient conduct of his business, to sell his product at a price lower than the actual cost of production (R. 19-24);
(5) Requests for instructions to the jury (R. 24-28);
(6) Motion in arrest of judgment (R. 13-16).

The District Court upheld the Act. It refused to allow the proffered testimony to be given or to consider a defense based upon the invalidity of the Regulation on the ground that Sec. 204(d) of the Act deprived it of jurisdiction to entertain such a defense (R. 18-19 and 23-24). The District Court adhered to this position in its charge to the jury (R. 31) and its rulings on requests submitted by the petitioner (R. 24) and on motion in arrest of judgment (R. 15-16).

The Circuit Court of Appeals, in affirming the conviction, held that Sec. 204(d) of the Act operates to bar the attack

sought to be made by the petitioner against the Regulation; and that Sec. 204(d) as so construed is constitutional (R. 42-56).

The Regulation was issued on December 10, 1942 (7 Fed. Reg. 10381). The petitioner was indicted on February 24, 1943 (R. 5). He did not within a period of sixty days after the issuance of the Regulation file a protest with the Price Administrator under Sec. 203(a) of the Act.

Specification of Errors.

The errors assigned (R. 39-40), upon all of which the petitioner relies, present in substance the following questions:

1. Whether Sec. 204(d) of the Emergency Price Control Act of 1942 precludes a defendant from challenging by way of defense to a criminal prosecution the statutory and constitutional validity of the Regulation.

2. Whether, if Sec. 204(d) of the Act does preclude such a challenge, the Act contravenes the Fifth and Sixth Amendments of the Federal Constitution and works an unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

Summary of Argument.

Point I.

As a matter of interpretation Sec. 204(d) of the Emergency Price Control Act of 1942 does not preclude a defendant from challenging by way of defense to a criminal prosecution the statutory and constitutional validity of a regulation under the Act.

A. Inquiry should first be made whether the Act as a matter of interpretation precludes this sort of defense to the indictment.

B. An interpretation of the Act which does not preclude this sort of defense is permissible and should be adopted in the instant case.

1. The statutory arrangement would seem to so indicate.

2. The provision of the Act employs terms appropriate to equity procedure; it employs no terms peculiar to criminal procedure.

3. The provision of the Act, being in its application to the instant case a provision in a criminal statute, should be strictly construed in favor of the defendant.

POINT II.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied due process of law under the Fifth Amendment.

The statutory command against the trial court's considering the validity of the Regulation is said to find support in the doctrine of exhaustion of administrative remedies. That doctrine, however, should not be applied in the instant case.

To apply the doctrine of exhaustion of administrative remedies in the instant case constitutes a failure to observe essential fundamental fairness.

A. If the doctrine of exhaustion of administrative remedies is invoked in this case, the petitioner is left with insufficient safeguards against administrative error.

B. The doctrine of exhaustion of administrative remedies will not be applied where, as in the instant case, the available administrative relief is inadequate.

1. The sixty-day time limitation within which to apply for administrative relief renders the administrative remedy inadequate.

2. The lack of proper procedural standards renders the administrative remedy inadequate.

Applying these touchstones to the instant case, it will be seen that—

(*a*) No notice or opportunity to be heard is required prior to the issuance of a regulation.

(*b*) The protest procedure provided for in Sec. 203 of the Act, available after the issuance of the regulation, fails to meet the standards applicable to quasi-judicial administrative proceedings.

(*c*) The scope of judicial review is too restricted. Under Sec. 204(b) the Emergency Court of Appeals is limited to a determination of whether the Regulation is "in accordance with law, or is arbitrary or capricious."

3. A challenge to the constitutionality of the entire Act, such as made in the instant case, renders the administrative remedy inadequate.

C. The doctrine of exhaustion of administrative remedies is not applicable to a criminal prosecution.

Point III.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied a trial by jury under the Sixth Amendment.

A. The petitioner in the instant case is entitled to a trial by jury as a matter of constitutional right.

B. The guaranty of a trial by jury implies "a trial in that mode and according to the settled rules of the common law." And the impairment of any essential element of such a trial is forbidden.

C. Sec. 204(d) does work such impairment.

Point IV.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the regulation by way of defense to a criminal prosecution, it works unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

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 certain causes of action, yet the important related judicial function of passing on the validity of the order is denied to these same courts.

Argument.

Point I.

As a matter of interpretation Sec. 204(d) of the Emergency Price Control Act of 1942 does not preclude a defendant from challenging by way of defense to a criminal prosecution the statutory and constitutional validity of a regulation under the Act.

A. Inquiry should first be made whether the Act as a matter of interpretation precludes this sort of defense to the indictment.

As stated in *Crowell* v. *Benson,* 285 U.S. 22, 62 (1931):

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30 (1937).

B. An interpretation of the Act which does not preclude this sort of defense is permissible and should be adopted in the instant case.

1. The statutory arrangement would seem to so indicate.

Review of administrative regulations is provided for in one section of the Act (Sec. 204); criminal proceedings for violation of such regulations in an entirely different section (Sec. 205(c)). It is in the former section, and in that section only, that there appears the provision precluding consideration of the validity of a regulation. No such provision appears in the latter section dealing with criminal proceedings.

