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CITATIONS

STATUTES AND REGULATIONS

AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 375

BENJAMIN ROTTENBERG and B. ROTTENBERG, INC.,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE

Preliminary Statement

The appellants, who were engaged in the sale and delivery of wholesale beef, were indicted by the United States Government, charging them with violation of Maximum Price Regulation No. 169, as amended, purportedly issued pursuant to the provisions of the Emergency Price Control Act of 1942 (56 Stat. 23).

Upon the trial of the petitioners in the United States District Court for the District of Massachusetts, the Court denied to the accused the right to introduce evidence as to the invalidity of the regulation upon which the indictment was based, and similarly refused to permit evidence to be introduced to show that the regulation was not issued *under* Section 2 of the Act, and refused to consider other evidence bearing upon the question of the validity of the regulation.

After the trial thus had, the petitioners were convicted by the jury, and the petitioner, Benjamin Rottenberg, was sentenced to pay a fine of $1,000 and to serve a term of six months in jail, and the petitioner B. Rottenberg, Inc., was sentenced to pay a fine of $1,000.

The judgment and sentences of the District Court were affirmed by the Circuit Court of Appeals for the First Circuit (137 F. (2d) 850).

Questions Presented On This Hearing

(1) Where enforcement proceedings are instituted by the Price Administrator under the Emergency Price Contral Act and Regulations issued pursuant thereto, may the Court, which has been selected by the Price Administrator as the forum for the enforcement proceedings, properly preclude the defendants from interposing and proving every defense available to it in law and equity challenging the validity of the regulations upon which the enforcement proceedings are based?

(2) Does not Section 204 (d) of the Emergency Price Control Act of 1942, which the Government contends vests exclusive jurisdiction in the Emergency Court of Appeals to determine the validity of any regulation or order issued under Section 2:

(a) Infringe upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States?

(b) Deprive appellants in this case and other persons, that may be similarly situated in enforcement proceedings, civil and criminal, of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

(c) Deprive appellants in this case and other persons, that may be similarly situated in enforcement proceedings, civil and criminal, of a full, fair, complete and impartial trial on all issues involved, in violation of Article III, Section 2, Clause 3, of the Constitution of the United States, and in violation of the Sixth Amendment to the Constitution of the United States?

(3) Do the administrative remedies provided for by the Emergency Price Control Act of 1942 accord to persons affected thereby, due process of law, and does said Act contain adequate provisions for judicial protection and judicial review?

(4) Is the Emergency Price Control Act of 1942 unconstitutional, in that it illegally delegates legislative powers to the Price Administrator, in violation of Article I, Section 1, of the Constitution of the United States?

Summary of Argument

POINT I—Section 204 (d) of the Act, as construed by the courts below, precludes courts selected by the Price Administrator as the forum for enforcement proceedings instituted by him from hearing any defenses interposed by the defendant which challenge the validity of any regulation or order issued, or claimed to have been issued, by the Price Administrator under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States.

Point II—Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the court below, deprives the petitioners of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

Point III—Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms regulates prices, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method, whereby such maximum prices shall be established, it is an unlawful delegation by Congress to the Administrator of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States.

Point IV—In view of the fact that the petitioners could not properly be indicted for a violation of M. P. R. 169, unless said regulation had been issued *under* Section 2 of the Act, and since such section, under the authorities, refers to one issued in compliance with Section 2, the Court below erred in refusing to permit evidence to be introduced to show that said regulation was not issued under Section 2 of the Act.

Point V—The contentions contained in the opinion of the court below and the authorities relied upon by the Government are distinguishable.

POINT I

Section 204 (d) of the Act, as construed by the Courts below, precludes courts selected by the Price Administrator as the forum for enforcement proceedings instituted by him from hearing any defenses interposed by the defendant which challenge the validity of any regulation or order issued, or claimed to have been issued, under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States.

Section 204 (d) of the Act provides as follows:

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206 and of any provision of any such regulation, order or price schedule."

It will be noted that jurisdiction may be conferred upon the Emergency Court of Appeals only by the voluntary act of a party who must first have filed a protest with the Price Administrator (Sections 203, 204(a) of the Act).

Section 205 of the Act specifically confers jurisdiction upon the district courts in any action for enforcement brought by the Administrator.

This Court has already held in *Lockerty* v. *Phillips,* 319 U. S. 182, 63 Sup. Ct. 1019, that a district court does not have jurisdiction to enjoin the enforcement of price regulations prescribed by the Administrator. In

doing so, however, the Court specifically stated that it did not pass upon

> "whether or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it" (p. 189).

Equally emphatic was the opinion of this Court in its statement that

> "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored" (p. 188).

The question expressly before this Court now is whether Section 204 (d) of the Act, after the submission of an enforcement proceeding to the jurisdiction of the Court, in an action brought by the administrator, does not deny all opportunity for judicial determination of an asserted constitutional right, and deny to the Court an opportunity from making "a judicial determination of an asserted constitutional right".*

Clearly, under the form of government established by our Constitution, it is within the province of the judiciary to say what the law is, and a legislative enactment may not validly shackle the inherent powers of a court and compel the rendering of an opinion based upon judicial investigation and reflection which is legislatively limited. The act of the court below in trying individuals and passing sentence under a construction of Section 204 (d) that precluded it from hearing and determining the defenses interposed by the defendants, was in violation of the first concepts of our judiciary.

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* This question thus left undecided by this court in *Lockerty* v. *Phillips* (*supra*) has been recognized in many decisions to be one of pressing importance that should be answered. Cf. *United States* v. *Siegel*, 52 F. Supp. 238, *Brown* v. *W. T. Grant*, unreported, United States District Court, S. D. of N. Y., Dec. 14, 1943.

Early in the history of this Court, it was declared that the unrestricted power of judicial review was an essential attribute of the judicial power given to the courts by the Constitution.

In *Marbury* v. *Madison,* 1 Cranch 137 (1803), Chief Justice Marshall said (at p. 177):

> "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

To the same effect see:

> *Ableman* v. *Booth,* 21 How. 506 (1858), 520;
> *Gordon* v. *United States,* 117 U. S. 697, 705.

This power flows from the Constitution itself.

Article III, Section 1, of the Constitution provides:

> "The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, Clause 1, provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *".

Thus, by constitutional grant, there was created a separation of powers vesting in the judiciary an immunity from legislative control of all inherent and essential elements of judicial power.

