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Supreme Court of the United States

October Term, 1943.

No.

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

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF AP- PEALS FOR THE FIRST CIRCUIT.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioners, Benjamin Rottenberg and B. Rottenberg, Inc., respectfully represent the following:

I. Summary Statement of Matter Involved.

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 \$1,000.00 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 \$1,000.00 (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 in their briefs and pleadings and ignored them, but decided upon the following main grounds: 1st. That the Act challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator, was a point not well taken (R. 85); 2nd. 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. 169,¹ as amended, (R.

¹ 7 F. R. 10,381.

83), stated in another way, the Circuit Court of Appeals held in substance with the District Court that the validity of a Regulation could not be questioned in any court except the Emergency Court of Appeals and that the District Court trying a criminal indictment 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 in Massachusetts; 3rd. 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 and Executive Order No. 9250,² 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; 4th. 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 Price Administrator Prentiss M. Brown had declared that the law had not been followed in issuing the Regulation, and that the middlemen were entitled to a reasonable margin of profit and that he intended to see that these men had a reasonable margin of profit such as they had before these terrible restrictions,³ said refusal being predicated upon the sole ground that Section 204 (d) of the Act precluded the Court

² 7 F. R. 7871.

³ Hearing of the Sub-Committee of the Committee on Agriculture & Forestry held at Washington, D. C., on March 3, 1943.

from considering the validity of the Regulation (R. 68), and this question was not passed upon by the Circuit Court of Appeals.

II. Grounds Upon Which Jurisdiction of this Court is Invoked.

A. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347 sub-division (a) (Judicial Code, Section 240a as amended) and Rule 38 of Revised Rules, 1939, of the Supreme Court of the United States.

B. The Circuit Court affirmed a conviction of sentence and imprisonment in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Fifth Amendment to the Constitution of the United States.

C. The Circuit Court affirmed a conviction of sentence and imprisonment in violation of the guarantees of the Sixth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Sixth Amendment to the Constitution of the United States.

III. Questions Presented for Review.

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

2. Whether the trial judge and the Circuit Court of Appeals were right in their rulings that upon a trial of a

criminal indictment against these defendants they were precluded from questioning the validity of the Regulation upon which the indictment was based; and stated another way, the question presented for review is whether the Emergency Court of Appeals has exclusive jurisdiction to determine the validity of any Regulation made by the Administrator, and stated in a third way, the question presented is whether the procedure set up by Sections 203 and 204, if not complied with by the defendants, preclude them from challenging the validity of the Regulation upon the trial of an indictment against them.

3. Whether the defendants are entitled to have questions of law raised by them in their trial upon a criminal indictment passed upon by the Circuit Court of Appeals or passed over by the Court.

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.

IV. Reasons Relied on for the Allowance of the Writ.

1. This case involves the important question of whether the standards set out by the Emergency Price Control Act

of 1942 and delegation of authority to the Price Administrator is such as to render the Act unconstitutional as an unlawful delegation of legislative power. The Circuit Court of Appeals held that the Act was constitutional. Petitioners believe that the language setting forth the purposes of the Act are vague, uncertain and indefinite, that the delegation of authority to the Price Administrator violates Article 1, Section 1 of the Constitution of the United States, and should be decided by this Court as it is a matter with which all of our citizens are affected in their daily life.

2. This case also involves the important question of whether an administrative officer may issue a regulation having the force of law and a defendant in a criminal indictment be precluded from showing that the Regulation was not issued in accordance with law. The question as to what extent the trial court may entertain a defense based upon the alleged invalidity of this Regulation was left open in *Lockerty v. Phillips*, U. S., decided May 10, 1943, where this Court said:

“We have no occasion to determine now 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.”

3. Was the Regulation *issued* under Section 2 of the Act? Although the exclusive jurisdiction of the Emergency Court referred to in Section 204 (d) is limited to regulations *issued* under Section 2; no determination was made by the Circuit Court of Appeals of this question.

Under the Regulation here involved the Price Administrator has not fixed the prices in the manner contemplated by the Act and within the rules of the delegated power. He delegates to the defendants the power and authority to fix the ceiling prices under conditions which are most difficult and appalling. The opinion of the Court relates the difficulties under which the Government or Price Administrator labors in fixing maximum prices and that he should be given a chance by trial and error to arrive at a fair ceiling price. The opinion of the Court does not take into consideration the difficulties of the middleman in the beef business and does not consider that the non-action of the Administrator in placing a maximum price upon the grower or producer of cattle puts the middleman in a position where he becomes a victim of blackmail when a consumer ceiling price is fixed and that the Act affords no remedy against the Administrator for non-action. The Regulation itself, recites that it is intended to be issued under the joint authority of Emergency Price Control Act, the Inflation Control Act and Executive Order #9250.

4. This case further involves the very serious question of whether the language of Section 204 (d) of the Act intends to deprive the District Court of some of the power conferred upon it under Section 205 (c) wherein the District Court is given *jurisdiction* of criminal proceedings for violations of Section 4 of the Act.