The provision is contained in a section of the Act prescribing a special procedure by which a person subject to a price regulation may invoke the judicial power to have the regulation set aside. It should, therefore, naturally be read as meaning no more than that this special statutory procedure is the only means by which such a person may maintain a suit directed to that end; that is, that no court other than the Emergency Court of Appeals shall have jurisdiction to entertain a suit by such a person to set aside any provision of the Act or of a regulation thereunder or to restrain the enforcement thereof—the situation in *Lockerty* v. *Phillips,* 319 U.S. 182 (1943). The provision should be read to apply only to a civil proceeding in which a person subject to a regulation comes into court seeking affirmative relief, not to an enforcement proceeding against such a person.

Clinkenbeard v. *United States,* 21 Wall. 65, 70-71 (1874).

Brown v. *Wyatt Food Stores,* 49 F. Supp. 538 (D.C. N.D. Tex., 1943).

2. The provision of the Act employs terms appropriate to equity procedure; it employs no terms peculiar to criminal procedure.

> "The draftsman has used apt and familiar words from the Chancellor's vocabulary, 'to stay, restrain, enjoin or set aside.' But since he has not used any terms peculiar to criminal procedure, it might be argued that criminal cases were not within the ban."
>
> Wyzanski, D.J., in *United States* v. *Slobodkin,* 48 F. Supp. 913, 916 (1943).

3. The provision of the Act, being in its application to the instant case a provision in a criminal statute, should be strictly construed in favor of the defendant.

Krichman v. *United States,* 256 U.S. 363 (1921).

The court should lean more strongly in favor of the defendant than it would if the statute were remedial.

See *Bolles* v. *Outing Co.,* 175 U.S. 262, 265 (1899).

Point II.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied due process of law under the Fifth Amendment.

The statutory command against the trial court's considering the validity of the Regulation is said to find support in the doctrine of exhaustion of administrative remedies. That doctrine, however, should not be applied in the instant case.

As stated by the Court in *Lisenba* v. *California,* 314 U.S. 219, 236 (1941):

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

To apply the doctrine of exhaustion of administrative remedies in the instant case does constitute a failure to observe essential fundamental fairness.

A. If the doctrine of exhaustion of administrative remedies is invoked in this case, the petitioner is left with insufficient safeguards against administrative error.

As stated by Stason, *Timing of Judicial Redress from Erroneous Administrative Action,* 25 Minn. L. Rev. 560:

> "The courts are groping with greater or less success for formulae to fit the wide variety of situations encountered. They are seeking orderly rules of procedure which will permit freedom of action for administrative agencies engaged in enforcing their respective statutes, and which, at the same time, will provide adequate protection from administrative errors."

The Emergency Price Control Act of 1942 represents a departure from established administrative procedure in providing administrative procedures never before so combined, and each of which sharply cuts down the protection afforded a person subject to the administrative process. For the Act implements its administrative procedure not merely with the doctrine of exhaustion of administrative remedies, requiring both prior resort to the administra-

tive tribunal and the exhaustion of all available administrative remedies before invoking judicial relief, but also with a narrowly restricted period of time within which administrative relief may be sought and after which no remedy whatever is available—"administrative impregnability by estoppel"[1]—together with a denial of power to stay an order pending appeal.[2]

With respect to the last of these features it was said in *United States* v. *Sosnowitz & Lotstein,* 50 F. Supp. 586, 588-589 (D.C. D. Conn., 1943):

> "To be sure, a citizen adversely affected by railroad rates prescribed by the Interstate Commerce Commission may not only apply to a court to have the rates set aside but he may, at least in a proper case, under the Urgent Deficiencies Act, obtain a temporary stay thereof, thereby avoiding the impact of criminal sanctions while his challenge to the validity of the rates is in progress . . . This same safeguard was carried over into the Communications Act of 1934 . . . and into the Packers and Stockyards Act . . .
>
> "And this familiar and salutary technique of administrative review, doubtless due to the press of present urgencies, has been discarded by the draftsmen of E.P.C.A."

And, as it was pointed out in 37 Ill. L. Rev. 256, 264, *Judicial Review of Price Orders under the Emergency Price Control Act:*

> "The Price Control Act also differs radically from other recent statutes in this respect. In the Securities Act of 1933, the Securities Exchange Act of 1934, and

[1] Note, *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts,* 51 Harv. L. Rev. 1251, 1264.

[2] Sections 204(b), 204(c), 204(d).

the Public Utility Holding Company Act, the reviewing court can stay the effectiveness of an order pending appeal, and there is no provision in the jurisdiction of offenses sections prohibiting the enforcing court from passing on the validity of the orders. Under the Fair Labor Standards Act, enforcing courts are not prohibited from considering the constitutionality and validity of wage orders. The same is true under the AAA of 1938, and, in addition, the farmer who has paid a penalty for exceeding what turned out to be an invalid quota may sue for refund.''

And also at pages 263-264 of the same article:

> ''The practical result, then, of the exclusive jurisdiction provision is to give to administrative action a finality hitherto unknown. It finds no precedent in other statutes vesting exclusive jurisdiction in certain courts, as for example, the National Labor Relations Act. The vesting of exclusive jurisdiction in the Circuit Court of Appeals under that act is scarcely analogous here, for there is no criminal penalty for violation of an order of the N.L.R.B. until the Board has petitioned a Circuit Court for enforcement of its order. Thus an order must be obtained from the court which also has the exclusive right to review the Board's order. With enforcement and review in the same court, there is no danger of enforcing what may turn out later to be an invalid order.''