> *United States* v. *Klein,* 13 Wall. 128 (1871);
> *Michaelson* v. *United States,* 266 U. S. 42 (1924).

This concept of the independence of the courts was well stated by then Professor *Felix Frankfurter* and *James M. Landis,* in an article in the *Harvard Law Review* (Vol. 37; at p. 120 (1924), in the following language:

> "They (the courts) are an independent organ of government with finality of judgment within their domain, and not advisory adjuncts of the executive or the legislature."

This conclusion flows indisputably from a long line of well settled authorities.

In *United States* v. *Klein,* 13 Wall. 128 (1871), there was before the court for consideration the Act of Congress which provided in substance that where in the trial of a case before the Court of Claims it was proved and established that the claimant had taken part in an act of rebellion or disloyalty, "the jurisdiction of the court shall cease" and the suit was to be dismissed. The effect of the Act is stated at greater length as follows (at p. 143):

> "* * * that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that, whenever any pardon granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late Rebellion, or was guilty of any act of

> rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the court of claims, and on appeal, that the claimant did give aid to the Rebellion; and on proof of such pardon or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed."

In holding this Act unconstitutional as an attempt by the Legislature to infringe upon the judicial power, Chief Justice *Chase* said (13 Wall. 146):

> "It is evident from this statement that the denial of jurisdiction to this court, as well as to the court of claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. *The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.*
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> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.
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> * * * * * * *
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> *"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.*
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> It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'
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> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the

> court of claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." (Italics ours.)

That case compels analogy to the case at bar, for here, too, the Government contends the District Court "has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists", (to-wit, that a defense has been interposed of unconstitutionality or invalidity of a regulation), "its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."

To follow this contention to its logical conclusion is to hold *"that Congress has inadvertently passed the limit which separates the legislative from the judicial power."*

To the same effect is the case of *Ex Parte N. K. Fairbank Co.,* 194 Fed. 978, where the Court said (at p. 995):

> "When Congress creates an inferior court and distributes to it jurisdiction over such subject-matters falling within the judicial power as Congress sees proper to confer, the particular court eo instanti is armed, by virtue of the Constitution itself, with all the power essential to preserve its independence, to prevent the usurpation of its powers by other departments, and to enable the court to exercise the judicial power thus conferred as to every matter involving a judicial determination in any case before it. While Congress may regulate the methods of practice and procedure in the court in many respects, it cannot exercise this power of regulation so as to take from the courts, under the guise of regulating its procedure, the right to exercise judicial power as to any matter arising in the case whose disposition properly calls for the exercise of judicial power."

In the case of *Kuhnert* v. *United States,* 36 F. Supp. 798; aff'd 127 F. (2) 824, the Court said, in reference to an Act

conferring jurisdiction upon the Federal District Court to render judgment against the United States for damage to land of named persons resulting from construction of dikes (at p. 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 classes of cases they shall exercise judicial power. But the judicial power is conferred upon the district courts 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. *It is not conceivable that Congress ever would say to the constitutional courts* (such legislative courts as the Court of Claims may be in a different situation): *'Congress has decided what rule of law will govern the decision of this case; the court will pronounce judgment accordingly'.*
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> To illustrate, let us assume the case of A. v. United States, a war risk insurance case. The prime questions in the case are: Was A regularly enlisted; did he apply for war risk insurance; was he totally and permanently disabled on January 1, 1925? These are questions to be decided upon the law and the evidence under and by the judicial power. Congress would not usurp the judicial power by specially legislating as to that particular case that the district court should find as a fact that A was an enlisted man, although the evidence might be to the contrary, or that in that case the rule against hearsay evidence should not be enforced or that the district court should not apply the law applicable to the actual contract but should apply the law applicable to an entirely different character of contract. Congress would not so legislate and no judge, having respect for the judicial oath, would obey such legislation if enacted." (Italics ours.)

Yet, the contention pressed for by the Government would clothe with validity the purported mandate of Congress in the Emergency Price Control Act of 1942 which the Court

in *Kuhnert* v. *United States* (*supra*) held to be without the confines of constitutionality. Since a regulation issued under an act becomes an integral part of that legislative scheme, courts charged with the enforcement of the regulation would quite, logically, therefore, be constrained to enforce a regulation whose terms may be clearly unconstitutional. This must perforce follow, notwithstanding the clear indications of the decisions that judges of a State Court (which is also charged with enforcement of regulations under the Act) may not enforce a statute whose terms are clearly unconstitutional.

Marbury v. *Madison,* 1 Cranch 137, 2 L. Ed. 60;
People v. *Western Union Tel. Co.,* 70 Colo. 90, 198 P. 146, 15 A. L. R. 326;
Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist.,* 281 U. S. 74 (1930).

In the Matter of *Ex Parte Bakelite Corporation,* 279 U. S. 438, 49 S. C. 411 (1929), the District Courts are described as constitutional courts, not statutory. When once created by statute, they exist under the Constitution, and their jurisdiction to decide controversies brought before them cannot be whittled down. These inherent powers attach to the District Courts, so that in the matters before them they have plenary powers to decide and enforce their decision.

To this effect see: *Farrell* v. *Waterman Steamship Co.,* 291 Fed. 604.

It is not disputed that a District Court may be deprived by Congress of jurisdiction to entertain a controversy, but in the light of the authorities heretofore referred to, it is respectfully submitted that no equal right exists enabling the Legislature to say that once the controversy is properly before the Court, that its power to decide the controversy under all its inherent powers may be nullified or limited.

If the rule of law were otherwise, a retailer affected would be compelled to obey every regulation no matter how arbitrary, capricious, oppressive and unconstitutional it may be on its face, in order to avoid a prosecution in which he has been stripped in advance of all rights to contest the validity of the regulation.

This limitation on the power of Congress has been very adequately expressed by Mr. Justice Rutledge in his concurring opinion in *Schneiderman* v. *U. S.*, 320 U. S. 118, 63 S. Ct. 1333, where he stated at page 168:

> "Congress has, with limited exceptions plenary power over the jurisdiction of the federal courts. *But to confer the jurisdiction and at the same time nuulify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority".* (Italics ours.)

