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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 375.

BENJAMIN ROTTENBERG AND B. ROTTENBERG CO., INC., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The memorandum of the District Court upon motion to quash (R. 59-67) is reported in 48 F. Supp. 913. The opinion of the Circuit Court of Appeals for the First Circuit (R. 69-82) is reported in 137 F. (2d) 850.

Jurisdiction.

Petitioners filed a petition for a writ of certiorari in this Court on September 22, 1943, which was allowed on November 8, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U.S.C. Sec. 347 (a)) and Rule 38 of the Revised Rules, 1939, of the Supreme Court of the United States.

Case Stated.

The petitioners were convicted by a jury after trial in the United States District Court for the District of Massachusetts upon indictments numbered 16074 and 16075 (R. 1-13) charging them in twenty counts with the sale and delivery of wholesale beef cuts at prices higher than the maximum prices established under Revised Maximum Price Regulation No. 169, as amended, allegedly issued and effective pursuant to the provisions of the Emergency Price Control Act of 1942 (P.L. No. 421, 77th Cong.), 56 Stat. 23, as amended by the Inflation Control Act of 1942 (P.L. No. 729, 77th Cong.), 56 Stat. 765.

The petitioner Benjamin Rottenberg was sentenced on March 10, 1943, to pay a fine of $1000 and to serve a term of six months in jail (R. 26-27). The petitioner B. Rottenberg, Inc., was sentenced on the same date to pay a fine of $1000 (R. 54-55).

The petitioners filed an appeal to the United States Circuit Court of Appeals for the First Circuit upon various grounds presented in the motion to quash (R. 14-19) and amendment to motion to quash (R. 19-20); upon the Court's refusal to direct a verdict of not guilty on count 1 for variance, in each indictment, and upon the Court's refusal to give certain requests for rulings and instructions (R. 38-41); upon the Court's overruling the motion for a new trial as appears in the motion (R. 25-26), and the Court's denial of a motion in arrest of judgment upon the grounds stated therein (R. 23-24).

The Circuit Court of Appeals for the First Circuit on August 23, 1943, handed down an opinion affirming the judgments and sentences of the District Court (R. 69) and entered judgment (R. 86).

The Circuit Court of Appeals in its opinion did not consider certain questions raised by the petitioners but decided the case upon the following main grounds: *First.* That the Act challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator was a point not well taken (R. 85). *Second.* That Section 204 (d) of the Act (56 Stat. 26) deprived the United States District Court in criminal proceedings from considering the validity of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), as amended (R. 83), and the District Court, upon a criminal trial, was precluded from receiving any evidence as to the invalidity of the Regulation upon which the indictment was based (R. 79), and that persons failing to file a protest with the Administrator under Section 203 and follow the procedure for review outlined in Section 204 of the Act were precluded from challenging the validity of the Regulation when brought into court as defendants upon a criminal indictment.

Although the question was raised in the pleadings and brief that the Regulation upon which the case was tried was a joint regulation, under the Emergency Price Control Act, the Inflation Control Act and Executive Order No. 9250 (7 Fed. Reg. 7871), no consideration was given to the question of whether the Regulation was *issued* under Section 2 of the Act, which, under the Act itself, is the only case where the "exclusive jurisdiction" of the Emergency Court under Section 204 (d) applies.

The District Court refused to consider evidence submitted upon the motion for a new trial (R. 25-26) and motion in arrest of judgment (R. 23-24) to the effect that the

Price Administrator had declared that the law had not been followed in issuing the Regulation, said refusal being predicated upon the sole ground that Section 204 (d) of the Act precluded the Court from considering the validity of the Regulation (R. 68), and this question was not passed upon by the Circuit Court of Appeals.

Laws, Statutes and Regulations Involved.

This case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C., Appendix, Supp. II, Sec. 901 *et seq.*), as amended by the Inflation Control Act of October 2, 1942 (56 Stat. 765, 50 U.S.C., Appendix, Supp. II, Sec. 961 *et seq.*), which are set forth in the Appendix.

Pertinent provisions of the Emergency Price Control Act are Sections 1 (a), 2 (a), 2 (c), 2 (d), 2 (h) and 4 (a). Section 203 sets out the protest procedure and Section 204 the Emergency Court review procedure, with Section 204 (d) giving that Court exclusive jurisdiction to determine the validity of a regulation issued under Section 2. Section 205 (c) confers exclusive jurisdiction of criminal proceedings for violations of Section 4 of the Act upon the District Courts, and the penal provisions are in Section 205 (b) and definitions as used in the Act are in Section 302.

Pertinent provisions of the Inflation Control Act are Sections 1, 2 and 3, and the penal provisions are in Section 11.

There is also set forth a pertinent section of Executive Order No. 9250 (7 Fed. Reg. 7871).

Applicable sections of the Constitution of the United States are also set forth in the Appendix.

The applicable provisions of Revised Maximum Price Regulation No. 169 are Sections 1364.451 to 1364.455, inclusive (7 Fed. Reg. 10385-10392), establishing maximum prices for sales of wholesale cuts of beef, and Section

1364.401 (*id.* 10382), prohibiting sales at prices above the legal maximum.

Questions Presented.

1. Whether the Emergency Price Control Act is unconstitutional by reason of indefiniteness of the enumerated subjects in Section 1 of the Act and unlawful delegation of legislative power, contrary to Article I, Section 1, of the Constitution of the United States.

2. Whether the trial judge and the Circuit Court of Appeals were correct in their rulings that, upon a trial of a criminal indictment against the defendants, they were precluded from questioning the validity of the regulation upon which the indictment was based.

3. Where the defendants, upon their trial of a criminal indictment, raise questions of law to the effect that no crime was committed because the statute only made it a crime to violate a regulation issued under Section 2 of the Act, and the regulation upon which the indictment was founded was outside the mandate of Congress, can the Courts below pass over and refuse to rule upon such questions?

4. Where the Emergency Price Control Act of 1942 in Section 205 (c) has given jurisdiction of criminal proceedings to the District Court, can the power of that Court be limited or restricted by the provisions of Section 204 (d) so as to deprive a citizen from presenting any legal defense?

5. Whether the defendants have been deprived of their rights under the Fifth Amendment to the Constitution by taking of their liberty and property without due process of law.

6. Whether the defendants have been deprived of their rights under the Sixth Amendment to the Constitution to

be tried in the state and district wherein the crime shall have been committed, with the power to raise all defenses which they might make in any criminal case.

Summary of Argument.

1. The Emergency Price Control Act is unconstitutional by reason of the unlawful delegation of legislative power and the indefiniteness of the enumerated subjects in Section 1 of the Act, contrary to Article 1, Section 1, of the Constitution of the United States.

(*a*) The Act is unconstitutional by reason of indefiniteness of the stated purposes and embraces matters over which Congress has no right to legislate.

(*b*) Considering the enumerated purposes set out in Section 1, there has been an unlawful delegation of authority by Congress to the Administrator. The Act gives to the Administrator a discretionary right to determine the necessity, time and manner of performance of an Act as his judgment might suggest.

2. The Court below was in error in holding that it was precluded by Section 204 (d) of the Act from entertaining defense which the defendant might offer to show that the Regulation was not issued in conformity with the law.

(*a*) It was the duty of the Court to determine whether there was a legal regulation upon which the defendants could be tried and convicted of crime. The regulation was not issued under Section 2 of the Act and was outside the delegated powers of the Administrator, but the Court ruled that it had no authority to question a regulation once issued. The regulation was issued under purported authority emanating from different sources carrying different penal provisions and leaves defendants in doubt as to the exact crime of which they were convicted.

(*b*) The conferring of jurisdiction upon the District Court of criminal proceedings for violation of Section 4 of the Act carries with it all the powers incident to jurisdiction. It was the duty of the Court to determine whether its jurisdiction attached to a regulation upon which an indictment was brought, and this, of necessity, requires inquiry into the content of the regulation.

(*c*) Section 204 (d) of the Act is not applicable to criminal prosecutions and was only intended to apply to matters wherein the persons affected seek affirmative relief.

(*d*) Cases cited and contentions of the Courts below in the opinion are distinguishable.

3. If Section 204 (d) does withdraw from the District Court the right to determine in criminal proceedings whether the indictment is founded upon an illegal, arbitrary and capricious regulation, it is unconstitutional.

(*a*) In conferring jurisdiction over all criminal proceedings for violations of Section 4 of the Act, it became the obligation of the District Court to carry into effect all powers attending the exercise of its jurisdiction. Congress could not constitutionally prevent the Court from determining the legal content and effect of a regulation upon which an indictment was founded, or require the Court to approve a regulation without ruling upon its legal merits.

(*b*) The remedies provided under Sections 203 and 204 are inoperative, ineffectual and chimerical. The protest and review procedure, so far as it relates to criminal proceedings, deprives defendants of due process of law as guaranteed under the Fifth Amendment and denies the right to a full trial before a jury in the district where the crime was alleged to have been committed.

Argument.

I.

The Emergency Price Control Act is unconstitutional by reason of the unlawful delegation of legislative power; the speculative character of the facts to be found by the administrator, and the unlimited powers and discretion given to the Price Administrator to accomplish the purposes of the Act.

A.

It is contended, first, that so far as applicable to these indictments the Act itself is unconstitutional by reason of indefiniteness of stated purposes.

The general rule is stated in—

> Cooley's Constitutional Limitations (8th Ed.), vol. 1, at page 229:
>
> "The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

Section 1 (a) declares it to be in the interest of the national defense and security necessary to the effective prosecution of the present war—

> "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 dissi-

> pated 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 valued; . . ."

No further declaration has been made by Congress in the Act in reference to the above-enumerated subjects, other than to provide in Section 2:

> "Whenever in the judgment of the Price Administrator (provided for in Section 101) 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."

It must be assumed the only manner and means by which the purposes of the Act are to be carried out are by the establishing of maximum price or prices as in the judgment of the Administrator will effectuate the purposes. That is to say, every enumerated purpose in Section 1 (a) can be carried out by the establishing of prices when it has been determined by an Administrator that the price or prices of commodities have risen or threaten to rise in a manner inconsistent with the enumerated purposes.

The power of Congress provides for the common defense granted under provisions of Article 1, Section 8, and that right is not questioned. In the exercise of that power—

> "from its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law, . . ."
>
> *United States* v. *McIntosh,* 283 U.S. 605-622—

although—

> "extraordinary conditions do not create or enlarge constitutional power."
>
> *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398.

The constitutional authority for the enactment by Congress of this legislation is derived from Article 1, Section 8, Clause 18, of the Constitution, sometimes called the "implied power" or "elastic clause," which reads as follows:

> "The Congress shall have power . . . To make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."
>
> *Fairbank* v. *United States,* 181 U.S. 283.

Some thought must be given to the question of whether the purposes of Section 1 (a) are within the granted powers to Congress or reserved under the Tenth Amendment to the Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The terms "stabilize prices," "speculative," "unwarranted," and "abnormal increase in prices and rents," "and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the National Emergency," "persons with relatively fixed and limited incomes," "undue impairment of their standards of living," are terms of general and indefinite meaning, the determining of the application of which is not fact finding but the exercise of discretionary power.