It should be noted, moreover, that under the Act the issuance of regulations is a quasi-legislative action for which no notice is said to be required. See *Hearings before the Committee on Banking and Currency,* House of Representatives, 77th Congress, First Session, on H.R. 5479, pp. 328-333; Nathanson, *The Emergency Price Con-*

trol Act of 1942: Administrative Procedure and Judicial Review, 9 Law and Contemporary Problems, 60, 62.

The cases invoking the doctrine of exhaustion of administrative remedies, however, are cases dealing with quasi-judicial action, for which notice must be given to those interested before action is taken. See, for example, *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938); *Prentis* v. *Atlantic Coastline Co.,* 211 U.S. 210 (1908). The fairness of applying the doctrine to the instant case is, therefore, to say the least, open to doubt. See *American Economic Mobilization,* 55 Harv. L. Rev. 427, 493; *Administrative Features of the Emergency Price Control Act,* 28 Va. L. Rev. 991, 999.

Although, of course, any one of these administrative features singly, or perhaps in combination with another, would not so restrict as to constitute a denial of due process, the cumulative deprivations of all these features in combination do work such a denial. The result of such a combination is a situation in which, once sixty days after the promulgation of the regulation has elapsed, there is no tribunal to which a person subject to the regulation may turn to seek relief and in which an enforcing court cannot consider the validity of the regulation which it is enforcing and for the violation of which it may fine and imprison.

B. The doctrine of exhaustion of administrative remedies will not be applied where, as in the instant case, the available administrative relief is inadequate.

The rule which requires a litigant to exhaust administrative remedies before he may invoke judicial relief is in essence a rule of judicial administration in the field of equity jurisdiction. See *Myers* v. *Bethlehem Corp.,* 303 U.S. 41, 51 (1938).

> "The tendency to assimilate the presence of an administrative remedy to the availability of an adequate

remedy at law, clearly articulated in the later cases, made itself felt from the outset. From the beginning, the exhaustion rule was formulated in terms of *equity jurisdiction,* that is to say, a litigant who failed to avail himself of administrative avenues of redress could not 'maintain a suit in equity'."

> Raoul Berger, *Exhaustion of Administrative Remedies,* 48 Yale L.J. 981, 985-986.

1. The sixty-day time limitation within which to apply for administrative relief renders the administrative remedy inadequate.

The harsh doctrine of estoppel barring a collateral attack upon a void order by a statutory time limit has hitherto been confined to the tax field. See Stason, *op. cit.,* 580. In that field there is a certain justification for invoking such a penalty, harsh though it may be. Public revenues must be fixed and certain; the account books of the governmental body must be closed.

Even in the tax field this harsh doctrine will not invariably be applied. Even there the time limit must be sufficient to allow the collection of evidence and preparation of the case. If the allotted time is insufficient for that purpose, judicial relief will be afforded.

> *Munn* v. *Des Moines National Bank,* 18 F. (2d) 269 (C.C.A. 8th, 1927).

"If, however, in other areas of administrative law reasons of public need of summary disposition of the cases are not present, the doctrine is too harsh to be applied. In such areas of administrative action, if the administrative remedy is still open, the doctrine of exhaustion should be applied and the party litigant should be forced to complete the administrative process. If, however, the administrative door is closed

by lapse of time, the litigant should be permitted his judicial redress regardless of the failure to take all administrative steps except in cases where his failure to take such steps is the result of gross carelessness or deliberate design."

Stason, *op. cit.*, 580-581.

The reasons advanced for implementing the Emergency Price Control Act with this harsh and drastic penalty appear to be scarcely compelling. As stated by David Ginsburg, Esq., general counsel of O.P.A. in the brief submitted at the Price Control Hearings of the Senate and printed as part of the record of those hearings, it is that this procedure assures timely readjustment of ceilings—by imposing the sixty-day limitation the Administrator will learn immediately what practical effect his order has.[3]

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[3] *Hearings before the Committee on Banking and Currency,* United States Senate, 77th Congress, First Session, on H.R. 5990, p. 250:

"5. The protest procedure assures timely readjustment of ceilings.—A comprehensive picture of the operation of any price ceiling on business is essential for the equitable treatment of individual business and for effective price control. By providing for the filing of protests within 60 days after the issuance of a price ceiling regulation, the committee bill assures that the Administrator will learn immediately what practical effect his order has. Formal hearings on single protests would supply the Administrator with information piecemeal. Only after large numbers of businessmen had appeared in successive adversary proceedings could the Administrator begin to get an overall view of the regulated industry. It is wholly impractical to attempt to judge the needs of a large group of businessmen in a proceeding between the Administrator and a single member of the group. The committee provision for simultaneous presentation of the views of all the business affected makes possible adjustments in the ceiling which are both equitable for individual businessmen and consistent with a reasoned and coherent price program.

"The selection by the committee of a flexible procedure, adapted to the realities of regulation and designed especially for the presen-

In view of the fact that the order of the Administrator is effective when issued, and is issued without notice to or opportunity to be heard by those subject to it, and in view of the fact that this is an entirely new procedure and technique, thereby making it probable that many of those persons (particularly the small business man, such as this petitioner) will be unaware of the very existence of the order, and will certainly not know of the sixty-day limitation,[4] the reasons stated appear disingenuous.[5] A rapid, accurate readjustment of ceilings protecting all elements in the business community is to be assured by rapidly and decisively cutting off all rights to any readjustment whatsoever.