The same principle is also well stated in *Michaelson* v. *United States,* 291 Fed. Rep. 940 (at p. 946):

> "Viewing the inferior courts, and also the Supreme Court as an appellate tribunal, we see that Congress, the agency to exercise the legislative power of the United States, can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but, the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution.
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> "Congress may limit the jurisdiction of an inferior court to hearing criminal cases, or to designated kinds of criminal cases; but Congress cannot constitutionally deprive the parties in such a court of the right of trial by jury. The same is true of trials of 'cases in law.' And the jury in such a civil or criminal court must comprise 12 jurors and their verdict must be unanimous. Similarly Congress may limit the jurisdiction of an inferior court to hearing 'cases in equity', or to designated kinds of equity cases; but Congress cannot constitutionally deprive the parties in an equity court

> of the right of trial by the chancellor. Martin v. Hunter's Lessees, 1 Wheat. 331, 4 L. Ed. 97; In re Atchison (D. C.) 284 Fed. 604."

In that case there was involved the question whether Congress had the power to deprive a court of the right to punish for contempt. The Circuit Court of Appeals in the opinion, from which the above quotation has been taken, held that the right to punish for contempt is an inherent power of the court which Congress may not abrogate.

Upon appeal this Court (266 U. S. 42, 45 S. C. 18), affirmed the view taken by the Circuit Court of Appeals, but modified it to the extent that it held that a regulation of the manner of punishment for contempt was not an abrogation thereof.

The Court pointed out that notwithstanding the control of Congress over the inferior federal courts, *it cannot adopt a statute which will render inoperative the power of those courts to function.* In that case the Court said (at p. 66):

> "* * * the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."

To the same effect are those cases which hold that rules of evidence, that are contrary to normal inferences, cannot be forced upon the District Court in the decision of a case properly before it.

The latest of these authorities is:

> *Tot* v. *United States,* 319 U. S. 463, 63 Sp. Ct. 1241,

where it was held that the provision in the Federal Firearms Act, that possession of a firearm by a person who has been convicted of a crime of violence or who is a fugitive shall be presumptive evidence that it was re-

ceived in interstate commerce, is inconsistent with any argument drawn from experience and violates the due process clause of the Constitution.

Mr. Justice *Roberts* in his opinion stated as follows (pp. 1244, 1245):

> "The rules of evidence, however, are established not alone by the courts but by the Legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. *But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.*
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> "This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the Legislature to create it as a rule governing the procedure of courts."

When once the Government institutes prosecution, whether civil or criminal, and thereby invokes the inherent powers of the District Court, those powers cannot in large measure be clipped off, so that the defendant is deprived of its weapons of defense. The court below, in the full exercise of its inherent powers, was clothed with constitutional protection from any interference in its right to decide all matters before it open for decision.

In the language of this Court in *Hopkins* v. *Southern Cal. Telephone Co.*, 275 U. S. 393, 48 S. C. Rep. 180

(at p. 399):

> "As it acquired jurisdiction, all material questions were open for decision. Greene, Auditor v. Louisville, etc., Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88."

To the same effect see *Greene* v. *Louisville & Interurban R. Co.,* 244 U. S. 499, 37 S. C. Rep. 673, where the Court stated (at p. 677):

> "This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Ohio Tax Cases, 232 U. S. 576, 586, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372."

Convincing proof that the Act not only has theoretically usurped powers rightfully belonging to the judiciary, but has actually resulted in many instances of such infringement, and has resulted in an administrative body which has arrogated to itself unlawful powers, is contained in the Report of the Congressional Select Committee to Investigate Executive Agencies—House Report No. 862, 78th Congress, 1st Session (November 15, 1943).

On page 6 of said Report, the following is stated:

> "Nevertheless your committee has found, and proposes to show, that the Office of Price Administration has not remained within the bounds of its statutory powers. It has misinterpreted the language of the act so as to arrogate unto itself additional powers nowhere granted it by law and has administered the Act in such fashion as to cause many unnecessary hardships to our citizens."

To the same effect it is stated on pages 2 and 3 of said Report as follows:

> "The committee finds that the Office of Price Administration has assumed unauthorized powers to legislate by regulation and has, by misinterpretation of acts of Congress, set up a Nation-wide system of judicial tribunals through which this executive agency judges the actions of American citizens relative to its own regulations and orders and imposes drastic and unconstitutional penalties upon those citizens, depriving them in certain instances of vital rights and liberties without due process of law.
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> "In addition to the statutory court created by the Emergency Price Control Act, your committee has found that the Office of Price Administration has developed an unauthorized and illegal judicial system and that through the mass of rules and regulations daily enacted by that agency it has also developed such intricate and involved administrative review machinery that litigants are completely bewildered by the maze of procedure through which they must wander to eventually arrive at a court which will grant them only the crumbs of judicial relief."

These conclusions have even been confirmed by the Judiciary, as shown by the following footnote to page 5 of the Report:

> "In the case of *Clarence McDugle et al.* v. *Alex Elson, regional counsel, Office of Price Administration et al.,* decided before a three-judge Federal court in the northern division of the southern district of Illinois, September 9, 1943, Judge Briggle stated in an oral opinion that 'this is the culmination of a series, a long series, of legislative acts which tend to deprive the courts of our country of jurisdiction of many questions and many, many problems, and has vested in various boards and various agencies the decision of public questions that normally and rightfully, in my judgment, belong to the courts.' The remarks of Judge Briggle were taken in shorthand at the time they were spoken, later transcribed and a copy of his remarks is now in the files of your committee."

POINT II

Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the Court below, deprives the petitioners of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

The petitioners herein were denied the right to show and prove the invalidity of the regulations under which they were indicted. Instead, it was the opinion of the courts below that due process of law was accorded to the appellants by the administrative remedies outlined by Sections 203 and 204 of the Act.

It is contended by the appellants at bar that said sections, which might have to be resorted to by one, before he may look to the courts for affirmative relief, are without application to the case at bar. It is also contended by petitioners that the doctrine of exhaustion of administrative remedies is a procedural step in equity which has to be followed before judicial processes for affirmative relief can be sought, and that said doctrine has no application to a criminal prosecution.

Aside from the suggested inapplicability of the doctrine of exhaustion of administrative remedies to a criminal case, this principle can likewise have no application to cases under the Emergency Price Control Act of 1942, because of the inadequate protection afforded by that Act to persons questioning regulations issued thereunder while the administrative remedies are sought.