There is no declaration by Congress in Section 1 (a) that the establishment of maximum price or prices will effectuate the purposes of the Act, and the direction to the Administrator to establish prices when, in his judgment, prices of commodities have risen or threaten to rise to an extent or manner inconsistent with the purposes neither supports nor contradicts the question whether the purposes of the Act can be accomplished or not.

> ". . . 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; . . ."—

is clearly without the power of Congress to legislate on, even though it be assumed that it relies upon Article 1, Section 8, of the Constitution:

> "To provide for the common defense and general welfare of the United States."

The emergency character of the Act clearly indicates that Congress acted under the power "to provide for the common defense" and did not base the legislation upon the power to provide for the "general welfare." Congress did

not intend the legislation to apply both to the "common defense" and to the "general welfare" as well.

> "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; . . ."—

is objectionable because it is discriminatory and selects as beneficiaries five separate classes of individuals, contrary to the provisions of Article 4, Section 2, of the Constitution;

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"—

and Article 9, Amendments to the Constitution of the United States:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Assuming that the purpose referred to can meet the test of constitutionality, the phrase "from undue impairment of their standard of living" presents additional objection.

Article 1, Section 8, recites:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

Here, if at all, rests the power to determine by legislative fiat (referring to the inhabitants, alien and citizen) "their

standard of living." The temporary character of the Act is indicated by its title: "The Emergency Price Control Act." Upon the ending of the present war, the Congress by resolution, or the President by proclamation, may terminate the Act.

There is no suggestion that the "standard of living" (Section 1) is to be maintained beyond the termination of the Act, which confines the decision of the Administrator or the courts to the period of the present war.

It might be logical to assume that, if an Administrator would determine and define the standard of living of America for a temporary period, he could determine it for a full generation or more.

In arriving at such a finding, the different elements of our complex life must receive full consideration, there being only one basis of legislation that meets the test of the self-evident truths as testified in the Declaration of Independence.

Dean Sutcliffe in "What About the American Standard of Living?" in Bostonia, Boston University Alumni Magazine, February, 1943, states:

> "During these hectic war days, one is constantly hearing statements as to the effect of war on the American standard of living. There are those who argue that the Lease Lend Act will so reduce the supply of goods and services available to the American people that there will, of necessity, be a lowering of the American standard.
>
> "On the other extreme are those who point out that never in the history of the American nation has the national income been so high. Who is right? No one can say since the term 'standard of living' is a generalization which is supposed to characterize 130,000,000 people, which is, of course, absurd.

> "We, as consumers, are already familiar with price control under the Office of Price Administration. These controls do protect the citizens from inflation, but at the same time do not necessarily safeguard the standard of living of the various income groups. They merely stabilize at current levels. Millions of white collar workers have not participated in the increased national income; yet prices, though now stabilized, have gone up so that the power to command commodities has decreased, . . . but they [price controls] do not protect, as some would have us believe, the standard of living for every citizen."

This analysis might be construed that there is an American standard of living, yet it leaves open the suggestion of Dean Sutcliffe that it is a "generalization which is supposed to characterize 130,000,000 people," and the writer amplifies, "of course, this is absurd."

If the Act leaves to a ministerial officer the definition of the thing to which it is to be applied, such definition must be commonly known; otherwise, it is an unlawful delegation of legislative power.

> *People* v. *Yonker* (1932), 351 Ill. 139, 184 N.E. 228.

There is no legal definition of the phrase "standard of living." It has never been a fiat of any legislation, nor adopted as a fundamental precept of any party or political organization, either in Europe or America.

Statistics have been marshalled which result in the estimate that the American standard of living is higher than that of any other nation in the world; but comparative figures or conclusions do not satisfy the inquiry. What is

the American standard of living? Upon what basis is it determined, or to be determined?

In an economic democracy, any standard of living established by the government must bear with even effect on every one entitled to the protection of that government. To classify into groups would be impractical and destructive of the government itself, which can only endure as a democracy, gathering its vitality and life from the masses which make up its numbers, and through them alone.

Could the climatic conditions of the South, which favors the people of that section, lower food and living costs because of the suburban character of its towns and cities and other economic factors which are absent in the congested industrial centers of the North, with the increased cost of foodstuffs, due to the distances from the source of food, be classified under a similar standard of living? What does the phrase mean in such a case? Assume the necessity wants of both are the same; no standard of living could equally be applied to both, because the conditions of both are different and cannot, because of natural reasons, ever be reconciled. If this be so, is it violative of the expressed limitations upon which this Government rests?

If one is satisfied with his mode of life, if his income is sufficient to support his happiness and provide for him what he believes are his essential wants, surely no law ought to compel him to enlarge upon his philosophy for the benefit of those whose views are different.

A standard is an authoritative or generally accepted model or measure by comparison with which the quantity, excellence and correctness of other things may be determined.

Living is especially offered to that which one earns in order to keep alive. In this sense the word often implies what is sufficient to live on economically, but not sufficient for luxury.

To issue a Regulation under Section 2 (a) of the Act, "to prevent undue impairment of their standard of living," where Congress has not established a "standard of living," and, as it is contended, cannot within the granted powers of the Constitution declare a "standard of living," the Administrator, in issuing the Regulation, determines the "standard of living" of the enumerated persons, which is beyond any power ever exercised in the history of the law.

The general characterization, "standard of living," can be construed beyond the physical needs of a person, and includes mental and moral needs and opportunities. Such a construction permits the application of the fundamental rule:

> "The concession of such a power would open the door to unlimited regulation of matters of State concerned by Federal authority.
>
> "The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens, speaking through their representatives."
>
> *United States* v. *Constantine,* 296 U.S. 287, 296.

This Court, in discussing the phrase "general welfare," declared in *United States* v. *Butler,* 297 U.S. 1, 64:

> "The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted, 'it is obvious that under color of the generality of the words, to "provide for the common defense and general welfare," the Government of the United States is in reality a government of general and unlimited powers,

notwithstanding the subsequent enumeration of specific powers.' ''

Story, Commentaries on Constitution of the United States (5th Ed.), Vol. 1, Sec. 907.

Such a general term as "standard of living" is wholly inadequate as a standard for administrative action, and requires a most unique construction to permit of Regulation No. 169, Section 1364.451, upon which the indictment is based.

As a preliminary, the Administrator is required to determine that the price or prices of commodities have risen or threaten to rise to an extent inconsistent, at least, with the protection of persons with fixed and limited incomes from impairment of their standard of living. There must be a determination of fact as to who the persons are with relatively fixed and limited incomes, their numbers, status at law, points of domicile, sources of income and mode of life as of the time of the issuance of the Regulation. These facts should be determined in accordance with the provisions of the Constitution and the established standard should bear true relationship to the welfare of all the citizens.

"Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality."

Arkansas Gas Co. v. *R.R. Commission,* 261 U.S. 379.

"To be constitutional, the law must bear equally upon all engaged in a like business."

Missouri v. *Lewis,* 101 U.S. 22.
Reagan v. *Farmers L. & T. Co.,* 154 U.S. 362, 399.

Barbier v. *Connolly,* 113 U.S. 27.
Gulf Ry. Co. v. *Ellis,* 165 U.S. 150.

Such general terms as are in Section 1 (a) are wholly inadequate as standards for administrative action, are not within the powers granted to Congress by the Constitution, and are violative of Article 10 of the Amendments to the Constitution.

On any reasoning, defining the meaning of the words expressing the purposes of the Act becomes more disturbing and permits a reference to the statement of this Court:

> "And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in Section 1 of Title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

Schechter v. *United States,* 295 U.S. 495, 537.

B.

There has been, considering the enumerated purposes set out in Section 1, an unlawful delegation of authority by Congress to the Administrator.

Is the determining or finding of the Administrator the making of law, or is it based upon the exercise of authority and power properly delegated to him?

In *J. W. Hampton & Co.* v. *United States,* 276 U.S. 394 (1928), Mr. Chief Justice Taft said, at page 407:

> "The true distinction, therefore, between the delegation of power to make the law, which necessarily involves a discretion as to what it should be and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law, the

first cannot be done; to the latter, no valid objection can be made."

The Emergency Price Control Act does not set forth definite rules or standards to guide the Administrator and permit him to use his discretion as to when these rules and standards should be carried into execution.

The directions to the Administrator in Section 2 (a) that he shall "so far as practicable" give due consideration to the prices prevailing between October 1 and October 15, 1941, are advisory and not definite, because of the further statements:

> "If 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 are generally representative."

There is no basic period to which he must confine himself.

Congress has not required the Administrator to use the figures existing between October 1 and October 15, but merely to consider them, and once he has considered them, he may reject them and arbitrarily adopt such time period as satisfies his individual opinion. This is challenged as a delegation to the Administrator of legislative power.

On April 28, 1943, the Administrator issued General Maximum Price Regulation (7 Fed. Reg. 3153, 3330, 3666, 3990, 3991, 4339), and established as the maximum price for wholesale meat cuts the highest price charged by the seller during the month of March, 1942, for the same commodity.

On June 19, 1942, Maximum Price Regulation No. 169 (7 Fed. Reg. 4653) was issued, establishing the maximum price to be the highest price actually charged by the seller, during the period March 16 to March 28, 1942, at or above which at least 30% of the total weight volume of seller's sales were made during such period.

On December 10, 1942, Revised Maximum Price Regulation (7 Fed. Reg. 10381) was issued establishing specific prices, by zones, throughout the United States at a level slightly above that which prevailed between March 16 and March 28, 1942.

Section 302 of the Act defines the term "commodity" to mean "commodities," "articles," "products" and "materials" (with certain exceptions). Commodities are generally classified as meaning all articles of trade and commerce.

It is apparent, therefore, that provisions of Section 2 permit the Administrator to find that the price or prices of every article of trade or commerce within the Nation have risen or threaten to rise in a manner inconsistent with the purposes of the Act, and to use as the basis for such determination the prevailing prices of all articles of trade and commerce over any two-week period which, in his judgment, are representative.

There is no standard which controls the exercise of his discretion and he is free to act as far as his judgment suggests in the control of our national economy.

Under the terms of the Act the necessity, time and occasion of performance have been left to the discretion of the Administrator.

In *Schechter* v. *United States,* 295 U.S. 495 (1935), Mr. Justice Cardozo states at page 551:

> "This Court has held that delegation may be unlawful, though the act to be performed is definite and

> single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate."

Under Section 2 the Administrator may, as has been done in the instant case, control meat and refuse to control live-stock from which it is processed.

To borrow the words of Mr. Justice Cardozo, *Schechter* v. *United States, supra,* at page 553:

> "This is delegation running riot. No such plenitude of power is susceptible of transfer."