In any event, the time allotted for the collection of evidence and preparation of the case, sixty days, is insufficient for that purpose.

If, in accordance with the decision in the *Munn* case, *supra,* the defendant must be allowed a sufficient time in which to collect his evidence and to prepare his case, the inadequacy of a sixty-day period for that purpose is apparent.

It should first of all be borne in mind that the full sixty-day period may not be available in any given case—the

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tation of economic data in the most informative fashion, assures that the price control authority will function rapidly, accurately, and with proper regard for all elements in the business community."

[4] See *Payne* v. *Griffin,* 51 F. Supp. 588, 596 (D.C. M.D. Ga., 1943).

[5] See *Second Intermediate Report of the Select Committee to Investigate Executive Agencies,* House of Representatives, 78th Cong., First Sess., p. 4:

". . . one of the purposes of the legislation which they [the Price Administrator and his counsel] drafted was to place, so far as possible, final and non-reviewable power and authority in the hands of the Administrator to be created by the proposed legislation."

person desiring to protest may not have learned of the regulation or become familiar with its provisions and its impact upon him until well after its issuance—particularly is this true of so involved and complex a regulation as that in the instant case.

Secondly, it must be realized that the protest is to the Regulation itself—a regulation which covers not merely the protestant's business, but the entire industry which is sought to be regulated. The full comprehension of such a regulation, the Circuit Court in its decision in the instant case has declared (R. 51), "is a lifetime study." The proponents of the Act in the Congressional Hearings have likewise adverted to the infinite complexity of the subject-matter.

> ". . . the matters in dispute involve the application of expert and informed judgment to complex economic facts. . ."[6]

> "In protest proceedings, however, the facts are impersonal and endlessly complex."[7]

2. The lack of proper procedural standards renders the administrative remedy inadequate.

> *Kansas City Southern Ry. Co.* v. *Ogden Levee District,* 15 F. (2d) 637 (C.C.A. 8th, 1926).

The procedural provisions of the Act do not afford due process of law under the Fifth Amendment.

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[6] *Hearings before the Committee on Banking and Currency,* House of Representatives, 77th Congress, First Session, on H.R. 5479, at p. 329.

[7] *Hearings before the Committee on Banking and Currency,* United States Senate, 77th Congress, First Session, on H.R. 5990, at p. 250.

Daniel Webster's often-quoted definition of due process appears in the *Dartmouth College Case,* 4 Wheat. 518, 581 (1819):

> "a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

As applied to the field of administrative regulation this has been stated by Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 73 (1935):

> "The inexorable safeguard which the due process clause assures is . . . that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

As stated by Mr. Chief Justice Hughes in *Morgan* v. *United States,* 304 U.S. 1, 14-15, 18-19:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the

administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'.

. . . .

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Applying these touchstones to the instant case, it will be seen that

(*a*) No notice or opportunity to be heard is required prior to the issuance of a regulation.

Under Sec. 2(a) the Administrator is given the power, whenever in his judgment the price of a commodity has risen or threatens to rise to an extent or in a manner inconsistent with the purposes of the Act, by regulation to establish such maximum price as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Before issuing any regulation, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected. Any hearing, therefore, which may be given prior to the issuance of the regulation is wholly discretionary.

The right to a hearing, however, must rest on a basis more substantial than favor or discretion. See *Roller* v. *Holly,* 176 U.S. 398, 409 (1900). A hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law that the Constitution requires. See *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 424 (1915).

It has been urged, however, that no hearing need be provided because of the analogy to legislative enactments without hearing—since the legislature may act without notice and opportunity to be heard, the administrative agency to which legislative power has been delegated may act likewise. The analogy, however, is far from complete. See *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190, 197 (1933). In the legislative process before a bill becomes law it is subjected to study by a committee, hearings, debate, report, public criticism and a publicly recorded vote. See Freund, *Administrative Powers Over Persons and Property* (1928), p. 220. Moreover, as stated by Davis, *The Requirement of Opportunity to Be Heard in the Administrative Process,* 51 Yale L.J. 1093, 1115:

> "A legislature is a representative body whose members are supposed to and to a large extent do reflect the will of their constituents. Those affected by a pending measure are not denied opportunity for participation in the determination, for they are presumably represented within the legislature itself. This element of representation is usually lacking in the administrative process. When private parties tend to obstruct an agency in gaining its objectives, those parties seldom have spokesmen among the membership of the agency. If their arguments and evidence are to enter into the formulation of the governmental action, special procedural devices must be made avail-

able—something in addition to what a legislature provides."

Denominating the proceeding as "legislative," moreover, does not solve the problem. In *Morgan* v. *United States,* 298 U.S. 468, 479 (1936), the Court did require a judicial hearing although it termed the rate-making proceeding (a species of price fixing) as legislative in character. An opportunity for a hearing must be afforded. *Londoner* v. *Denver,* 210 U.S. 373 (1908). *Chesebro* v. *Los Angeles County Flood Control District,* 306 U.S. 459 (1939). *McGrew* v. *Industrial Commission,* 96 Utah, 203 (1938). And such opportunity must be afforded before the regulation becomes effective. See *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 153 (1941).