We respectfully submit that administrative remedies must provide adequate protection during the time of the

consideration of the matter before the administrative tribunals, and where such protection is not afforded to the persons affected, as to those persons the statute is unconstitutional.

Thus, in examining the constitutionality of withdrawal of a limited amount of jurisdiction from the District Court to enjoin certain activities under the Labor Relations Act, this Court in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938), first examined the Act as to whether adequate protection was afforded thereby. The Court stated (at p. 48):

> "The grant of that exclusive power is constitutional because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board."

And concluded by saying (at p. 50):

> "Since the procedure before the Board is appropriate and the judicial review so provided is *adequate,* Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." (Italics ours.)

It must be observed that the court stressed the fundamental requirement of adequate protection. No such adequate protection is afforded by the act in question.

It was likewise held that statutes which deny an injunction to a public utility pending review of the fairness of a rate order are unconstitutional under the due process clause.

> *Mt. States Power Co.* v. *P. S. Commission of Montana,* 299 U. S. 167 (1936);
> *Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196 (1924).

It has likewise been held that the principle of exhaustion of remedies has no application where no adequate protection is afforded to the parties questioning the regulation while an administrative remedy is sought. This is the case where an act establishes such unusually heavy penalties as to preclude judicial determination.

> *Ex Parte Young,* 209 U. S. 123, 28 Sup. C. Rep. 441 (1908);
> *Natural Gas Pipeline Co. of America* v. *Slattery,* 302 U. S. 300; 58 S. C. 199 (1937).

In the latter case, the Court stated as follows (at p. 310):

> "As the act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process."

A like situation exists with respect to all persons whose business is affected by regulations issued by the Price Administrator under the Emergency Price Control Act of 1942. No bond is required of the Government while the validity of the regulation is being considered by the Price Administrator, the Emergency Court of Appeals, and the United States Supreme Court. During that time, months may elapse during which business and trade are virtually confiscated.

Moreover, the Emergency Court of Appeals, which the Government claims has exclusive jurisdiction to pass upon the validity of regulations or orders, in all events is not really a court, except in name, and can only be considered part of the administrative process established by the court. This must be clear from a study of the powers of that court. The Emergency Court of Appeals (a) has no power to enjoin the enforcement of the Act; (b) is

denied the power to issue any temporary restraining order enjoining the effectiveness of any regulation or order promulgated under the Act; and (c) any judgment of the court holding any regulation or order invalid is inoperative for a period of thirty days.

The Government has conceded that the necessity for adequate protection of the merchant is a prime requisite for the constitutionality of the Emergency Price Control Act. In *9 Law and Contemporary Problems,* at page 76, it is stated with great assurance on the part of one of the counsel for the Government as follows:

> "There is here no attempt to preclude a judicial determination by establishing unusually heavy penalties.[74] On the contrary, the path has been cleared for a speedy and complete judicial review without any of the risks of disobedience. The exclusive jurisdiction provisions require only that this path be followed. Whether or not such provisions would be appropriate in a peace-time price control measure, with no real threat of inflation impending, is now an academic question. There is no doubt that the exclusive jurisdiction provisions are both appropriate and essential to the effective operation of the Emergency Price Control Act."
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> [74]Cf. *Ex parte Young,* 209 U. S. 123 (1908).

A very clear example as to what must await the merchant who would perchance test the validity of a regulation along the devious administrative routes outlined by the Act, appears in connection with another regulation issued under the Act, to-wit, Maximum Price Regulation No. 330 (referred to here as M. P. R. 330).

M. P. R. 330 was issued on February 18, 1943. Said Regulation is upon its face not one for price control but for sales limitation. Within sixty days thereafter, to-wit, on April 19, 1943, *Montgomery Ward & Co., Inc.,* filed its protest with the Secretary of the Office of Price Administration. This protest claimed that M. P. R. 330 was in-

valid because in excess of the statutory power of the Price Administrator. On May 20, 1943, the Office of Price Administration issued an order denying the said protest. A complaint was thereafter duly filed on June 19, 1943, with the United States Emergency Court of Appeals, and on September 23, 1943, the matter came up for hearing before the United States Emergency Court of Appeals.

*While the decision from that Court was still pending, the Price Administrator commenced injunction proceedings to enjoin Montgomery Ward & Co., Inc., from alleged violation of M. P. R. 330, the very Regulation which is before the Emergency Court of Appeals on the protest and complaint of said Montgomery Ward & Co. Inc. The injunction proceeding has already been determined, and an injunction has issued against Montgomery Ward & Co., Inc., notwithstanding the fact that at that time no decision had been handed down by the Emergency Court of Appeals.**

The very thing which this Court in *Natural Gas Pipeline Co. of America* v. *Slattery* (*supra*), said was not within the realm of due process, has been forced upon Montgomery Ward & Co., Inc., under the Price Administrator's construction of the Emergency Price Control Act, to-wit, that company is now suffering from the penalties and hardships of an injunction "pending an attempt to test the validity of the order in the courts and for a reasonable time after decision", and this situation is in the language of the same Court "a denial of due process".**

The denial to merchants in all cases affected by the Act and the Regulations issued thereunder of the right of a stay, pending completion of the lengthy administrative process just outlined, establishes the inapplicability of the doctrine of the exhaustion of administrative remedies.

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* Case still unreported.

** That this is by no means an isolated instance, appears from the cases of *Safeway Stores, Inc.* v. *Brown,* Emergency Court of Appeals, 1 Price Control Cases, Par. 50,989, Cert. denied, Dec. 13, 1943, 12 LW 3198 and *Aberle, Inc. et al.* v. *Prentiss Brown,* Emergency Court of Appeals, Docket No. 97, undecided.

In *Porter* v. *Investors Syndicate,* 286 U. S. 461 (1932), this Court, in an opinion by Mr. Justice *Roberts,* said (at pp. 470, 471):

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 454. But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

See also:

> *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290 (1923).

It is a fact that the Legislature in enacting Statutes providing for administrative regulation has in the past been cognizant of the requirement that provision be made for the stay of administrative orders that are likely to bring about harsh results if left outstanding pending judicial review thereof.

Provisions for that purpose appear in the (1) Securities Act of 1933, (2) Securities Act of 1934, (3) Public Utility Holding Company Act of 1935, (4) the Federal Power Act, (5) the National Labor Relations Act, (6) the Natural Gas Act, (7) the Fair Labor Standards Act of 1938, (8) the National Bituminous Coal Commission Act, (9) the Agricultural Adjustment Act of 1938, (10) the Civil

Aeronautics Act of 1938, and (11) the Federal Food, Drug and Cosmetics Act of 1938. (12) Under the Federal Alcohol Administration Act, the commencement of review proceedings operates as a stay unless the court orders to the contrary.