Where Congress has left it to the Administrator to determine that prices of all articles of trade or commerce have reached a point where they are inconsistent with the purposes set out in Section 1 of the Act, then Congress has permitted the Administrator to define and create a crime.

Here Congress has not established the standard of legal obligation, but has attempted to transfer that function to the Price Administrator in an unconstitutional delegation of legislative power.

Assuming that the enumerated purposes of Section 1 are necessary to the effective prosecution of the war, although Congress has not definitely declared that they are, and the method by which the purposes to be accomplished are not set up, there must be fixed or definite standards upon which an administrative officer can act.

> *J. W. Hampton & Co.* v. *United States,* 276 U.S. 394.

To permit the Administrator, in his judgment, based upon such matters as he may elect to consider, to fix the time period upon which prevailing prices should be estab-

lished, as the standard, is to supply the deficiency in Section 1 (a), and is an unconstitutional delegation of legislative authority.

> "If, by the terms of an act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power, and the act is void. Such a determination of legislative expediency can be made by the legislature alone."
>
> *Williams* v. *Evans* (1917), 139 Minn. 32; 165 N.W. 495; L.R.A. 1918F, 542.

Nothing prevents him from selecting one time period upon which there can be a prosecution and likewise select another time period upon which there can also be a prosecution, although the regulations themselves could be exactly alike, excepting the time period.

Where the Act provides that a violation of a regulation shall be punishable by fine or imprisonment the construction of penal statutes must be followed, and it cannot be suggested that an administrative officer be permitted such latitude in issuing a regulation upon which a valid indictment can be returned.

This Court said in *Small Co.* v. *American Sugar Refining Co.,* 267 U.S. 233 (1924) (referring to criminal prosecutions founded on indefinite standards), at page 239:

> "It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no standard at all."
>
> *United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81 (1920).

II.

The Court below was in error in holding that it was precluded by Section 204 (d) of the Act from entertaining a defense which the defendant might offer to show that the Regulation was not issued in conformity with law.

A.

It was the duty of the Court to determine whether there was a legal regulation upon which the defendants could be tried and convicted of crime.

This is a power inherent in the trial upon any indictment charging the commission of a crime. The indictment (R. 1-13) provided:

> "On or about the 10th day of December, 1942, the Administrator of the Office of Price Administration, pursuant to the authority granted under the Emergency Price Control Act of 1942, as amended, issued Revised Maximum Price Regulation No. 169 . . . At all times hereinafter referred to, said Maximum Price Regulation No. 169, as amended, was effective under the provisions of Section 2 of the Emergency Price Control Act of 1942, (Public Law 421, 77th Cong.), Approved January 30, 1942."

The motives of an honest and efficient Administrator, as set out in the Circuit Court of Appeals opinion (R. 78), and the difficulties of enforcement (R. 78-79), cannot be substituted for the constitutional rights of a citizen and those rights subjugated to the "practical necessities of administration." Mr. Chief Justice Hughes in *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, at page 432, said:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or

> of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission. . . ."

Section 2 (a) of the Act sets forth the circumstances under which a regulation may be issued by the Administrator, and the manner in which such regulation is to be issued.

The Act was amended by the Inflation Control Act (50 U.S.C., Appendix, Supp. II, Sec. 961 *et seq.*), which specifically provided in Section 3 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."

In *Commonwealth* v. *Anthes,* 5 Gray (Mass.), 185, 188-189, Mr. Chief Justice Shaw said:

> "Every criminal prosecution therefore necessarily involves two very distinct inquiries: 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?
>
> . . . . . .
>
> "It will be at once perceived that, in resolving the first question, the inquiry divides itself into several distinct inquiries, namely:
>
> "1. Supposing the prosecution to be on a statute, is there any such legislative enactment?
>
> "2. Does the statute, when expounded according to the rules of law, according to the true intent of the legislature, bear the meaning and interpretation put upon it in the indictment, so as to bring the acts

> charged against the defendant within the true meaning of the statute, and render him liable to the penalty of it?
>
> "3. Is it within the constitutional power of the legislature, as fixed and limited by the Constitution of the Commonwealth; or does it exceed those limits, so that, although it has all the forms of law, it wants the vital energy, which can only be breathed into it by the Constitution, and therefore is inoperative and void?"

Again at page 192 he said:

> "Such then is the nature and character of a criminal prosecution in every system of jurisprudence; it necessarily embraces two questions: first, whether there is such a law as the indictment assumes; and next, whether the accused has violated it."

In all criminal trials according to the settled principles of the common law—the kind of trial guaranteed by the Sixth Amendment—two questions are involved: *First,* whether there is such a law as the defendant is charged with violating; and *second,* whether he has violated that law. And it follows necessarily that, in criminal trials according to the settled principles of the common law, the Court has not only the power but the duty to say what the law is.

In the early case of *Marbury* v. *Madison,* 1 Cranch, 137 (1803), at page 177, the Court said:

> "It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary

means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

In *Bowles* v. *United States,* 319 U.S. 33 (May 3, 1943), Mr. Justice Jackson stated in his dissenting opinion, on pages 37-38 (Mr. Justice Reed concurring):

"the ultimate question raised by Bowles is whether one indicted for failing to submit to an induction order [of a Selective Service draft board] may defend by showing that the order is invalid . . . The Court does not consider whether one may be convicted for disobeying an invalid order; and I do not care to express a final opinion on the subject, since the disposition of the matter by the Court precludes its determination of the question. *But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made.*" (Italics supplied.)

In the issuance of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10,381) the Price Administrator, as a condition precedent to the issuance of the Regulation, made the following finding:

> "In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 issued by the President on October 3, 1942, to maintain as the maximum prices for veal carcasses and wholesale cuts and processed products the prices prevailing with respect thereto during the period March 16 to March 28, 1942, inclusive, and to establish for beef carcasses and wholesale cuts specific prices slightly higher than those prevailing during such period. These prices are established as provided in Sections 1364.451, 1364.452, and 1364.476. The Price Administrator has ascertained and given due consideration to the prices of beef and veal carcasses and wholesale cuts prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed to be of general applicability. So far as practical, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.
>
> "In the judgment of the Price Administrator the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register.

> "The maximum prices established herein are not below prices which will reflect to producers of the agricultural commodities from which beef and veal carcasses and wholesale cuts and processed products are produced a price for their products equal to the highest of the prices required by the provisions of the Emergency Price Control Act of 1942, as amended, and by the Executive Order of October 3, 1942."

From this statement in issuing R.M.P.R. No. 169, upon which these indictments are based, the Administrator determined in his judgment, not that it would effectuate any particular enumerated purpose, but that it was necessary and proper to effectuate the purposes of the Emergency Price Control Act of 1942, the Inflation Control Act, and Executive Order No. 9250, issued by the President on October 3, 1942.

His conclusions are amplified by the further statement:

> "In the judgment of the Price Administrator, the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order."

Here, if anywhere, is the record of the exercise of the administrative power pursuant to the provisions of Sections 1 and 2 of the Price Control Act. The Administrator has not made findings of fact and shown his determinations as required by law.

> *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 432-433.

The requirement of findings is far from a technicality. It is a means of guaranteeing that cases shall be decided ac-

cording to the evidence and the law, rather than arbitrarily or from extra-legal considerations. And they serve the additional purposes of apprising the parties and the reviewing tribunal of the factual basis of the agency's action, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extra-legal considerations.

> Vom Baur, Federal Administrative Law, p. 537 ff.

Failure of an administrative officer to make a clear finding showing that it has applied the legislative mandate given him would render his action invalid.

> *Panama Refining Co.* v. *Ryan* (1935), 293 U.S. 388, 432.

> "Officers and bodies such as those may be required by reviewing courts to express their decision in formal and explicit findings to the end that review may be intelligent. [Citing cases.]"

> *Panama Refining Co.* v. *Ryan* (1935), 293 U.S. 447.

And at page 448:

> "If legislative power is delegated, subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfillment there is, in truth, no delegation and hence no official action but only the vain show of it."

> "We held that the order in that case [*Wichita R.R. & Light Co.* v. *Public Utilities Commission,* 260 U.S. 48] made after hearing and ordering reduction was

> void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."
>
> *Mahler* v. *Eby,* 264 U.S. 32, 44.

The Administrator in his findings recites:

> "In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act."

This phrase "effectuate the purpose of this Act" and its relation to the enumerated purposes has, in a somewhat similar legislation, National Recovery Act, Sec. 1, been criticized by this Court:

> ". . . that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the 'Declaration of Policy'.
>
> "Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the

creation by the President of administrative agencies, to assist him, but the action or reports of such agencies, or of his other assistants,—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. Such recommendations or findings in no way limit the authority which Section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

"Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies.

> *Schechter* v. *United States,* 295 U.S. 495, 538-539.

". . . To hold that he is free to select as he chooses from the many and various objects generally described in the first section and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power."

> *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 431, 432.

Nothing is added to the findings by the statement:

"The maximum prices established by this Regulation are and will be generally fair and equitable."

This again, as the Court has stated:

> "is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws."

Schecter v. *United States,* 295 U.S. 495.

It requires more than his judgment and declaration that the prices established by his official action will be generally fair and equitable and will effect the purposes of the Price Control Act and the Executive Order of the President himself.

A democracy cannot endure when its vital needs, such as food, clothing and housing, become subject to the judgment of any individual, no matter how endowed he may be with the talents that such a responsibility requires.

For the Regulation upon which this indictment is based to conform to requirements of law, there should be some approach to express and definite findings, and these findings must be more than conclusions or opinions, not with an exactness which will make the law static or prevent the war from being successfully determined, but shall rest upon findings of fact, supported by substantial evidence and within the comprehension, not alone of the reviewing body, but of all those whom it is intended to regulate.

Section 2 (a) of the Act requires:

> "Every regulation or order issued under the foregoing provisions of this section shall be accompanied by a Statement of Considerations involved in the issuance of such regulation or order."

The Statement of Considerations (O.P.A. Document No. 8175), which Section 2 requires should accompany every regulation, does not appear to have been printed in the

Federal Register, as required by law, and is handed to the Court as a separate appendix. It discloses (*a*) the nature of the beef industry; (*b*) history of price action; (*c*) recent price relationships; (*d*) the maximum prices established by Revised Maximum Price Regulation.

In not one single line does it point out or even consider any reference to the enumerated purposes of Section 1 of the Act. It is without legal objective, silent as to its application, and its interpretation is left with one's own economic theory.

The District Court has had jurisdiction conferred upon it by Section 205 (c) of the Act.

Section 4 (a) of the Act provides that:

> ". . . it shall be unlawful . . . to sell or deliver any commodity . . . in violation of any regulation or order under Section 2 . . ."

The provisions of Section 4 (a) do not render it a crime to violate *any* regulation but only such regulation or order as is *issued under Section 2.* It therefore became the responsibility of the District Court to determine whether the regulation upon which the indictment was founded was *issued under Section 2.*

The Courts below gave no consideration whatsoever to a determination of whether, as a matter of law, the regulation was issued under Section 2 and stated that Section 204 (d) of the Act precluded consideration of that question. This interpretation by the Courts below leaves a defendant in the position where he could be indicted for violation of *any* regulation and be convicted of crime, because Section 204 (d) precludes a determination by them of the content of the regulation, notwithstanding that Section 4 (a) makes it a crime to violate a regulation *only* "issued under Section 2."