The character of the enforcement which attaches to a regulation must be borne in mind in considering the procedure adapted to its formulation. As stated by Fuchs, *Procedure in Administrative Rule-Making,* 52 Harv. L. Rev. 259, 271-272:

> "When, however, a regulation presents affected parties with the alternative of compliance or loss of property or liberty, with only limited opportunity or none at all to challenge its correctness, the need is evident for an antecedent opportunity to influence its content or be heard in regard to it."

In the instant case, since the Act provides for "stringent criminal sanctions" [8] with a most narrowly restricted opportunity to challenge the correctness of the Regulation, the need for opportunity to influence its content and to be heard prior to its becoming effective is a most urgent one.

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[8] *Administrative Features of the Emergency Price Control Act,* 28 Va. L. Rev. 991, 1000.

To the argument of the necessity for haste there is the statement of Mr. Justice Cardozo in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 304-305:

> "The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

(*b*) The protest procedure provided for in Sec. 203 of the Act, available after the issuance of the regulation, fails to meet the standards applicable to quasi-judicial administrative proceedings.

It should be noted that in *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 47 (1938), the Court in passing upon the adequacy of the available administrative remedy emphasized that—

> "There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied."

(*i*) There is no hearing of right. By Sec. 203(c) "Any proceeding under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs." In other words, a hearing is not of right and the Administrator may limit the proceedings to written evidence only. Such procedure does

not satisfy the requisites of due process.[9] *Londoner* v. *Denver,* 210 U.S. 373 (1908). See Rava, *Procedure in Emergency Price Fixing,* 40 Mich. L. Rev. 937, 963-964; and Reid and Hatton, *Price Control and National Defense,* 36 Ill. L. Rev. 255, 289.

(*ii*) The Administrator may consider evidence of which the protestant is not informed. By Sec. 203(b) the Administrator may take official notice of economic data and other facts, including facts found by him in his studies and investigations. And the protestant need not be informed of the Administrator's contentions, except in the decision of denial—Sec. 203(b). The protestant is thus deprived of a *viva voce* hearing, of the rights of cross-examination, of the opportunity to meet and rebut adverse evidence, and of presenting an argument based upon a knowledge of all the evidence and the contentions of the Administrator. Such procedure denies due process of law.

> *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292 (1937).
> *Morgan* v. *United States,* 304 U.S. 1 (1938); 298 U.S. 468 (1936).

(*iii*) Speedy administrative determination is not assured. Sec. 203(a) provides that within thirty days after the filing of the protest "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present

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[9] The shortened procedure of the Interstate Commerce Commission sometimes cited as a precedent may be employed only with consent of the parties. If any of the parties, including interveners, refuses consent, hearing must be held. See *Report of Attorney General's Committee on Administrative Procedure,* Senate Document No. 8, 77th Congress, 1st Session (1941), 406.

further evidence in connection therewith." This provision is scarcely effective because no further time limit is fixed within which final action must be taken.[10] It should be weighed in the light of the fact that no stay of the Regulation may be granted save by the Emergency Court of Appeals upon judicial review of a denial of the protest. Sec. 204(d). *Lockerty* v. *Phillips,* 319 U.S. 182 (1943). If, as claimed in the instant case, the maximum prices set by the Regulation are confiscatory, irreparable injury must ensue.

(*c*) The scope of judicial review is too restricted. Under Sec. 204(b) the Emergency Court of Appeals is limited to a determination of whether the Regulation is "in accordance with law, or is arbitrary or capricious." No inquiry may be made into the correctness of the Regulation even to see if it is supported by substantial evidence. Since validity of a regulation depends on facts concerning an entire industry, a single violator in that industry may be in no position adequately to contest the regulation. See *Legal and Economic Aspects of Wartime Price Control,* 51 Yale L.J. 819, 846. Such a limited review does not accord with due process of law.

Southern Railway Co. v. *Virginia,* 290 U.S. 190 (1933).

St. Joseph Stock Yards Co. v. *United States,* 298 U.S. 38 (1935).

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[10] In practice this provision appears to have had an unfortunate history of being used by the Administrator for delay. See *Second Intermediate Report of the Select Committee to Investigate Executive Agencies,* House of Representatives, 78th Congress, 1st Session, pp. 6-7; and the *Third Intermediate Report* of that Committee, pp. 3-4.

3. A challenge to the constitutionality of the entire Act, such as made in the instant case, renders the administrative remedy inadequate.

Prior resort to the administrative body is not required when the constitutionality of an entire statute is questioned rather than the validity of some regulation under the statute. *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926). *Buder* v. *First Nat. Bank in St. Louis,* 16 F. (2d) 990 (C.C.A. 8th, 1927); cert. den. 274 U.S. 743 (1927). See *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts,* 51 Harv. L. Rev. 1251, 1263. See also Stason, *Timing of Judicial Redress from Erroneous Administrative Action,* 25 Minn. L. Rev. 560, 575.

C. The doctrine of exhaustion of administrative remedies is not applicable to a criminal prosecution.

1. It is, as we have seen, in essence a rule of equity jurisdiction invoked by the courts in civil proceedings where the litigant is seeking affirmative relief—usually invoking the extraordinary injunctive powers of the court. See *Myers* v. *Bethlehem Corp.,* 303 U.S. 41, 51, note 9 (1938).

Its very concept is alien to the field of our criminal law, where, far from restricting the opportunities of the defense, our law sedulously seeks to safeguard those opportunities.