Judicial sanction has been given to stays pending review of administrative action, where irreparable loss and damages may result, in the following cases:

Uebersee Finanz-Korporation, etc. v. *Rosen,* 83 F. (2d) 225, 228;
Truax-Traer Coal Co. v. *National Bituminous Coal Commission,* 95 F. (2d) 218;
Saxton Coal Mining Co. v. *National Bituminous Coal Commission,* 96 F. (2d) 517.

In the last mentioned case, the United States Court of Appeals for the District of Columbia in its opinion stated as follows (at p. 517):

> "* * * it further appears that the producing coal companies were parties to these orders and that they are interested parties, and that if the orders are invalid, they are suffering irreparable and continuing damage. Under these circumstances the denial of relief pendente lite, sought to prevent continuing irreparable damage and to preserve in so far as possible the status quo until a ruling upon final review, would be extraordinary unless the ultimate right of review sought is clearly without foundation."

Of particular interest with regard to these contentions is the 43rd Report of the Special Committee on Administrative Law of the American Bar Association, wherein the following is stated on page 3 thereof:

> "If Congress has provided a statutory scheme for such review, he may find that too but an illusion. Take the Emergency Price Control Act of 1942. If

> the citizen were charged with an ordinary criminal offense, under the Bill of Rights he would 'enjoy the right to a speedy and public trial, by an impartial jury of the state and district.' But if charged with criminal violation of the Price Control Act, or prosecuted civilly, he may have the benefit of constitutional and statutory protections and defenses only in the Emergency Court of Appeals at Washington (Section 204 (d), Emergency Price Control act). Even then he must first have undertaken formal protest proceedings before the Price Control Administrator, which may consume three months (Section 203 (a)). Then he must take some time, say a month, to get the case into the Emergency Court staffed by specially assigned judges busy in their several circuits. *Meanwhile that court has no authority to grant him a stay of the price regulation* (*Section* 204 (*c*)), *something that Congress has never before withheld* (*Scripps-Howard Radio* v. *Comm'n.,* 316 U. S. 4, 17). Even should that court find for him, its judgment is suspended for at least a month, and for an indefinite time if the Government shall seek *certiorari* in the Supreme Court (Section 204 (b)). At the very least sixs months will have elapsed, after which the issues will long since have become moot or the Office of Price Administration may make some insufficient adjustment and so require the parties to start all over again. Not only is the statutory review illusory, but it effectively precludes recourse to non-statutory review which might otherwise be available. The consequent lack of any practical review leaves the statute merely advisory and the administrative arm supreme. And there is no reason to believe that this state of affairs has not harmed, rather than aided, the cause of price control." (Italics ours.)

It is respectfully submitted that the contentions contained under this Point are especially warranted in the light of the following conclusion contained in the Report of the Select Committee To Investigate Executive Agencies, House Re-

port No. 862, 78th Congr., 1st Session, wherein it is stated as follows (at p. 8):

> "With the narrow limitations, both on the scope of review and the extent of relief which the court may grant, your committee submits that it will be very rare when the Court will be able to determine that any decision of the Administrator is 'arbitrary or capricious' *and that therefore the scope of the judicial review provided as a safeguard in the act is so small as to be almost nonexistent.*" (Italics ours.)

In view of the unreasonable length of time that must elapse before administrative review is possible, no argument is required to show that during such proceedings, a merchant may suffer irreparable loss and damages. Under the cases discussed herein, the inadequacy of judicial review constitutes deprivation of property without due process of law, in violation of the Fifth Amendment to the Constitution.

POINT III

Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms regulates prices, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method whereby such maximum prices shall be established, it is an unlawful delegation by Congress of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States.

It is a fundamental constitutional principle that the power of the Congress to legislate is confined constitutionally to the Congress, and the delegation of such powers may validly be made only under carefully defined standards and rules.

As stated by this Court in:

Wichita R. & L. Co. v. *Commission* (1922), 260 U. S. 48, 43 S. Ct. 51,

(at p. 59):

> "In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

The motive of Congress in effecting the delegation is not the basis for testing the constitutionality of the Act.

In: *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 55 Sup. Ct. Rep. 241 (1935), there came before this Court the validity of an Executive Order issued pursuant to a provision of the National Industrial Recovery Act of June, 1933, which authorized the President to prohibit transportation in interstate and foreign commerce of petroleum in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State, and further provided that any violation of any order of the President issued thereunder should be punishable by fine or imprisonment, or both. The President under an Executive Order prohibited the transportation in interstate and foreign commerce of petroleum in excess of the amount permitted by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Referring thereto, this Court, per Mr. Chief Justice *Hughes,* said as follows (at p. 420):

> "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 best of motives is not a substitute."

In the same case, this Court in invalidating the Executive Order, based its decision upon the fact that in effecting its delegation of power (at p. 430):

> "* * * Congress has declared no policy, has established no standard, has laid down no rule, * * *."

This Court has thus expressly held that a policy and standards must be set up to give an act of Congress constitutionality. The Emergency Price Control Act of 1942 in its delegation of powers to the Price Administrator is as defective as was the act and order under consideration in *Panama Refining Co.* v. *Ryan (supra).*

As stated in *Roach* v. *Johnson,* 48 F. Supp. 833, in discussing the Emergency Price Control Act of 1942 (at p. 834):

> "The order in this case, as in the *Panama* case, contains no finding of facts, no statement of the grounds of the Administrator's action. Again in the case at bar, as was held in the *Panama* case, if it could be inferred that Congress intended certain circumstances or conditions to govern the exercise of the authority conferred, the Administrator could not act validly without complying with the circumstances and conditions and findings by the Administrator that these conditions existed and were necessary, else it is left entirely to the unfettered discretion of the Administrator."
>
> * * * * * * * * *
>
> "No determinations of facts are shown in the case at bar. The only provision in the Emergency Price Control Act that even hints at the necessity for determination of fact is found in Section 202, 50 U. S. C. A. Appendix § 922, where it is provided that:
>
> > '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'."