Revised Regulation No. 169 (7 Fed. Reg. 10381) recites that it was promulgated under the exercise of the powers conferred upon the Administrator by the Emergency Price Control Act, the Inflation Control Act and Executive Order No. 9250 (7 Fed. Reg. 7871). The Regulation specifically states that the Administrator has jointly exercised the powers originating from separate sources.

In spite of the limitation of the purposes of the Inflation Control Act authorizing the President—

> "To issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; . . ."—

the President has authorized the Administrator to control not only prices, wages and salaries, but profits as well.

> "TITLE V—PROFITS AND SUBSIDIES—EXECUTIVE ORDER No. 9250.
>
> "The Price Administrator in fixing, reducing or increasing prices shall determine price ceilings in such a manner that profits are prevented, which in his judgment are unreasonable or exorbitant."

In the Second Intermediate Report, Select Committee to Investigate Executive Agencies, House of Representatives, 78th Cong., 1st Sess., November 15, 1943, pp. 12-13, the Committee says:

> "Notwithstanding the plain provisions of the Act, your Committee has found, . . . a well-devised and planned scheme to control the profits of American Industry . . . The Office of Price Administration has no legal right or authority to formulate such a plan or attempt to put such a plan in effect."

The proffered testimony during the course of the trial (R. 32-37) and in support of the motion for a new trial(R.

25-26) was denied upon the sole ground that the Court was precluded from considering the validity of the Regulation (R. 37-68).

The denial of the motion for a new trial was not based upon the judge's discretion.

The Circuit Court of Appeals in its opinion (R. 78-79) upholding this interpretation of the Act renders the language of Section 4 (a) meaningless, and makes the return of an indictment alleging the violation of any regulation conclusive and binding upon the Court in criminal proceedings.

This interpretation is in the teeth of Section 205 (c), which gives it exclusive jurisdiction over all criminal matters. How can it determine, as a matter of construction, whether a crime as set out by Section 4 (a) has been committed unless it first determines whether the regulation or order was issued under Section 2?

The defendants submit that Section 204 (d) as construed by both Courts must be unconstitutional as denying them due process of law under the Fifth Amendment to the Constitution and the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed as guaranteed by the Sixth Amendment.

In *Fasulo* v. *United States,* 272 U.S. 620, 629 (1926), Mr. Justice Butler said:

> "There are no constructive offenses, and before one can be punished, it must be shown that his case is *plainly* within the statute." (Italics supplied.)

See also *Williamson* v. *United States,* 207 U.S. 425, 462 (1908).

Viereck v. *United States,* 318 U.S. 236, 241 (1943).

The Price Administrator, in adopting the price schedule without allowing any margin for processing, was not merely acting unreasonably or arbitrarily; he was acting without any statutory authority at all.

In speaking for the Supreme Court in *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1918), Mr. Justice Brandeis said at page 562:

> "If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission [citing cases], and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law [citing cases]. But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is *void.* In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." (Italics supplied.)

Defendants' attack goes to the *jurisdiction* of the Administrator, as the United States Supreme Court said in *Crowell* v. *Benson,* 285 U.S. 22 (1931), at page 63:

> "The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration *in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable.*" (Italics supplied.)

Assuming, *arguendo,* that the Courts below were correct in their interpretation, how could a defendant under indictment ask the District Court to suspend its trial while he goes to the Emergency Court of Appeals for a determination of the character and legal force of the regulation upon which the indictment is founded? If our system of conduct of criminal trials permitted the defendant to take such action, would not the Emergency Court of Appeals immediately reply that jurisdiction of any criminal proceedings was expressly denied to that Court by the language of Section 205 (c), and further that it was not a Court of original jurisdiction or a trial Court like the District Court, but that its function was solely limited to a review under the protest procedure outlined in Section 203 of the Act?

The writings indicate that it is the duty of a Court on a criminal trial for violation of an administrative regulation to make a determination of whether the regulation forms the basis of criminal responsibility.

> "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 designated by Congress."
>
> Note, Validity of Federal Departmental Regulations Involving Criminal Responsibility, 35 Harv. L. Rev. 952 (1922).
>
> And see Administrative Penalty Regulation, 43 Col. L. Rev. 213, footnote 2 (March, 1943):
>
> "United States v. Eaton, 144 U. S. 677 (1892); United States v. 11,150 Pounds of Butter, 195 Fed.

657 (C.C.A. 8th, 1912); and St. Louis Merchants' Bridge Ry. Co. v. United States, 188 Fed. 191 (C. C. A. 8th, 1911) were cases where the statutes explicitly made violations of proper administrative rules criminal, and the holdings were that the rules in question were unauthorized and, therefore, failure to conform not criminal."

See also 37 Ill. L. Rev. 256 (Nov.-Dec. 1942), Judicial Review of Price Orders under the Emergency Price Control Act:

"The only question subject to review is whether the Administrator has acted within statutory limits and in accordance with statutory standards."

If the regulation was not issued in accordance with the authority conferred upon the Administrator, any action taken by him was a nullity.

This Court said in *Manhattan Co.* v. *Commissioners,* 297 U.S. 129 (1936), at page 134:

"The power of a representative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make laws,—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this but operates to create a rule out of harmony with the statute is a mere nullity. Lynch v. Tilden Produce Co. 265 U. S. 315, 320-322; Miller v. United States, 294 U. S. 435, 439-440."

The defendants in their offer of proof (R. 32-37) not only offered to show that the Regulation provided for no fair and equitable margin of profit, but that it was arbitrary,

capricious and illegal. The further offer of the defendants in support of their motion for new trial (R. 25-26) that the Administrator had disregarded the mandate of Congress as evidenced by the testimony of the Administrator himself before the subcommittee of the Senate Committee on Agriculture and Forestry held at Washington, D.C. on March 3, 1943, gave the defendants the right to have determined by the Court and jury whether the indictment was founded upon a legal regulation, violation of which was a criminal offense.

United States v. *Eaton,* 144 U.S. 677 (1892).
United States v. *George,* 228 U.S. 14, 22 (1913).

In *Clinkenbeard* v. *United States,* 21 Wall. 65 (1874), an Act of Congress provided that no suit should be maintained for the recovery of any tax erroneously or illegally assessed until an appeal first be made to the Commissioner of Internal Revenue. The Government brought suit to enforce collection of a tax which it had assessed. *Held,* the defendant was not precluded from setting up as a defense the erroneous assessment or illegality of the tax, although he had not appealed from the assessment.

The two leading bridge cases so indicate.

Union Bridge Co. v. *United States,* 204 U.S. 364 (1907).
Monongahela Bridge Co. v. *United States,* 216 U.S. 177 (1910).

The correctness of the claim of the defendants has been supported by testimony of the Price Administrator before the Small Business Committee, Hearings before the Select Committee to conduct a study and investigation of the National Defense Program in its relation to small business in the United States House of Representatives, Seventy-

eighth Cong. First Sess., on H. Res. 18, April 8 and 9, 1943, Part 5 (Unrevised):

> "The Chairman: Do you believe that law has been complied with, Mr. Brown?
>
> "Mr. Brown: It is difficult for me to answer, Mr. Chairman. I think, to be perfectly frank, that it could be said that our regulation at times is in violation of that law, particularly that at the present time with respect to small packers. Now it is very largely a question of judgment. I don't know how or where you can draw the line and say so many small packers will of necessity fall down under a legal administration."

And the testimony of R. V. Gilbert, Economic Advisor to the Administrator, Hearing before the Committee on Agriculture, House of Representatives, 78th Cong. First Sess., October 26, 1943 (Unrevised) (p. 5):

> "Mr. Kinzer: Let me ask you this question—are these attorneys, who now tell you you haven't a leg to stand on, the same ones who drew the order and the regulations (wholesale meat regulations) in the first place?
>
> "Mr. Gilbert: That is right.
>
> "Mr. Hope: They have changed their minds since that time?
>
> "Mr. Gilbert: The situation is just as clear as a bell and it is not in our judgment, or in the judgment of anybody who has studied this problem, open to any real question. The price of livestock, on the average, throughout the 9 months, the first 9 months of this year, was $1.47 above the level that was necessary to cover the total cost of the non-processing slaughterer. Now, under those circumstances, it can be demonstrated that, as a class, these people have been put into the

red, and have been put into the red to the extent of 1½¢ per pound on what they slaughter.

"Mr. Kleberg: And under the law they must be left with an equitable amount of profit?

"Mr. Gilbert: That is right. It puts us under an affirmative obligation to provide a generally fair and equitable margin for distributors. We have known for a long time, Mr. Chairman, that this situation existed.

"Mr. Kleberg: How long have you known it?

"Mr. Gilbert: We have known it since February of this year. . . ."

Page 30:

"Mr. Cooley: Did you say the Nagle decision is going to fix the date upon which live market prices reached a point which was too high and forced the violations? They are not going to undertake to fix any date, are they?

"Mr. Gilbert: The Court isn't. The Court is going to base its decision upon the prices we established and the costs which the non-processing slaughterer incurred. It is going to say that we were not allowing them a generally fair and equitable margin . . ."

Page 37:

"Mr. Gilbert: Prentiss Brown testified before a Committee of the House or Senate months ago that in his judgment our regulation was illegal. That is a matter of public record and not all of our lawyers shared that feeling but all of our lawyers have thought that we were on awfully thin ice."

Again, in House Report No. 898, Third Intermediate Report of the Select Committee to Investigate Executive Agencies, 78th Cong. First Sess., November 29, 1943, p. 1:

> "Your committee finds that the Office of Price Administration has exceeded its powers and violated express provisions of the Price Control Act by setting maximum prices that were not generally fair and equitable upon meats on all levels between slaughterer and retailer . . .
>
> "First. The Office of Price Administration by its order (MPR 169; 7 F. R. 10381) dated December 10, 1942, fixed ceiling prices at which meats must be sold by packers to retail butchers that were not generally fair and equitable and consequently violated Section 2 (a) of the Price Control Act, which provides: . . . the Price Administrator . . . may by regulation or order establish such maximum price or maximum prices as in his judgment will be *generally fair and equitable* . . ."

Defendants have been denied the right to show, ever since the return of the indictment against them, that the Regulation did not carry out the declared policy of Congress, although they have, at appropriate stages of the case (R. 70), endeavored to present their defense and have this question decided.

In his book Federal Administrative Proceedings, Walter Gellhorn (1941), p. 44, points out:

> "There can be no depreciation of a passion for justice in law administration whether by judges or others."

See also McMahon, Ordeal of Administrative Law (1940), 25 Iowa L. Rev. 425, 435:

> "The general assumption, therefore, should be that no good idealized in the theory of judicial justice will be sacrificed needlessly in the rise of administrative justice."