2. As a matter of policy the doctrine has no place in the criminal law.

As was stated by Gellhorn, *Administrative Law—Cases and Comments,* p. 449:

> "Imprisonment as a deterrent of anti-social behavior is traditionally the earmark of the criminal law. The processes of the criminal law, fortified by federal

> and state constitutional provisions, are calculated to furnish safeguards against arbitrary deprivations of liberty of the person. So long as imprisonment may be the sanction, should we not be able to insist that, however the statute may dominate the proceeding, it is in fact and in custom a criminal proceeding, to be disposed of in accordance with the practice developed in that branch of jurisprudence?"

3. This policy is applied in passing upon the validity of administrative regulations carrying criminal sanctions.

As stated in the Note, *Validity of Federal Departmental Regulations Involving Criminal Responsibility,* 35 Harv. L. Rev. 952:

> "Assuming that the defendant has violated a departmental regulation, for which the government seeks to hold him criminally responsible, the court must determine whether the regulation is beyond the powers conferred upon the department by Congress. Since the purpose of the exercise by the executive of regulatory functions is to enable Congress more effectively to express its will, the rule-making power cannot be exercised beyond the limits exercised by Congress."

The courts will, if the regulation is enforceable by penal sanction, carefully scrutinize the regulation to determine whether or not it comes within the scope of the authority conferred by the statute. If it does not, it will be held void and of no effect.[11] *United States* v. *Eaton,* 144 U.S. 677

[11] As to the admitted invalidity of the Regulation in the instant case see Testimony of Prentiss M. Brown, Price Administrator, at *Hearing before Subcommittee of Committee on Agriculture and Forestry of the United States Senate,* March 3, 1943, pp. 749-750 and pp. 760-761 (Rottenberg Record, pp. 25-26); see also his testimony at *Hearings before the Select Committee to Conduct a Study*

(1891). *State* v. *Retowski,* 6 W. W. Harr. (36 Del.) 330 (1934). *People* v. *Ryan,* 267 N.Y. 133 (1935). See *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 134 (1936), stating that a regulation which "operates to create a rule out of harmony with the statute, is a mere nullity;" see also dissenting opinion of Mr. Justice Jackson in *Bowles* v. *United States,* 319 U.S. 33, 38 (1943), stating:

> "But I would not readily assume that . . . Courts must convict and punish one for disobedience of an unlawful order by whomsoever made"—

and see also *Viereck* v. *United States,* 318 U.S. 236, 241 (1943), stating:

> "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress"—

and see also Schwenk, *The Administrative Crime,* 42 Mich. L. Rev. 51, 64.

4. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable.

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and Investigation of the National Defense Program in its Relation to Small Business in the United States, House of Representatives, 78th Congress, 1st Session, on H.R. 18, April 8 and 9, 1943, Part 5, (Unrevised); see also testimony of R. V. Gilbert, Economic Adviser to the Administrator at *Hearings before the Committee on Agriculture,* House of Representatives, 78th Congress, 1st Session, October 26, 1943, pp. 37 and 38; and see also *Third Intermediate Report of the Select Committee to Investigate Executive Agencies,* House of Representatives, 78th Congress, 1st Session, November 29, 1943, pp. 1 and 3.

In the cases analogous to penal proceedings, dealing with the seizure and confiscation of the property of rebels, arising out of the stresses of another great national war crisis, this Court has so declared.

> *McVeigh* v. *United States,* 11 Wall. 259 (1870).
> *Windsor* v. *McVeigh,* 93 U.S. 274 (1876).

In each of these cases the United States, under an Act of Congress passed in 1862, filed a libel in a District Court for the forfeiture of the defendant's property, alleging that the defendant was engaged in armed rebellion against the United States. The defendant appeared by counsel, made a claim to the property and filed an answer. The court, on motion of the United States Attorney, struck the claim, answer and appearance from the files, as it appeared from the answer filed that the defendant was a rebel.

Subsequently the defendant was defaulted and a decree of condemnation entered.

In the first of these cases Mr. Justice Swayne said at page 267:

> "The order in effect denied the respondent a hearing. It is alleged that he was an alien enemy, and hence could have no *locus standi* in the forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And in the second of these cases Mr. Justice Field said at page 277:

> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting

his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus entered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

Compare *Hovey* v. *Elliott,* 167 U.S. 409 (1897).
And see *Rogers* v. *Peck,* 199 U.S. 425, 435 (1905):

> "Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself *in the prosecution.*" (Emphasis supplied.)

It is submitted that the principle of these cases should be applied to the instant case.

POINT III.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, the defendant is denied a trial by jury under the Sixth Amendment.

A. The petitioner in the instant case is entitled to a trial by jury as a matter of constitutional right.

Callan v. *Wilson,* 127 U.S. 540 (1887).
District of Columbia v. *Colts,* 282 U.S. 63 (1930).
See *Schick* v. *United States,* 195 U.S. 65 (1904).
See also *District of Columbia* v. *Clawans,* 300 U.S. 617 (1937).
See also Frankfurter and Corcoran, *Petty Federal Offenses and Constitutional Guaranty of Trial by Jury,* 39 Harv. L. Rev. 917.
Cf. *Capital Traction Co.* v. *Hof,* 174 U.S. 1 (1899).

The crime charged here is not a petty offense. It is both an "offense of a grave character, affecting the public at large,"[12] and the punishment prescribed is "stringent."[13] Either one of these elements is sufficient.

See *District of Columbia* v. *Clawans,* 282 U.S. 63 (1930).