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." Title 28, U. S. C. Section 41 (2). Title 18, U. S. C. Section 546, provides: "The crimes and of-

fenses defined in this title shall be cognizable in 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''.

5. The decision of the Circuit Court of Appeals presents a substantial question of federal law as to whether the defendant's constitutional rights under the due process clause of the Fifth Amendment to the Constitution has been violated. The Circuit Court in affirming the judgment of conviction and sentence has said that the exclusive jurisdiction of the Emergency Court under review procedure of 204 of the Act precludes the District Court from determining the validity of any Regulation in a criminal action. The doctrine of exhaustion of administrative remedies was never intended to apply to criminal prosecutions and no consideration is given by the courts below to the inadequacy of the relief afforded by the Act. What is intended to be a form of relief really means compliance with a Regulation, no matter what hardships result therefrom, or going out of business. The Act affords no means of aiding one from the harshness of a Regulation as no court has the power to stay the effectiveness of a Regulation once it is issued under Section 2. The only thing a person subject to a regulation can do is to follow the protest procedure under Section 203 and the review procedure under Section 204 of the Act. This procedure may cover a total of 150 days and does not include possible postponements or time taken for consideration. With constantly changing economic conditions, uncontrolled prices on live stock and the power resting in the Administrator to modify or rescind the Regulation at any time, notwithstanding the pendency of review, the relief set out by the Act is indeed illusory.

6. While the Sixth Amendment to the Constitution by direction guarantees the accused in criminal prosecutions trial by an impartial jury of the state and district wherein the crime shall have been committed * * * and to be confronted with the witnesses against him, Sections 203 and 204 of this Act, by indirection, have the effect of depriving the defendants in a criminal prosecution of those guarantees.

Section 203 permits the administrator to take notice of economic data and other facts and he may limit a protest to the filing of affidavits. The Emergency Court, being restricted to *review* the action of the Administrator, no person is entitled to go into any court, cross-examine the witnesses and present such evidence as ordinarily leads to a judicial determination of facts.

7. There are at least six cases pending in the United States District Court of Massachusetts where judgment is awaiting the decision in the case at bar. The petitioners are informed and believe that there are 75 to 100 cases in the same situation involving the same Regulation and the questions raised in this petition are of grave and serious public importance, and involve important questions of federal law upon which enforcement depends, which have not been, but should be, settled by this Court.

Wherefore, your petitioners pray that Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the First Circuit directing said Court to certify and send to this Court a full and complete transcript of the Record and the Proceedings of the said Circuit Court had in the case numbered and entitled on its Docket calendar #3885, *Benjamin Rottenberg, et als, Defendants-Appellant v. United States of America, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided further by the statutes of the United

States; and that judgment of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated September 10, 1943.

BENJAMIN ROTTENBERG and
B. ROTTENBERG CO. INC.,
LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Petitioners.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

I. Opinions of the Court Below.

The memorandum of the District Court upon Motion to Quash is in the record (R. 59-67). The opinion of the Circuit Court of Appeals rendered August 23rd, 1943 is unreported and is (R. 69-86).

**II. Grounds Upon Which Jurisdiction of this Court
is Invoked.**

A. The reasons stated in the preceding petition under II (p. 4) herewith adopted and made a part of this brief are believed to constitute good ground for invoking the jurisdiction of this Court.

B. The reasons stated in the preceding petition under III (pp. 4-5) herewith adopted and made a part of this brief

are believed to constitute good ground for invoking the jurisdiction of this Court.

III. Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-4), which is hereby adopted and made a part of this brief.

IV. Specifications of Errors.

The Circuit Court of Appeals erred:

- a. In denying the defendants' motion to quash the indictment (R. 14).
- b. In denying the defendants' amended motion to quash the indictment (R. 19).
- c. In denying the defendants' requests for rulings (R. 38-41).
- d. In denying the defendants' motion in arrest of judgment (R. 23).
- e. In denying the defendants' motion for a new trial upon newly discovered evidence (R. 25).
- f. In holding that the Emergency Price Control Act of 1942 was constitutional.
- g. In refusing to consider the offer of proof of the defendants on the ground that the District Court in trying a criminal case was precluded from hearing evidence and passing upon the invalidity of the Regulation.
- h. In disregarding the questions raised by the defendants as to whether the Regulation was issued under Section 2 of the Act.
- i. In ruling that although the district court was given jurisdiction of criminal proceedings, it lacked the

power to pass upon the validity of the Regulation upon which the indictment was based.

- j. In holding that the Act as applied did not violate the due process clause of the Fifth Amendment of the Constitution and failing to consider the inadequateness of the procedure outlined in the Act.
- k. In ruling that the Act as applied did not deny the defendants of the guarantees of the Sixth Amendment to the Constitution of the United States.