And Professor Robert L. Hale, in his article Our Equivocal Constitutional Guarantees (1939), Col. L. Rev. 563, states:

> "'In these days when individual liberty is being extinguished almost daily in new areas of Europe, we, in this country, may well pray to escape the course of totalitarianism . . . What we must do is to safeguard the more essential elements of liberty, not only by *limiting* the power of government to impose arbitrary restraints, but also by invoking the power of government to restrain the more powerful from imposing arbitrary restraints on the less powerful.''

In *Jones* v. *Securities & Exchange Commission,* 298 U.S. 1, 23-24 (1936), Mr. Justice Sutherland said:

> "The action of the Commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a Government of laws—because to the precise extent that the mere will is an official, or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the Government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency, the Courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States,* 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches

> and slight deviations from legal modes of procedure. . . . It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis'.*"

See Administrative Justice and the Supremacy of the Law, John Dickinson (1927), p. 307:

> ". . . if the Commission [Interstate Commerce Commission] acts in disregard of a principle of law or without evidence to support its order, it acts without jurisdiction" (citing *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.,* 227 U.S. 88).

In Review of Administrative Acts, Uhler (1942), footnote 5, p. 179, it is said:

> "Relief from administrative action in many cases calls for review of the injurious and impeached act upon a statutory appeal . . . but the act complained of, if it is wholly void, can be collaterally attacked . . . by way of defense to prosecution of an alleged violation. See Stason, 24 A. B. A. J. 274 ff."

Section 205 of the Emergency Price Control Act provides for punishment up to $5000 or 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. Section 11 of the Inflation Control Act provides for a fine of not more than $1000 or imprisonment for not more than one year, or both such fine and imprisonment upon conviction of willful violation of the Act.

If a defendant were indicted for violating a separate regulation issued under the Emergency Price Control Act, and, in the same count of that indictment, was charged with violating another regulation issued under the Inflation

Control Act, there would be no question but that that count of the indictment would be bad for duplicity.

By the action of the Administrator in combining the authority derived from both of these Acts in a single regulation (R.M.P.R. 169) an indictment founded upon violation of the regulation leaves a defendant in the position where he does not know whether he has violated one or the other statute. This question was raised by the defendants in their motion to quash the indictment (R. 14-19).

B.

The conferring of jurisdiction in criminal proceedings for violations of Section 4 of the Act upon the District Court carries with it all the powers incident to jurisdiction.

Congress recognized the constitutional right of the District Court over criminal cases.

The *jurisdiction* of the District Court, which was established by Congress under Article III, Section 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."

28 U.S.C. Sec. 41 (2).

18 U.S.C. Sec. 546, provides:

> "The crimes and offenses defined in this title shall be cognizable in the district courts of the United States."

Section 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.

The question of jurisdiction has been discussed, and its meaning defined, in many cases.

Binderup v. *Pathe Exchange,* 263 U.S. 291, 305.
Foltz v. *St. Louis & S.F. Ry. Co.,* 60 Fed. 316, 318.
Hopkins v. *Commonwealth,* 3 Met. (Mass.) 460, 462.
Hayward v. *Superior Court in and for Los Angeles County,* 130 Cal. (App.) 607, 610.
Morrow v. *Corbin,* 122 Tex. 553, 560.

In *Binderup* v. *Pathe Exchange,* 263 U.S. 291, the Court said at page 305:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact."

In *Foltz* v. *St. Louis & S.F. Ry. Co.,* 60 Fed. 316 (C.C.A. 8) (1894), the Court said at page 318:

> "Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to the question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, *but includes every issue within the scope of the general power vested in the court,* by the law of its organization to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. *It empowers the court to determine*

every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, . . ." (Italics supplied.)

In *Hopkins* v. *Commonwealth,* 3 Met. (Mass.) 460, the Court said at page 462:

"To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment, in a *regular course of judicial proceeding.*"

In *Hayward* v. *Superior Court in and for Los Angeles County,* 130 Cal. (App.) 607, 610, the Court said:

"Jurisdiction is the power to hear and determine. Two steps, generally speaking, are necessary to the exercise of jurisdiction: 1. The ascertainment of the facts. 2. The application of law to the facts."

In *Morrow* v. *Corbin,* 122 Tex. 553, 560, 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."

The District Court is a constitutional Court.

Kuhnert v. *United States,* 36 Fed. Supp. 798; aff. 124 Fed. (2d) 824 (C.C.A. 8).

Liberty Warehouse Co. v. *Grannis,* 273 U.S. 70, 76 (1926).

The judicial power vested in the District Court by the Constitution cannot, therefore, be limited, restricted or interfered with by legislative action.

Commonwealth v. *Anthes,* 5 Gray (Mass.), 185.
Merrill v. *Sherburne,* 1 N.H. 199.
Vaughn v. *Harp,* 49 Ark. 160, 162.
Houston v. *Williams,* 13 Cal. 24, 25.

C.

Section 204 (d) of the Emergency Price Control Act is not applicable to criminal prosecutions and was only intended to apply to matters wherein the persons affected seek affirmative relief.

In *Clinkenbeard* v. *United States,* 21 Wall. 65 (1874), the government brought suit to enforce collection of a tax. An Act of Congress declared that no suit should be maintained for the recovery of any tax erroneously or illegally assessed until an appeal first be made to the Commissioner of Internal Revenue and a decision had. The Court permitted the defendant to set up the defense that the assessment was erroneous although he had not appealed therefrom, saying (pp. 70-71):

> "When the government elects to resort to the aid of the courts it must abide by the legality of the tax."

In *Brown* v. *Wyatt Food Stores,* 49 Fed. Supp. 538 (March 8, 1943), the Court said in discussing the Emergency Price Control Act of 1942 (p. 540):

> "There are two roads pointed in this statute. One is for the citizen in his protest, and his remedy. That road leads to the Emergency court at Washington, and to the Supreme Court. The other road is for the use of the Administrator. He enters court against the

citizen. That court is neither the Emergency court nor the Supreme Court. It is any state or national court which has jurisdiction of the controversy. It is the local court. That is the road upon which the parties arrive here. Show cause orders were issued to the defendant at the request of the plaintiff to exhibit to the court any reason he had why he should not be restrained.

"The general authority given to the Administrator to make regulations is that they shall be 'generally fair and equitable'.

"The defendant in accepting battle where it was begun by the complainant, does so by stating that the Administrator is seeking to enforce regulations that are not 'generally fair and equitable.' That there is another provision of the Act which vests 'exclusive jurisdiction' in the Emergency and Supreme court to pass upon 'validity' of regulations, and to stay orders made by the Administrator, is not a sufficient answer nor a sufficient program as to what shall take place in and upon this voyage.

"Whether the defendant shall get anywhere in its attack upon regulations made by the Administrator for the defendant's business, is beside the question. We do not need to argue that one may not enter court until he has exhausted his Administrative remedy. We all know that. The requirement for such entry is no novelty [citing cases].

"But it would be rather disappointing if the sovereign should declare that one of its representatives might enter a court to enforce its decrees against the citizen, and then deprive the citizen of his day in that court to speak against what is being attempted against him [citing cases]."

The procedure outlined by Sections 203 and 204 is intended as an administrative remedy, which had to be resorted to by one before he might look to the Courts for affirmative relief.

The doctrine of exhaustion of administrative remedies was a procedural step in equity which had to be followed before judicial processes for affirmative relief could be sought.

It has no application to a criminal prosecution.

> See Raoul Berger, Exhaustion of Administrative Remedies, 48 Yale L.J. 981, 985-986 (1939).

It is a procedural step which postpones the right to claim judicial relief until all administrative remedies have been pursued.

> "The desire to avoid interference with administrative regulations unless it is certain that they will not be modified to satisfy the *complainant,* (italics supplied) and the desire for expert determination insofar as possible, have led to the doctrine that the suit is premature and the issue nonjusticiable so long as the possibility of administrative relief lies unexplored."
>
> Note, Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts, 51 Harv. L. Rev. 1251, 1261 (1938).

One reason for enacting this policy was that it prevented efforts "to swamp the Courts, by a resort to them in the first instance."

> *United States* v. *Sing Tuck,* 194 U.S. 161, 170 (1904).

Another reason advanced for the "exhaustion" rule is to give due play to *administrative expertness* and is based upon the ground of comity, and that the procedural administrative remedy, *if adequate,* bars resort to equity.

> See Review of Administrative Acts, Uhler (1942), pp. 68-69.
>
> Notes, Administrative Action as a Pre-requisite of Judicial Relief, 35 Col. L. Rev. 230 (1935).

The inadequacy of the remedy afforded under the Act and administrative inexpertness are treated later in the brief.

The terms employed in drafting Section 204 of the Act are appropriate only to equity procedure. No terms have been used which would relate to criminal proceedings.

Here the defendants do not seek affirmative relief. They merely ask the right to defend themselves upon a criminal indictment, in a full, rather than a partial, trial. Congress could not, within the constitutional rights guaranteed to a defendant, deny him the right to a full and fair trial within the district where the crime is alleged to have been committed. He is entitled to put forth his best defense when brought to trial on an indictment. To deny him that right by legislative enactment would, in essence, deprive him of the protection afforded by the Constitution. If the construction of Section 204 (d) by the Courts below was correct, we are brought to the conclusion that our lawmakers, by the force of Section 204 (d), intended by indirection to deprive a defendant in a criminal proceeding of those rights which they, by direct legislation, could not take away from him. Such a construction should not be favored.

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a stat-

ute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

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

See also *Crowell* v. *Benson*, 285 U.S. 22, 62 (1931).

The fact that Congress, in a later section of the Act, Section 205 (c), conferred jurisdiction of criminal proceedings upon the District Court without any limitation upon that jurisdiction and without in any way referring to the review procedure as set out in Section 204 is strongly indicative of the fact that they were intended to be separate and distinct and Section 204 was not intended to limit the right of the District Court to hear all matters in a criminal case.

The statement of Mr. Justice Stone in *Columbia Broadcasting System, Inc.*, v. *United States*, 316 U.S. 407 (1942) (a bill in equity to set aside an order of the Federal Communications Commission threatening irreparable injury to complainant's property), at page 425:

"The ultimate test of reviewability is not to be found in an overrefined technique"—

would seem to be applicable with even greater force to a situation such as in the instant case, where the defendant is faced not merely with injury to his property but with loss of his liberty.

D.

Cases cited and contentions of the courts below in the opinion are distinguishable.

The reason given by the Circuit Court of Appeals for its interpretation of Section 204 (d) (R. 78) is as follows:

> "If a violator could procure acquittal in a criminal case by convincing the particular District Court or Jury that the Regulation is arbitrary or capricious or not generally fair and equitable, the Government could not appeal and for practicable purposes the enforcement of the Regulation in that District would be at an end."

No comment is necessary upon that line of reasoning. Convenience of the Administrator cannot determine the constitutionality of the Act or the legal force of a regulation.