(At pp. 834, 835):

> "As defendant very well says on page 16 of his brief,
>
> > 'He (the Administrator) possesses here not only a figurative "roving commission", but one in patent literalness. He may move from state to state, from county to county, and according as "the spirit moves" or in the measure of his last nocturnal sojourn, whether restful or restless, his morning meal palatable or inedible, find or decline to find, as for that territorial locality where each morning sun discovered him, that it was "an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations which will bring about speculative, unwarranted and abnormal increases in rents which tend to defeat or obstruct the effective prosecution of the war". He (the Administrator) *becomes the general agent of the Congress—first to choose the area for legislation, then to choose the character of the legislation that he believes suits the area selected for action, and there to enforce it in the manner he sees fit.*' " (Italics ours.)

A judgment was entered in the above case based upon a finding of the invalidity of the Emergency Price Control Act.

The judgment was vacated by this Court (May 24, 1943), on the ground that the judgment had been obtained by collusion between the plaintiff (tenant) and the defendant (landlord), but no contrary opinion was expressed.

Schechter Corp. v. *United States,* 295 U. S. 495 (1935), involved the validity of Section 3 (a) of the National Industrial Recovery Act, authorizing the President to approve codes of fair competition "for trades and industries". The Statute provided that codes may be approved upon application of one or more trades or industrial groups, if the President found (1) that such associations impose no equitable restrictions on membership, and are

representative, and (2) that the codes are not designed to promote, monopolize or to eliminate small industries or to discriminate against them. It further provided that the President may as a condition of approval of any code, impose such conditions "for the protection of consumers, competitors, employees and others, and in furtherance of the public interests, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared."

In holding that such a sweeping delegation of legislative power found no support in the decisions of this Court, it said (295 U. S. 541):

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

As stated in the concurring language of Mr. Justice *Cardozo* (at p. 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."

Applying the principle of these cases to the present case, the conclusion is clear that the Emergency Price Control Act should be declared unconstitutional as an improper delegation by Congress of its legislative functions. By this Act Congress has conferred upon the Administrator not merely the power to fill up the details in the general scheme of the Act, or to exercise the administrative function of applying a general principle or standard, but complete and comprehensive authority to determine what the Act shall include, when it shall begin to operate, and when price schedules, regulations, or orders shall terminate.

The general purposes of the Act are stated in Section 1 (a) as follows:

> "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."

In order to carry out the stated purposes of the Act, Congress has delegated to the Administrator in Section 2 (a) virtually complete discretion in the matter of fixing maximum prices. Section 2 (a) provides:

> "Whenever in the judgment of the Price Administrator * * * 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. * * * Before issuing any regulation or order * * * 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. * * * 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."

Section 2 (c) provides:

> "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."

By Section 2 (h) of the Act it is further provided that the powers granted by Section 2 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".

It will thus be seen that under the provisions of this Act the power to determine on what commodities price ceilings should be placed is wholly discretionary and not mandatory. Although Section 2 (a) uses the word "shall" when dealing with the ascertainment and consideration of prices prevailing on any date and for the making of adjustments, it, nevertheless, provides that in establishing any maximum

price the Administrator shall do so only so far as practicable. Whatever mandatory effect these words may have is completely emasculated by Section 2 (c) which, it should be observed, provides that any regulation may be established in such form and manner, contain such classifications and differentiations, and provide for such adjustments and exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act. This latter provision, when considered with the words "so far as practicable", clearly shows that the Administrator is not compelled to follow any specified or certain standard but may fix any price which he may choose without taking into consideration any of the elements specified in Section 2 (a). Thereby no mandatory standard is established by the Act.

Moreover, there is no requirement in the Act that the Administrator must fix a price ceiling on every commodity which rises or threatens to rise. He may fix ceilings on some commodities and leave others alone. He may, under the terms of the Act, even differentiate between commodities in the same class. Thus, he may fix a ceiling on the price of chickens but need not on ducks or geese. In addition, he may terminate any price schedule whenever he wishes and re-impose any kind of a ceiling whenever he chooses. This gives him such an unbounded discretion, in the words of Justice *Cardozo,* as to amount to "delegation running riot."

Thus, the Administrator has not only been given the power to determine what prices should be fixed and what commodities should be covered by the price ceilings, but also the power to determine when a price ceiling shall begin and when it shall terminate. Congress has thereby failed to define the circumstances and conditions under which the Administrator should act and in the same manner Congress has failed to set up any standard sufficiently definite to guide him in his determination as to the period for which each price ceiling should exist.

Nor is the Administrator obliged to depend upon any specified procedure for the determination of the circumstances and conditions under which the ceiling is to be imposed or discontinued. Even fixing of the price ceiling is left to the uncontrolled discretion of the Administrator. Although Section 2 (a) provides that consideration should be given to the prices prevailing between October 1 and October 15, 1941 and that he shall make adjustments for such relevant factors as he might determine and deem to be of general applicability, such as speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of commodities during and subsequent to the year ended October 1, 1941, as we have already pointed out, he is not compelled to act upon such facts. All he is required to do is to consider them. So long as he considers them, he may disregard them completely. Again, this is not sufficient to provide a certain or definite standard for the setting of a price ceiling.

Nor can it be reasonably argued that the exercise of the powers conferred by the Act is merely a ministerial function delegated to the Administrator. If he may set a ceiling or unmake it, if he may apply it to all or none of the commodities sold in this country, if he may extend it to competing commodities or restrict it to enumerated commodities, if he may begin and end its application and determine its duration, if he may fix the extent of the ceiling, then and under such conditions the powers exercised by him cannot be said to be merely administrative but are, without question, discretionary. As such they clearly violate the constitutional prohibition against the delegation of powers for by their exercise it is the Administrator and not Congress who performs the legislative function. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935); *Schechter Corp.* v. *United States,* 295 U. S. 495 (1935).

Thus under M. P. R. 330, Section 1389.562 (a), the Administrator undertakes to set out definitions to govern

the regulations and in doing so, undertakes to subordinate the definitions contained in the Act itself, and to make the definitions contained in the Act applicable only where he has not otherwise specifically provided, for Section 1389.562 (a) provides:

> "Unless the context otherwise requires or unless *otherwise* specifically provided herein, the definitions set forth in Section 302 of the Emergency Price Control Act of 1942, as Amended, and in § 1499.20 of the General Maximum Price Regulation, shall apply to the terms used in this regulation." (Italics ours.)