The gravity of the situation which the Act was intended to meet need scarcely be labored. See *Message from the President of the United States Transmitting Request for Legislation Stabilizing the Price of Various Commodities and Rentals,* House Document 332, 77th Congress, 1st Session, dealing with the threat of inflation to the defense effort and the necessity for its control.

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[12] *Callan* v. *Wilson,* 127 U.S. 540, 556 (1887).

[13] *Administrative Features of the Emergency Price Control Act,* 28 Va. L. Rev. 991, 1000.

The punishment prescribed was severe. Sec. 205(a) prescribes imprisonment of not more than one year or fine of not more than $5000, or both. In *District of Columbia* v. *Clawans,* 300 U.S. 617, 625 (1937), the Court felt that a punishment of not more than ninety days applicable to an otherwise trivial offense left the question "not free from doubt."

B. The guaranty of a trial by jury implies "a trial in that mode and according to the settled rules of the common law."[14] And the impairment of any essential element of such a trial is forbidden.[15]

It therefore follows that, as was stated in the note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process,* 56 Harv. L. Rev. 282:

> "A judicial determination that a constitutional guarantee of trial by jury is applicable to a statute attempting to establish an administrative procedure must of necessity result, if not in the complete abandonment of the plan, in a substantial reduction in the powers and effectiveness of the Administrative body. This is so because the trial by jury contemplated in the federal and state constitutions not only requires the submission of questions of fact to a group of impartial men, but demands a trial in a court with a judge to guide the jury in the performance of its functions."

In *Wong Wing* v. *United States,* 163 U.S. 228 (1936), it was held that a Congressional Act providing for administrative action enforceable by severe criminal sanctions must, to be valid, provide for a *judicial* trial to establish the guilt of the accused. The Court stated at page 237:

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[14] *Callan* v. *Wilson,* 127 U.S. 540, 549 (1887).

[15] *Patton* v. *United States,* 281 U.S. 276 (1930).

> "It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

See dissenting opinion of Mr. Justice Brandeis in *United States* v. *Moreland,* 258 U.S. 433, 443 (1922).

The cases, in the words of the Court at page 290 in *Patton* v. *United States, supra,* "demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and make clear that a destruction of one of the essential elements has the effect of abridging the right in contravention to the Constitution."

Thus a defendant enjoying the right of jury trial is secured "the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged." [16] He cannot be required to try his case first before a tribunal without a jury, with the right of jury trial on appeal.[17]

He has a right to a jury of twelve men and not less, all of whom remain identical from the beginning to the end, and he may not, if he wishes, waive that right. *Thompson* v. *Utah,* 170 U.S. 343 (1898). The continuous presence of the same judge is equally essential. *Freeman* v. *United States,* 227 Fed. 732 (C.C.A. 2d, 1915). See Note, 114 A.L.R. 435.

He has the right to have the jury pass on the entire matter in issue. If the verdict finds only a part of that which is in issue, it is bad. *Patterson* v. *United States,* 2 Wheat. 221 (1817). *Hodges* v. *Easton,* 106 U.S. 408 (1882). He is entitled to have the judge instruct the jury as to the law and to advise them on the facts. See *Capital Traction Company* v. *Hof,* 174 U.S. 1, 13-14 (1899).

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[16] *Callan* v. *Wilson,* 127 U.S. 540, 557 (1887).

[17] *Id.;* cf. *Capital Traction Co.* v. *Hof,* 174 U.S. 1 (1899).

Since every criminal prosecution inquires: "First. Is there such a law as it is alleged in the indictment that the person accused has violated? Second. Has the person accused done the act or acts, which it is alleged in the indictment he has done?" [18] it must inescapably follow from the integrity of all the essential elements of trial by jury that Congress cannot require that a defendant submit the first inquiry which must be made during the course of the prosecution to some other tribunal; nor require that the jury shall be barred from hearing facts testing the validity of the applicable law, and the judge from instructing the jury thereon.

As was stated in the concurring opinion in the case of *Tot* v. *United States,* 319 U.S. 463, 473 (1943), in connection with the question of the construction and validity of a presumption contained in the Federal Firearms Act:

> "The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of the statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense."

In order to avoid constitutional difficulties in the administrative field, legislatures have resorted to two provisions: "(1) an appeal from the administrative ruling to a court where a jury will try the factual questions de novo, (2) an appeal to a court and a jury, with the administrative finding operating as prima facie evidence of the facts contained therein." [19] The first of these devices, as has been shown, is barred in cases involving serious criminal offenses. The right of confrontation contained in the Sixth

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[18] *Commonwealth* v. *Anthes,* 5 Gray (Mass.) 185, 188 (1855).

[19] Note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process,* 56 Harv. L. Rev. 282.

Amendment bars the second. *Dowdell* v. *United States,* 221 U.S. 325 (1911). *Soto* v. *United States,* 273 Fed. 628 (C.C.A. 3d, 1921). The second of these devices is permissible in civil cases because, the findings being merely prima-facie evidence, the "parties will remain as free to call, examine, cross-examine witnesses as if the report had not been made." *Ex Parte Peterson,* 253 U.S. 300, 311 (1920).

The prohibition in Sec. 204(d) against consideration of the validity of the Regulation is analogous in its impact to a conclusive presumption against the defendant. As shown by *Tot* v. *United States,* 319 U.S. 463 (1943), even a lesser presumption would obtain short shrift.