The opinion of the Circuit Court of Appeals (R. 81) lays down this astounding proposition:

> "Appellants were indicted not for a violation of the Administrator's price regulation but for violation of Section 4 (a) of the Act. Section 4 forbids any person from selling or delivering any commodity in any course of his trade or business in violation of any regulation or order under Section 2."

The Act itself is innocuous, harmless and ineffective without the Regulation. The only power the Administrator had was to make regulations in accordance with the delegated authority. Violation of such regulations is a crime and is punishable. The crime is the violation of the Regulation issued under and in accordance with the provisions of the Act, and it cannot be presupposed that the Regulation was issued under Section 2 without making a legal determination of that fact.

United States v. *Grimaud,* 220 U.S. 506 (1911).
Brodbine v. *Revere,* 182 Mass. 599.

The Circuit Court of Appeals further said (R. 80):

> "The Government has cited many cases as furnishing analogies bearing more or less directly on the present problem [citing cases].
>
> "It would unduly prolong this opinion to discuss the arguments and asserted distinctions which counsel have addressed to us with reference to these cases. We are satisfied with the conclusion we have reached, without relying on the props of precedent which some of these cases might afford us."

The Emergency Price Control Act combines exclusive jurisdiction to review administrative proceedings with a denial of power to stay an order, pending such review. This is an innovation in administrative procedure.

See 37 Ill. L. Rev. 256.

No case cited holds that a defendant is precluded from challenging a regulation upon which prosecution is based.

The Government generally relied on three classes of cases:

First, the license cases (sustaining licensing ordinances as a valid exercise of police power).

Second, the rate cases (sustaining regulation of rates of public utilities on the doctrine of businesses impressed with public interest).

Third, Selective Service cases (sustaining draft classifications under war powers).

1. Generally speaking, all that the licensing cases hold is that the states have a right to delegate power to issue licenses, and that such a delegation of power does not vio-

late the equal protection clause or the due process clause of the Fourteenth Amendment to the Constitution.

The licensing cases involved state rights, requiring a person to take out a license before he may conduct a business. He could still challenge the constitutionality of the Act requiring him to have a license.

Browning v. *Waycross,* 233 U.S. 16 (1913).

In *Bradley* v. *Richmond,* 227 U.S. 477 (1913), appellant had been convicted in the Hustings Court of Richmond for violating an ordinance forbidding the carrying on of the business of a private banker without a license.

In the case at bar we *did* have a license. The cases would only be analogous if the ordinance complained of in *Bradley* v. *Richmond* had required that, after the license was obtained, any banking business done by the licensee must be done at a loss. In that case there was no substantial loss of rights. Bradley could have continued business, and any overcharge, if the proper course was followed, would have been returned to him. Here, we would either be out of business, pending the protest, or if we continued in business on the basis of the illegal Regulation, there would be no way for recoupment of losses.

In the *Bradley* case there was no contention that the action taken by the Board was wholly outside the authority conferred upon it by statute, and after conviction was affirmed by the Supreme Court of the state, defendant started an affirmative proceeding for relief in this Court, which said at page 485:

> "Under the circumstances, he is not warranted in resorting to the extraordinary jurisdiction of this Court to arrest an administrative error susceptible of correction by an appeal to the council."

In both the *Bradley* and *Browning* cases the defendants were permitted to raise the defense in the trial Court, and the Supreme Court reviewed it.

2. The rate cases are distinguishable on other grounds. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, is an example, not of the application of the doctrine of exhaustion of administrative remedies, but of the invocation of the primary jurisdiction rule—a rule which has been confined to cases where a shipper seeks to recover damages or secure some other form of relief against some action of a carrier.

> See Breck P. McAllister, Statutory Roads to Review of Federal Administrative Orders, 28 Cal. L. Rev. 129, 144-145 (1940).

The *Lehigh Valley* and *Vacuum Oil* cases were criminal prosecutions under the Elkins Act for the giving and receiving of rebates. A rebate is there defined as any departure from the legal rate. The legal rate is established by the carrier's filing and publishing the particular rate (49 U.S.C. Sec. 41). The defendant was not permitted to defend on the ground that the rate was unreasonable. That was held to be a question only for the Interstate Commerce Commission.

Since by definition the crime charged was a departure from the *legal* rate, the legality of the rate, as distinguished from its reasonableness, was the only question to be decided by the Courts.

> See Note, Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts, 51 Harv. L. Rev. 1251, 1256.

The reasonableness of the rate was entirely irrelevant on the question of its legality. On the issue of legality the Court had for decision a question of fact—Had the rate been filed and published?—and that was all.

In the case at bar, however, the inquiry is of an entirely different nature: Did the defendant sell at a price in excess of the maximum price legally established? The defense, by denying the legality of the regulation under which it was issued, puts in issue the existence of a maximum price.

It must, moreover, be recognized that there is a peculiar desirability in having the Interstate Commerce Commission pass upon the question of reasonableness of rates. In so doing there are employed the services of a most expert body, which over a long period of years has completely won the confidence of the country, to pass upon the most difficult and intricate of questions—the reasonableness of a public utility rate. That, it should be recognized, is an entirely different matter from having a new, inexpert body, hastily created as a matter of war-time expediency, passing in Washington upon thousands of local maximum prices.

3. The Selective Service cases are also far removed from the questions which confront us. The offense in those cases was failure to appear for induction; something entirely different from whether the Draft Board properly classified a defendant. In such of those cases where inquiry was excluded by the Court, the exclusion was not based upon a claim that the Draft Board action fell outside its legislative grant of authority and, therefore, was a nullity.

In some of those cases—

> *Rase* v. *United States,* 129 Fed. (2d) 204 (C.C.A. 6, 1942);

Checinski v. *United States,* 129 Fed. (2d) 461 (C.C.A. 6, 1942);
Buttecali v. *United States,* 130 Fed. (2d) 172 (C.C.A. 8, 1942)—

the Court entertained the defense as to the action of the Draft Board, but found that the defense was without merit. All Selective Service cases involved judgment of the Draft Board as applied to an individual. There was no question of confiscation of rights of an entire industry, as referred to in House Report No. 898, Third Intermediate Report of the Select Committee to Investigate Executive Agencies, House of Representatives, 78th Cong., First Sess. (November 29, 1943), where the committee made a finding:

> "It was obvious that the Regulation would ultimately result in the destruction of all nonprocessing slaughterers as a class. It was shown in the testimony before this committee as long ago as June 30, 1943, that a large number of nonprocessing slaughterers had been forced out of business because of the losses incurred through their efforts to operate under this illegal order. Dr. Gilbert said of the situation:
>
> " 'The processor . . . has got a miserable shellacking for 9 months, an inexcusable shellacking.' "

Finally, still another remedy was open in those cases, which is not available to these defendants.

In *United States* v. *Kauten,* 133 Fed. (2d) 703 (C.C.A. 2, February 8, 1943), Judge Augustus Hand said at page 707:

> "Then the writ of *habeas corpus* is sufficient to remedy any irregularity of Draft Boards and to satisfy all reasonable scruples on the part of inductees. Moreover, it is the practice of the Army to grant a furlough

of seven days after a registrant is formally inducted before he is subjected to military training. This gives him time to apply for a writ of habeas corpus without disturbing the Selective Service machinery, if he thinks that his rights as a conscientious objector have been infringed."

In *Goff* v. *United States,* 135 Fed. (2d) 610 (C.C.A. 4, May 4, 1943), the Court said:

"It would seem, however, that the *total invalidity* of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order."

The Circuit Court of Appeals further said (R. 81):

"It is not amiss to note that in *Hirabayashi* v. *United States,* U.S. , June 21, 1943, under the war powers of the President and Congress, the Supreme Court upheld a military order which applied discriminatory treatment to citizens of the United States on the basis of their racial origin, a discrimination which would ordinarily be abhorent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress."

In the *Hirabayashi* case, 320 U.S. 81, Mr. Chief Justice Stone said at pages 104-105:

"Under the Executive Order the basic facts, determined by the military commander in the light of knowledge then available, were whether that danger existed and whether a curfew order was an appropriate means of minimizing the danger. Since his find-

> ings to that effect were, as we have said, *not without adequate support,* the legislative function was performed and the sanction of the Statute attached to violations of the curfew order." (Italics supplied.)

In the instant case defendants do not challenge the exercise of judgment by the Administrator that prices have risen or threaten to rise and the issuance of a proper regulation was an appropriate means of minimizing the danger; what they do say is that the Administrator failed to carry out his legislative function; that the sanction of the statute did not attach to a regulation issued outside the authority conferred upon the Administrator, and the defendants, upon trial of indictment, alleging that they violated a regulation *issued under the* Act, had the right to show that the regulation was outside the provisions of the statute, and the violation of such a regulation was not a crime.

In the *Hirabayashi* case injunctive proceedings could have been brought by Hirabayashi and judicial processes were available to prevent any wrong inflicted upon him. There was no claim that the administrative officer had failed to carry out the mandate of his authority.

In the case at bar the Act expressly excludes the right to resort to judicial process or injunctive relief, once a regulation is put into force, even though, as is here shown, the administrative officer admits that he has not confined himself to the legislative authority granted him.

III.

If Section 204 (d) does withdraw from the District Court the right to determine in criminal proceedings whether the indictment is founded upon a regulation which is illegal, arbitrary and capricious, it is unconstitutional.

A.

In conferring jurisdiction over all criminal proceedings for violations of Section 4 of the Act (Sec. 205 (c)), it becomes the obligation of the District Court to carry into effect all powers attending the exercise of its jurisdiction.

In order to sustain a conviction, under any indictment, the Government must prove all of the essential elements which go to make up the commission of a crime by a defendant. To give the Court the power to hear and determine certain of the facts and to deny it the power to hear other facts upon which the indictment is based would, in effect, strip the Court of many of the fundamental powers and duties vested in it by the Constitution and the laws.

Article III, Section 1, of the Constitution of the United States provides:

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

And Article III, Section 2, states:

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

Judicial power of the District Court, therefore, is not derived from Congress but from the Constitution. The meaning of the term "judicial power" as used in the Constitution has been defined by a number of Courts of last resort.

In *Kuhnert* v. *United States,* 36 Fed. Supp. 798 (1941); aff. 124 Fed. (2d) 824 (C.C.A. 8), the Court said at page 800:

"The United States District Court is one of the constitutional courts. Within the constitutional limits, the jurisdiction of district courts is determined by Congress,—in what geographical area they shall function, with respect to what *class of cases* they shall exercise *judicial power.* But the *judicial power* is conferred upon the district court *not by Congress, but by the Constitution.* To determine what is the law applicable to a case, to apply that law to the case, to render judgment accordingly, these things are of the very essence of the judicial power." (Italics supplied.)

Muskrat v. *United States,* 219 U.S. 346, 356.
Gilbert v. *Priest,* 165 Barb. (N.Y.) 444, 448.
People v. *Bruner,* 343 Ill. 146, 157.
State v. *LeClair,* 86 Me. 522.