In other words, Section 302 of the Act, which has certain definitions, means nothing to the Administrator.

302 (i) of the Act defines maximum price as the maximum *lawful* price of a "commodity", which word is defined in Sec. 302 (c) of the Act, yet the administrator subordinates this definition and says to merchants under M. P. R. 330:

> "You who were in business in March 1942 may not sell any merchandise above the highest price line carried by you during that month, notwithstanding that under the statement of considerations for Regulation 330 I have given your present competitors, who happened not to be in business in March 1942 the right to sell the same garment at the highest price charged by his most closely competitive seller, without reference to the March 1942 highest price line."

Assuming therefore (and it happens to be the fact) that a merchant was selling coats in March 1942 and the highest priced coat sold by him during that month was $14.89. This merchant has a coat of better quality which he can sell for $16.89, the Administrator forbids him to do so, notwithstanding the fact that that same coat is being sold by a competitor for $19.98. Thus the Administrator has one maximum lawful price for the merchant in business in March 1942, who operated at low cost and low markup and a much higher maximum lawful price for the mer-

chant who operated at high cost with high markups in March 1942, and a high maximum lawful price for the man who was not in business in March 1942, all of whom sell the identical article. That illustrates the construction by the Administration of Section 302(i) and Section 302(c) of the Act, and shows that the Administrator is absolutely indifferent to the meaning of maximum lawful price as set out in the Act. In other words, as he states in 1389.562(a) the statutory definitions have no worth or value when they conflict with the definition that the Administrator wishes to give to his Regulations.

It is submitted under this point that the Emergency Price Control Act of 1942 as amended by the Inflation Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator.

POINT IV

In view of the fact that the petitioners could not properly be indicted for a violation of M. P. R. 169, unless said regulation had been issued *"under"* Section 2 of the Act, and since such section under the authorities refers to one issued *"in conformity with"* Section 2, the Court below erred in refusing to permit evidence to be introduced upon the question whether said regulation was issued under Section 2 of the Act.

The legality of the acts of the petitioners must be based upon the provisions of Section 4 (a) of the Emergency Price Control Act of 1942, which states as follows:

> "It shall be unlawful * * * to do or omit to do any act, in violation of any regulation or order *under* section 2, * * *." (Italics ours.)

Clearly, therefore, unless M. P. R. 169 was issued "under" Section 2 of the Act, there has been no unlawful act of petitioners. That question can be determined

only upon inquiry as to whether the regulation in question was issued "in compliance" with the law authorizing its issuance.

We respectfully refer to the authorities establishing that the word "under" must be judicially defined as meaning "in conformity with".

To this effect, see *Risley* v. *Village of Howell,* 64 Fed. 453, in which case the Circuit Court of Appeals, referring to the question whether Municipal Bonds were properly issued *under* a statute, said as follows (at pp. 456-457):

> "In order to determine what effect should be given to this part of the recitals in the bonds, reference must be and to the whole instrument under the just and familiar rule of construction. In one part of each of the bonds it was represented that it was an 'improvement bond'. This, taken in connection with the subsequent reference to the statute, meant that it was a bond issued to provide means for a public improvement. In another place it was represented that the bond was *'issued under and by authority of a special act of the state of Michigan entitled* "An act to authorize the village of Howell to make public improvements in the village of Howell," being Act 248 of the Local Acts of 1885 of the legislature of the state of Michigan, approved February 25, 1885, and also under the ordinance of the village of Howell, passed August 12, 1885.' What was the meaning of this representation? To say that a thing is done *'under and by the authority' of a statute referred to is equivalent to saying that it is done in conformity with it, and authorized by it.* In Stoddard v. Chambers, 2 How. 284, 317, the supreme court said, in speaking of a statute which excluded from its operation locations of land previously made 'under any law of the United States': 'Now, *an act under a law means in conformity with it,* and unless the location of the defendant shall have been made agreeably to law' he is not within the exception." (Italics ours.)

And also:

City of Defiance v. *Schmidt,* 123 Fed. 1, 7.

Proof of the necessary compliance with the Act was even necessary to sustain the opinion of the Court below that the Emergency Court has exclusive jurisdiction herein, because of the language of Section 204 (d) of the Act which states as follows:

> "Except as provided in this Section, no court, federal, state or territorial, shall have jurisdiction or power to consider the validity of any such regulation * * *."

"Such regulation" refers to the former part of Section 204 (d) which states that the Emergency Court shall have exclusive jurisdiction to determine the validity of any regulation or order issued *under* Section 2.

It is worthy of observation that said Section 2 contains substantive limitations upon, and conditions precedent to, the valid and proper acts of the Administrator. Therefore, if the Administrator has promulgated a regulation which does not satisfy a condition precedent set forth as a substantive limitation upon his acts, said regulation has had no proper genesis and is a nullity. How, therefore, can it be properly contended that the district court below was correct in refusing to pass upon whether the regulation here in question was issued under Section 2 of the Act? Or in refusing to receive evidence to show that it was not?

If the regulation, which was the basis of the indictment was not validly in existence at the time of the acts complained of, no crime was committed.

In the language of the Court in *United States of America* v. *Pepper Bros.* (U. S. District Court for the District of Delaware; Opinion Unreported):

> "The finding in favor of defendant does not poach on the preserves of the Emergency Court of Appeals because I am not passing on the *validity* of any regulation promulgated under the Act. The word 'validity' is to be given its ordinary dictionary meaning since there is no persuasive evidence that Congress used it

> in a different or unusual sense when it enacted Sec. 204 (d) of the Act. Boston Sand Co. v. United States, 278 U. S. 41, 48. I simply find there was no regulatory mandate in existence at the time of defendant's acts complained of, the violation of which, it is charged, constitutes a crime."

The Trial Court, therefore, erred in refusing to permit the indicted parties to introduce evidence upon the question of whether the regulation was issued *under* Section 2 of the Act.

POINT V

The contentions contained in the opinion of the Court below and the authorities relied upon by the Government are distinguishable.

Construction of the Act before the Court involves a question of most serious import. By said Act, Congress, although vesting jurisdiction in the District Court for the enforcement of violations of regulations issued under the Act, has at the same time sought to withhold from that Court the right to hear in the same action such defenses, including asserted constitutional rights interposed by the defendant, which question the validity of a regulation.