See *Bailey* v. *Alabama,* 219 U.S. 219 (1911).

Point IV.

If Sec. 204(d) of the Act does preclude a consideration of the validity of the Regulation by way of defense to a criminal prosecution, it works unconstitutional legislative interference with the judicial branch in violation of the doctrine of separation of powers.

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 certain causes of action, yet the important related judicial function of passing on the validity of the order is denied to these same courts.

See *Legal and Economic Aspects of War Time Price Control,* 51 Yale L.J. 819, 846.

The distinction is that between the jurisdiction of a Court and its judicial power.

A. The jurisdiction of the District Court, which was established by Congress under Article III, Sec. 1, of the

Constitution, is vested by congressional enactment. Congress has determined that the District Court within the District of Massachusetts shall have jurisdiction "of all crimes and offenses cognizable under the authority of the United States." Title 28, U.S.C., Sec. 41 (2). Title 18, U.S.C., Sec. 546 provides: "The crimes and offenses defined in this title shall be cognizable in district courts of the United States." Sec. 205(c) of the Emergency Price Control Act of 1942, as amended, provides that "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act."

From the foregoing it is clear beyond controversy that Congress has vested in the District Court jurisdiction of criminal cases involving violations of this Act. Jurisdiction of a particular court is that portion of the judicial power which it has been authorized to exercise by the Constitution or by valid statutes.

> See *Hopkins* v. *Commonwealth,* 3 Met. 460, 462 (1842).
> *Foltz* v. *St. Louis & S.F. Ry. Co.,* 60 Fed. 316, 318 (1894).
> *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305 (1923).

B. The "judicial power" of the District Court, however, is derived, not from Congress, but from the Constitution. Article III, Sec. 1, of the Constitution provides as follows:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

Article III, Sec. 2, of the Constitution provides as follows:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

Judicial power is the power of a court to decide and pronounce a judgment and to carry it into effect between persons and parties who bring a case before it for decision.

See *Muskrat* v. *United States,* 219 U.S. 346, 356 (1910).
Kuhnert v. *United States,* 36 F. Supp. 798; aff. 124 Fed. (2d) 824 (C.C.A. 8th) (1941).

C. The attributes which inhere in the judicial power and are inseparable from it can neither be abrogated nor rendered practically inoperative.

In *Morrow* v. *Corbin,* 122 Tex. 553, 560 (1933), the Court said:

> "The jurisdiction of trial courts, under the Constitution, once it attaches, embraces every element of judicial power allocated to those tribunals, and includes (1) The power to hear the facts, (2) the power to decide the issues of fact made by the pleadings, (3) the power to decide the question of law involved, (4) the power to enter a judgment on the facts found in accordance with the law as determined by the court, (5) and the power to execute the judgment or sentence."

See *Michaelson* v. *United States,* 266 U.S. 42, 66-67 (1924).

See also *United States* v. *Klein,* 13 Wall. 128 (1871).

Commonwealth v. *Anthes,* 5 Gray (Mass.) 185 (1855).

Merrill v. *Sherburne,* 1 N.H. 199 (1818).

In the instant case, by precluding the trial court from considering the validity of the Regulation, Congress has abrogated the judicial power and rendered it practically inoperative. The court is unable to exercise its inherent function.

Under whatever procedural guise it be cloaked, we should recognize that we have here fundamentally the competing claims of two branches of government, the administrative and judicial branches.

We should recognize that the administrative branch is here seeking, in the name of war-time expediency, to encroach upon a field—trial by jury in a criminal case—historically and most jealously reserved to the judicial branch. We should recognize that to permit this is to deprive the citizen of a keystone in the arch of his civil liberties, one upon which his other liberties may in time depend.

As Blackstone warned in reference to a new mode for the trial of crimes:

> "And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."
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> 4 Bl. Commentaries, 350.

Conclusion.

It is therefore submitted that the District Court committed reversible error in its rulings which were affirmed by the Circuit Court of Appeals.

Wherefore the petitioner prays that the judgment be reversed.

Respectfully submitted,
ALBERT YAKUS,
By his Attorneys,
JOSEPH KRUGER,
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[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (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.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed $250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

Sec. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed $100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

[PUBLIC LAW 729—77TH CONGRESS]

[CHAPTER 578—2D SESSION]

[H. R. 7565]

AN ACT

To amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity

was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

SEC. 4. No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act, or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war.

SEC. 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of $5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week.

SEC. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe.

SEC. 7. (a) Section 1 (b) of the Emergency Price Control Act of 1942 is hereby amended by striking out "June 30, 1943" and substituting "June 30, 1944".

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

SEC. 8. (a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncooperators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended, shall, insofar as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war.

SEC. 9. (a) Section 4 (a) of the Act entitled "An Act to extend the life and increase the credit resources of the Commodity Credit Corporation, and for other purposes", approved July 1, 1941 (U. S. C., 1940 edition, Supp. I, title 15, sec. 713a-8), is amended—

(1) By inserting after the words "so as to support" a comma and the following: "during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated,".

(2) By striking out "85 per centum" and inserting in lieu thereof "90 per centum".

(3) By inserting after the word "tobacco" a comma and the word "peanuts".

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4 (a), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4 (a).

SEC. 10. When used in this Act, the terms "wages" and "salaries" shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees.

SEC. 11. Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

Approved, October 2, 1942.