In *Muskrat* v. *United States,* 219 U.S. 346 (1911), the Court said at page 356:

"It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. 'Judicial power', says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller on the Constitution, 314."

In *Gilbert* v. *Priest,* 165 Barb. (N.Y.) 444, the Court said at page 448:

"Judicial power within the meaning of the Constitution may be defined to be that power by which judi-

> cial tribunals construe the Constitution, the laws enacted by Congress, and the treaties made with foreign powers or with Indian tribes, and determines the rights of parties in conformity with such construction."

In *People* v. *Bruner,* 343 Ill. 146, the Court said at page 157:

> "The phrase 'judicial power' has been variously defined. Judge Cooley in his work on Constitutional Limitations, 8th ed. p. 184, defined it as the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws."

By the force of Article III of the Constitution it must be presumed that, when the District Court for the District of Massachusetts was set up, it was vested with the right to exercise the whole *judicial power* in the trial of criminal cases properly brought within its jurisdiction.

In *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1935), this Court said at page 296:

> "The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict."

Although Congress might vest jurisdiction over actions involving the Emergency Price Control Act and regulations thereunder, in some *constitutional* Court—

> *Ex Parte Bakelite Corp.,* 279 U.S. 438 (1929);
> *Williams* v. *United States,* 289 U.S. 553 (1933)—

it cannot vest jurisdiction in the District Court and then deprive it of the right to exercise the judicial power of the Court, except in a predetermined manner. Congress cannot interfere with, restrict or limit the judicial power of that Court, as an equal and co-ordinate branch of the Government, to determine the constitutionality and validity of regulations where jurisdiction is granted and invoked for their enforcement—nor require the Court to register mechanical approval of acts of administrative or executive officers without examination of the legal merits of such acts, or compel the Courts to inflict an injury which the Constitution requires them to remedy.

> *Opinion of the Justices,* 251 Mass. 569, 615 (1925).
> *United States* v. *Klein,* 13 Wall. 128, 147 (1871).
> *Crowell* v. *Benson,* 285 U.S. 22, 56-57 (1931).

As has been previously urged, there is no right or power in the Emergency Court of Appeals to determine whether the indictment is founded upon a regulation to which *jurisdiction,* as established by Section 205 of the District Court, should attach, since only the District Court may, in the first instance, determine whether a case is properly before it.

B.

The remedies provided under Sections 203 and 204 are inoperative, ineffectual and chimerical.

Under Section 203 a person affected must first file a protest with the Administrator. The protest must contain specifications of all the matters upon which the protest is based and include therewith affidavits, or other written evidence, in support of such protest.

Inadequacy of the relief afforded by the review procedure of Section 204 is immediately apparent when one considers (*a*) that only such data as "may be practicable" shall be included in the transcript; (*b*) the regulation, oppressive though it may be, is still in force, pending review; (*c*) the review only attaches at such time as the protest is denied; (*d*) the Administrator may rescind or modify the regulation, pending appeal; (*e*) no objection may be considered unless set forth in the protest or contained in the transcript; (*f*) the judgment of the Court setting aside a regulation is postponed until the expiration of thirty days from entry, and if certiorari is filed with the Supreme Court the effectiveness of such judgment is postponed until the order of the Supreme Court becomes final.

Section 203 restricts a hearing on a protest to the extent of filing affidavits, briefs or other written evidence. It permits the Administrator to accept economic data and other facts, and the judicial review is limited to a transcript of such portions of the proceeding as are material, including a statement "so far as practicable" of economic data and other facts of which the Administrator has taken official notice.

The words "so far as practicable" in Section 204 (a) limit the right of review to the convenience of the Administrator.

By indirection, a defendant in a criminal proceeding is deprived of the guaranty of the Fifth Amendment, in that at *no* time and in *no* Court may he ever have an opportunity to cross-examine the witnesses against him and be confronted by his accusers.

The Price Administrator (Statement of Considerations accompanying General Maximum Price Regulation, 7 Fed. Reg. 3153) has said:

> ". . . in the domain of price regulation . . . so much must inevitably be a matter of trial and error and adjustment . . ."

It is a serious denial of rights to one faced with loss of his liberty to preclude him from showing that such a Regulation and the content thereof, formulated as an experiment, are illegal and impracticable.

Counsel for the Price Administrator, in his article, Legal Aspects of Price Control in the Defense Program (1941), 27 A.B.A.J. 527, states at page 532:

> ". . . to the extent that all prices and price relationships are stabilized, a producer is not injured by price regulations merely because he is not able to charge a price as high as he otherwise might have charged."

The workability of the statement made by counsel for the Administrator is dependent upon the words "all" and "price relationships," and unless *proper* price relationships are established, confiscation may result.

> See Comments on Notice and Opportunity to be Heard in Price Control Ceilings, 20 Texas L. Rev. 577.

There was no attempt to control the price of the livestock from which the dressed meat was processed, and with an uncontrolled economy in the basic product, in a market where there was a shortage of consumer goods, the law of supply and demand operates and the price of the uncontrolled commodity goes up. Where the control of price

started at a point beyond the basic material, the impracticability of the "experiment" established by Revised Maximum Price Regulation No. 169 becomes apparent.

The Administrator is given such wide discretion that he may fix prices on one commodity and refuse to fix them on another. In spite of the close relationship between meat and the live-stock from which it is processed, no limitation is placed upon the Administrator to act as he chooses. No right to protest non-action on the part of the Administrator is recognized by the Act, for in so doing he is merely exercising his judgment, a right given him under Section 2.

The Circuit Court of Appeals in its opinion, p. 856 (R. 77), pointed out that in *Hirabayashi* v. *United States,* 320 U.S. 81 (June 21, 1943), this Court said:

> "The Constitution, as a continuously operating charter of Government, does not demand the impossible or the impracticable."

This interpretation of the Constitution applies in favor of the citizen with as much force as it does against him.

R.M.P.R. 169 was issued on December 10, 1942, as O.P.A. Document No. 1267 and contains about fifteen thousand words. Although Section 2 (h) of the Act provides:

> "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 . . ."—

the Regulation proceeded to revolutionize the meat industry by eliminating terms and cuts of meat upon which the trade was founded and so recognized by custom for many years. It took time to study the Regulation and learn the

effect of these radical changes. Different rules applied in the various zones of the country and other features called for interpretations. Interpretations were in conflict even among O.P.A. officials, and confusion prevailed throughout the industry.

Meat cut in accordance with standard and accepted methods could thenceforth be sold only as a "miscut" priced at about one-third of the actual value of the meat. To illustrate: "Rumps and rounds" have been standard wholesale cuts in New England as far back as any meatman can recall. With the issuance of this Regulation, "rumps" were eliminated entirely and were made part of the loin. On the day that the Regulation went into effect, all dealers who had on hand "rumps and rounds" cut in the accepted New England manner were prohibited from selling them as such and receiving any more than approximately one-third of the price prevailing when they were cut. No specific ceiling price was established on such a cut by the Regulation.

The Circuit Court of Appeals (R. 77) recognized the difficulties attending the Administrator's economic adventure in this language:

> "The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities . . . the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started."

The matters involved in a protest required a study of economics upon which the Regulation was based, also a lifetime undertaking. Economic data was needed that could not have been available to any single citizen, unless he maintained an organization of a substantial nature,

with trained personnel in the field of economics and statistical research. The complications were many and the Regulation itself was an experiment, yet the citizen was limited to a short period of sixty days to learn the effect of such a regulation and protest thereon in the manner prescribed by Section 203.

With the right to a stay, pending an appeal, denied in every Court, persons affected by a regulation adversely must either go out of business pending the review procedure or continue doing business at a loss. If the business is run at a loss pending determination of the protest, by the time it is heard and determined bankruptcy may result.

While the complaint is pending in the Emergency Court, the Administrator could rescind or revoke the regulation and replace it with a new regulation. If the new regulation were objectionable, the protest and review procedure would again have to be pursued without any relief in the interim. Revocation of the regulation before initial review is completed or pending review would render the controversy moot.

> *Alexander Sprunt & Son* v. *United States,* 281 U.S. 249 (1930).
>
> *City of Atlanta, Ga.,* v. *Nat. Bit. Coal Comm.,* 99 Fed. (2d) 348 (1938).

Where would that leave a person who was indicted after a regulation had been revoked? He could not go to the Emergency Court and ask for review, and the Courts below take the position that they have no right to pass upon a regulation under Section 204 (d).

The inadequacy of the relief afforded in the practical operation of the protest and review procedure as applied to R.M.P.R. 169 is set forth in detail in House Report No. 898, Third Intermediate Report of the Select Committee to

Investigate Executive Agencies, House of Representatives, 78th Cong. 1st Sess. (November 29, 1943), pp. 3-4:

> "It was conclusively shown in the testimony before your committee on June 30, 1943, that the effect of the order was to favor, foster, and encourage monopolistic tendencies to concentrate the meat-slaughtering business in the hands of the comparatively few large processing slaughterers and to destroy the much greater number of small independent slaughterers who operate without processing facilities.
>
> "Between January 20 and May 10, 1943, a number of protests were filed by nonprocessing slaughterers as a preliminary to their right under the statute to go to the Emergency Court of Appeals for reversal of the price-fixing order. Section 203 (a) of the statute requires the Office of Price Administration to decide the protest within 30 days or notice such protest for hearing or provide an opportunity to present further evidence in connection therewith. Instead of deciding the protest at the end of 30 days so that the victims of this order might seek their right of redress in the only court open to them, i. e., the Emergency Court of Appeals, the Administrator of the Office of Price Administration dismissed the protest with leave to amend and present further evidence. Thereafter amended protests were filed, but the Administrator took no action within the 30 days' time limit fixed by law. Thus by the use of this procedure the Office of Price Administration delayed a decision on the protests indefinitely.
>
> "The slaughterers then filed suit in the Emergency Court of Appeals, alleging that the failure on the part of the Administrator to act upon their protest constituted in fact a denial of said protest and asked that the regulation be revoked and set aside. The Office of

> Price Administration by its answer affirmatively alleged that the Emergency Court of Appeals had no jurisdiction because of the fact that the Administrator had not acted upon the protest and that there had been no denial by him of said protest. Counsel for the complainant then moved the Emergency Court for an order dismissing the defense alleged on the ground that this defense failed to constitute a claim upon which relief could be based, either in law or in fact, and on the ground that the defense was insufficient. They asked in the alternative for an order directing the Price Administrator either to grant or deny the complainant's protest, on the ground that such an order was necessary to the end that the jurisdiction of the Emergency Court be reasonably and effectively exercised. Request was also made for oral argument on this motion. On October 13, 1943, the Emergency Court of Appeals heard oral argument and at the conclusion thereof suggested that the Administrator either grant or deny the protest on or before October 27. Failing to so act voluntarily, the court indicated that it would issue an order directing the Administrator to grant or deny the protest within one week thereafter."

The indictment in this case was returned February 24, more than sixty days after the issuance of the Regulation.