This Court has already held that a construction of a statute, which would deny all opportunity for a judicial determination of an asserted constitutional right, is not to be favored. (*Lockerty* v. *Phillips,* 319 U. S. 182, 63 S. Ct. 1019.)

The reasoning of the court below in its opinion in the instant case passing upon this question smacks of sophistry. There, the opinion of the Court states as follows (R. 81):

> "But the answer is, that Congress has not taken from the district courts the judicial power to decide

> any question of relevancy of proffered evidence. The District Court exercised such power in these very cases. It ruled that the Emergency Price Control Act was a valid enactment, and that under the provisions of the act the proffered evidence was not relevant. Appellants were indicted, not for a violation of the Administrator's price regulation, but for a violation of § 4 (a) of the Act."

There can be no violation of Section 4 (a) of the Act unless there is a violation of a regulation issued by the Administrator under the Act, and it was just that refusal of the District Court to accept the proffered evidence as to the invalidity of the regulation which spells for the petitioners in this case the difference between the freedom of obtaining the judicial review of an asserted constitutional right and criminal sentence and fine, with the constitutional rights undetermined, but instead relegated to an inadequate and impractical administrative forum.

The cases cited by the court below and other cases, that may be relied upon by the Government, to the effect that Congress may limit or withhold jurisdiction from inferior courts, are quite beside the point. There is no dispute of the right of Congress to do so.

If Congress had stated in the Emergency Price Control Act that only the Emergency Court of Appeals had jurisdiction to hear and determine every question involving the Emergency Price Control Act, including enforcement thereof, except the Supreme Court upon review, then there could be no question but that jurisdiction with regard to the Act had properly been withheld from the Court.

But this Congress did not do. Instead the Act states that District Courts and State Courts shall have jurisdiction in enforcement suits, and that, of course, means to hear and *determine* enforcement suits. But these courts, thus clothed with jurisdiction, find their inherent powers suddenly stripped at a point where the defendant inter-

poses defenses and proffers evidence on the question of the invalidity of the regulation which is the very basis for the enforcement suit. *Therein lies an excess of power not sanctioned by the Constitution of the United States.*

This Court in *Lockerty* v. *Phillips,* 319 U. S. 182, 63 S. Ct. 1019, while it expressed the undisputed principle that Congress has plenary power over the jurisdiction of the federal courts, did not hold that jurisdiction, once conferred, could at the same time be nullified or limited. On the contrary, Mr. Justice Rutledge in his concurring opinion in *Schneiderman* v. *U. S.,* 320 U. S. 118, 63 S. Ct. 1333, at page 168, did hold that it was not within the authority of Congress to confer jurisdiction upon federal courts and at the same time nullify the effect of the exercise thereof by such courts.

The court below refers not at all to the adequacy of administrative review contained in the Act. The Government may rely upon the following cases:

> *Texas & Pac. Ry. Co.* v. *Abilene Cotton Co.,* 204 U. S. 426; 27 S. C. 350 (1907);
> *Lehigh Valley RR. Co.* v. *U. S.,* 188 F. Rep. 879;
> *U. S.* v. *Vacuum Oil Co,* 158 F. Rep. 536.

These cases are all distinguishable. They involve suits in which a schedule of rates was established by the Interstate Commerce Commission, the Court holding that the shipper or the railroad company could not raise the question of the invalidity of the rates without having exhausted the administrative remedy. But in those cases the persons affected by the rates had an adequate remedy if the rates were confiscatory after having exhausted the administrative remedy and having been denied the same, since where the courts held the rates confiscatory, they were in a position to recover the excess paid. No such

situation exists in the case before this Court. On the contrary, injunctions may be obtained against businessmen, as in the case of *Montgomery Ward & Co.* (pp. 21, 22 of this brief), and no bond need be given by the Price Administrator. So that if upon review the Court should vacate the injunction, the merchant has suffered loss of months of time and consequent loss of money, if not his entire business, without hope of compensation.

In the twelve statutes referred to on pages 23 and 24 of this brief, provision is contained for stays pending review of administrative action, where irreparable loss and damages may result. No such right is given under the Act in question.

Reliance may also be placed by the Government upon *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, wherein the doctrine of the exhaustion of administrative remedy was approved. However, as already pointed out, the decision in that case is founded upon the provisions in the Act granting (at p. 48) "adequate opportunity to secure judicial protection against possible illegal action on the part of the board".

It is also worthy of note that the opposition to the issuance of the injunction therein was wholly placed upon the grounds that litigation would result in an expense and annoyance, the exact language being as follows:

> "* * * that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the corporation and its employees, and thus seriously impair the efficiency of its operations."

The decision of this Court in that case in effect held

> "that the expense and annoyance of litigation is 'part of the social burden of living under government.' "
>
> (*Petroleum Exploration* v. *Public Service Com'n.*, 304 U. S. 200, 222; 58 S. C. 834, 841.)

The situation in the case at bar is radically different. Here is involved no mere cost of litigation or impairment of good will and harmonious relations. Here is involved the freedom from taint of criminality of men and their commercial enterprises.

The question of delegation of power was but briefly touched upon by the court below and without discussion. Perhaps all that was said in defense of the Government's position as to the question of delegation of powers was stated in the brief submitted by General Counsel to the Office of Price Administration in the hearings before the Senate Committee on Banking and Currency.

On page 229 of the Committee Report (Dec. 1941), counsel holds that the standards in the Act are fully definite, and as proof thereof states the following (at p. 229):

> "Not only must the maximum prices established be fair and equitable and in accord with the purposes of the act but they also must be established, so far as practicable, with due consideration for prices prevailing during a specified period of time before the legislation became effective."

This standard approved by the Government as being fully definite must give pause to men in free governments. For here the standard is not what Congress thinks would be fair and equitable under designated facts, but what the Administrator in his uncontrolled discretion thinks would be fair and equitable. The Administrator thus becomes

the general agent of Congress, first to decide upon what commodities maximum prices must be established, then to decide himself as to what is fair and equitable and what is practicable, and then to choose the character of the regulation to put his thoughts into force, and next to enforce it in any manner he sees fit.

In the language of Mr. Justice *Cardozo* in *Schechter* v. *United States,* 295 U. S. 495, 551:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, * * *"
>
> * * * * * *

It "is delegation running riot" (at p. 553).

CONCLUSION

The judgment of the Lower Court should be reversed.

Respectfully submitted,

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