Section 203 by the interpretation of the Courts below would, therefore, preclude the defendants from ever showing that their conviction was based upon an illegal regulation. Such an unreasonable limitation violates due process.

> "In tax litigation an end must be promptly reached, in order that public revenues may be fixed and certain

public treasuries must not be embarrassed by deferred shrinkage of anticipated revenues."

E. Blyth Stason, Timing of Judicial Redress from Erroneous Administrative Action, 25 Minn. L. Rev. 560 (1941).

Judicial relief has been granted even in tax cases, in spite of failure to pursue all administrative remedies.

Montana National Bank v. *Yellowstone County,* 276 U.S. 499 (1928).

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

A law which indirectly imposes such conditions as would bring about denial of relief upon resort to judicial process is unconstitutional—

Missouri Pacific Ry. Co. v. *Tucker,* 230 U.S. 340 (1913)—

or if such irreparable injury might result, pending judicial review, as to render illusory the remedies afforded, that Act is likewise unconstitutional.

Natural Gas Pipe Line Co. v. *Slattery,* 302 U.S. 300 (1937).

Oklahoma Operating Co. v. *Love,* 252 U.S. 331 (1919).

Wadley Southern R. Co. v. *Georgia,* 235 U.S. 651 (1915).

Ex Parte Young, 209 U.S. 123, 146, 147, 148 (1907).

In *Smyth* v. *Ames,* 169 U.S. 466, 528, the Court said:

"The idea that any legislature, State or Federal, can conclusively determine for the people and for the

> courts that what it authorizes its agents to do, is consistent with the fundamental law, is an opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Gebelein Inc. v. *Millbourne,* 12 Fed. Supp. 105 (D.C. Md.), related to United States Revised Statutes No. 3224, which provided that—

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

In discussing this exclusive feature the Court said at page 118:

> "But despite the generality of this provision it has been held by the Supreme Court and by other Federal Courts that its provisions are inapplicable where there exists extraordinary and entirely exceptional circumstances, the existence of which would, by applying the statute, leave the taxpayer without an adequate remedy at law. *Hill* v. *Wallace,* 259 U. S. 44; *Miller, Collector* v. *Standard Nut Margarine Co.,* 284 U. S. 498."

To require a defendant to stand trial for violation of a regulation, but deprive him of the right to show that the Administrator has not followed the authority delegated

to him by Congress, or that he has acted in such an arbitrary and capricious manner in establishing a price as to destroy an efficiently conducted industry as a whole, is a denial of due process under the Constitution.

In a criminal trial the Constitution guarantees to the accused the right to have such witnesses as are necessary to trial brought into Court to be confronted by his accusers and to be tried in the state or district where the crime is alleged to have been committed.

The Emergency Court of Appeals has its office in Washington, D.C. It sits for the most part at Washington, and at other places distant from the protesting citizen.

A defendant, in a criminal case, is left without the right to have witnesses subpoenaed in his behalf, for the Regulation, even though illegal, is accepted as the basis for a criminal act and denies to all Courts and to all defendants the right to examine such witnesses. This cannot be the due process guaranteed to a defendant in a criminal action by the Constitution, and even though we are confronted with the exigency of war, as this Court said in *Ex Parte Milligan,* 4 Wall. 2, 120-121 (1866):

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with a shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government."

This fundamental principle was reaffirmed by this Court in—

United States v. *L. Cohen Grocery Co.,* 225 U.S. 81.

Ex Parte Quirin, 317 U.S. 1 (1942).

The Sixth Amendment guarantees to the defendant a full trial. The Fifth Amendment insures to a defendant the right to be tried according to law under the due process clause.

The word "trial" as used in the Sixth Amendment is defined in *Carpenter* v. *Winn,* 221 U.S. 533, 538-539 (1911), where the Court said:

> "a. The significance of the word 'trial'. Does that word embrace anything more than is commonly understood when we speak of the 'trial' of an action at law? Or does it include, as contended here, every step in a cause between issue joined and that judicial examination and decision of the issues in an action at law, which we always refer to as the trial? Blackstone defines 'trial' to be the examination of the matters of fact in issue. 3 Bl. Com. 350. This definition is adopted by Bouvier. In *Miller* v. *Tobin,* 18 Fed. 609, 616, Judge Deady applied this meaning to the removal act, saying, 'Trial is a common-law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided.' But the word has often a broader significance, as referring to that final examination and decision of matter of law as well as fact, for which every antecedent step is a preparation, which we commonly denominate 'the trial'."

Trial is guaranteed according to the principles of common law.

> *Simons* v. *United States,* 119 Fed. (2d) 539.
> *Ong Chang Wing* v. *United States,* 218 U.S. 272 (1910).
> *Rogers* v. *Peck,* 199 U.S. 425, 435 (1905).
> *Perlstein* v. *United States,* 120 Fed. (2d) 276.
> *Callan* v. *Wilson,* 127 U.S. 540, 549 (1888).

In *Ong Chang Wing* v. *United States,* 218 U.S. 272, 279, (1910), the Court said:

> "This Court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a Court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. *Rogers* v. *Peck,* 109 U. S. 425, 435; *Twining* v. *New Jersey,* 211 U. S. 78, and the cases therein cited."

In *Edwards* v. *United States,* 312 U.S. 473, 482 (1941), the Court said:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the selection which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contention or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

In *Stevens, Landowner,* 228 Mass. 368 (1917), a statute gave the right of appeal to a Court from an order of a

building inspector requiring the erection of a fire-escape. The owner on taking the appeal complained that it deprived him of his constitutional rights to a jury trial. Mr. Chief Justice Rugg said at page 373:

> "Doubtless if the landowner had not sought a review by the Superior Court of the action of the inspector in accordance with the terms of the statute, he would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the inspector."

If a statute was enacted by Congress which was contrary to the right to make law, it would have no effect as a law. *A fortiori,* if a regulation is enacted under a law authorizing its making and the regulation as issued fails to conform to the law, it too would have no effect.

The defendants had a right to prove in their trial all of those matters essential to a full trial and have the jury pass upon them. The government does not deny that the prosecution of the defendants is based upon a regulation which itself violates the Act, and as set out in House Report, No. 862, Second Intermediate Report of the Select Committee to Investigate Executive Agencies (November 15, 1943), p. 5:

> "that a citizen may be indicted, tried, and convicted for violation of an illegal regulation or order made by an executive agency, without having the right to plead such invalidity in the Court where he is indicted and tried is, indeed, a novelty in our jurisprudence and if sustained by the courts, it should be immediately corrected by amending the Act."

Conclusion.

1. While the Constitution was adopted to set up a national government, and to do for the states what the states could not do for themselves, and to define the jurisdiction and limitations of both Federal and state powers; yet the Constitution was founded for the protection of the rights of the individual citizen.

2. The Emergency Price Control Act is an unconstitutional delegation by Congress of its power and duty to enact laws under Article I of the Constitution of the United States; in fact, it is an abdication by Congress of its power to make the laws. The subject matter in Section 1 is vague and indefinite. The Administrator is given an indeterminable and almost unlimited authority to make a regulation violation of which is made a criminal offense punishable by fine and imprisonment, and this delegation goes far beyond the limitations of delegated power laid down by this Court in *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, in which this Court said:

> "The question whether such a delegation of legislative power is permitted by the constitution is not answered by the argument that it should be assumed that the President has acted and will act for what he believes to be the public good. The point is not one of motives but of constitutional authority for which the beliefs or motives is not substituted."

Also see the language of this Court in *Schechter* v. *United States,* 295 U.S. 495, at pages 537-538:

> ". . . Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation or expansion of trade or industry."

3. The regulations made by the Price Administrator upon his own admission were an experiment based upon "trial and error." The records of discussions before congressional committees show the Administrator for the time being has admitted that the regulation did not comply with the law. Both the District Court and the Circuit Court of Appeals held that they were precluded from considering the validity, constitutional or otherwise, of any regulation by reason of the provisions of Section 204 (d) of the Act. This Court said in *Panama Refining Co.* v. *Ryan,* 293 U.S. 388:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission."

Moreover, it should be considered that both the "Emergency Price Control Act" and the "Inflation Control Act" are a "dead letter" without regulations of the Price Administrator made under them. The regulations alone give life and effectiveness to the law. The provision of the Act contained in Section 4 (a) provides that it would be unlawful "for any person to sell or deliver any commodity . . . in violation of any regulation or order under Section 2 . . ."

The Court, having ruled that it was precluded from considering the validity of a regulation, did not pass upon the question raised by the defendants as to whether the regulation was issued under Section 2, and jurisdiction of the Court would not attach unless the regulation was issued under that section. Defendants claim prejudicial error by the Court's refusal of their evidence in support of this contention.

4. The reasoning of the Circuit Court of Appeals in favor of the validity of the regulation is at once an admission and an apology.

> "Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. It was not to be anticipated that he would glory in being 'arbitrary or capricious', or that he would be loath to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not 'generally fair and equitable.' He is at least as much interested as anybody else in the successful administration of his office" (R. 78).

This statement by the Court, comparing trained soldiers carrying out orders and employing fighting tactics to overcome those used by the enemy with the conduct of an inexpert Administrator who, with limited authority, because of practical difficulties, undertakes to make regulations outside the limitation of his authority, is hardly analogous or persuasive of what the law should be.

5. The defendant was not in the lower Courts, and is not in this Court, seeking injunctive or affirmative relief.

If he were, it might make a difference, as indicated by the opinion of this Court in *Lockerty* v. *Phillips,* 319 U.S. 182, decided May 10, 1943, which left open the question as to whether the defendant might challenge the constitutionality of the Act or regulations in Courts other than the Emergency Court by way of defense to a criminal prosecution or in a civil suit.

6. Finally, the protest procedure under Section 203 of the Act and the review procedure under Section 204 of the Act are violative of the Fifth Amendment in that they do not afford due process to one charged with the commission of a crime and contravene the defendants' rights under the Sixth Amendment to the Constitution of the United States, which provides "that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Where Congress has by Section 205 (c) of the Act given the District Court jurisdiction over criminal proceedings, it cannot limit the right of the Court to determine whether the Administrator has enacted a regulation within his delegated power.

7. Petitioners do not intentionally waive points not argued for lack of sufficient time to present them, and respectfully request the Court to consider the same.

For the reasons above stated, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Petitioners.

Appendix.

Constitution of The United States.

Article I.

Section 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

Sect. 8. The congress shall have power—to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Article III.

Section 1. 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. . . .

Sect. 2. 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; . . .

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

AMENDMENTS TO THE CONSTITUTION.

Art. V. No person shall be . . . deprived of life, liberty, or property without due process of law; . . .

Art. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

Art. X. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

EXECUTIVE ORDER 9250.

Title V—Profits and Subsidies.

1. The Price Administrator, in fixing, reducing, or increasing prices, shall determine price ceilings in such a manner that profits are prevented which, in his judgment, are unreasonable or exorbitant.

[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