V. Summary of Argument.

The Emergency Price Control Act is unconstitutional and in violation of Article 1, Section 1 of the Constitution and the powers given the Administrator are vague, uncertain and indefinite. Where the District Court was given jurisdiction of criminal prosecutions, this included the right to determine all of the law and facts upon which the indictment was founded. The interpretation of the Courts below that the district court had no power to consider the validity of a Regulation and the denial of the right of the defendants to show that the Regulation was not within the power and authority conferred upon the Administrator was in error.

If the Court's construction of the statute is correct then the statute does not afford due process of law and violates the Fifth and Sixth Amendments to the Constitution of the United States.

VI. Arguments, Points and Authorities.

I. The District Court and Circuit Court of Appeals held that the Emergency Price Control Act, as amended, setting up the Office of Price Administration, did not violate Sec-

tion 1 of Article 1 of the Constitution. The Court argued that the necessity of the war situation and the control of inflation made necessary the establishment of some means even though it be imperfect, in other words, justified the Act. It is submitted that necessity is not sufficient legal grounds upon which to base the Act. Necessity knows no law and generally makes bad law. The means adopted to carry out the purposes of the Act must be within the limitations of constitutional authority. While martial law has not been invoked and the Courts continue to function, the constitutional rights of the individual must be respected. Mr. Justice Murphy, in his concurring opinion in *Hirabayashi vs. U. S.* U. S. decided June 21, 1943, has well said:

“While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.”

The purposes of the Act contained in Section 1a and the delegation of authority as it is contained in Section 2a are found in Appendix A.

It will appear that the Price Administrator is not required to find facts to which the penal provisions of the Act shall be held to apply. He is given unlimited authority to make a regulation as to prices when, in his judgment, the price or prices of a commodity or commodities have risen or threaten to rise in an extent or in a manner inconsistent with the purposes of this Act, he may by regula-

tion or order establish such price or prices as in his judgment will effectuate and regulate the purposes of this Act.

This Court has said quite appropos, in the *Hirabayashi* case, *supra*:

“The constitution as a continuously operating charter of Government does not demand the impossible or the impracticable”.

Neither should the Government demand the impossible or impracticable of the citizen.

The whole history of the Office of Price Administration established under the Emergency Price Control Act shows instability and ever-changing policy and confusion. The opinion of the Court of Appeals (p. 80) contains a strong admission of the difficulties under which the Administrator labored.

“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 inter-relations 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... It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has led on the home front”.

That argument is answered by this Court in
Panama Refining Co. v. Ryan, 293 U. S. 388
 where the Court said at page 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 beliefs or motives is not substituted.”

These considerations of the Court of Appeals are at once an admission and an apology. It is submitted that this delegation of power to make rules and orders, the violation of which should be a criminal offense, goes far beyond that of any other decided case. Under the unlimited discretion, in the case of

Schechter vs. U. S., 295 U. S. at pp. 537-538
this Court said:

“If the codes have standing as penal standards, this must be due to the effect of the executive action. But 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.” . . .

There, the President was authorized to make a code, “which will tend to effectuate the policy of this title.”

The Court said further:

“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. . . .”

and at pp. 541 and 542:

“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 through the country is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power”.

An examination and analysis of the language of this Act will show that it is much broader than the delegation of power under the National Recovery Act. Here the Price Administrator must judge the future as well as the present and the effect of prices upon the progress of the war, inflation and the feeding of our own civilian population, the military establishments, the army and navy, and the necessities of our allies under the lend-lease Act without any fixed standard or limitations by which he is to be guided or any real limitation placed upon his authority by Congress.

II. The District Court and the Circuit Court of Appeals held that Section 204d of the Act precluded the Court from considering the alleged invalidity of the Regulation because Section (d) provided that the Emergency Court and the Supreme Court should have exclusive jurisdiction to determine the validity of the Regulations or orders issued under Section 2, even in a criminal prosecution.

Upon this construction of the Court, the defendants were denied the right to show that the Regulation was invalid which they were charged with violating, and was not within the authority of the officer making it.

In *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), Mr. Chief Justice Hughes stated at page 432:

“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.”

In *Bowles v. United States*, — U.S. — (May 3, 1943), Mr. Justice Jackson stated in his dissenting opinion (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.)

III. Neither Court made a determination of whether the Regulation in question was *issued* under Section 2.

A reading of the Regulation itself discloses that it was issued by the authority vested in the Administrator under the Emergency Price Control Act of 1942, the Inflation Control Act of 1942 and Executive Order #9250.

In this connection a portion of the Executive Order which is set out in Appendix C assumes to direct the Administrator to control profits. The Inflation Control Act under which authority the Executive Order was presum-

ably issued does not give the President specific authority to control profits.

Assume that Section 204 (d), does give exclusive jurisdiction to the Emergency Court of Appeals to determine the validity of any Regulation or Order issued under Section 2, must the Courts below give no consideration whatever to a determination of whether, as a matter of law, the Regulation was issued "under Section 2"?

The Statement of Considerations (OPA Document No. 8175), which Section 2 requires should accompany every Regulation, does not appear to have been printed in the Federal Register and is handed to the Court as a separate appendix. It discloses that 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.

This question was not passed upon by the Circuit Court of Appeals.

IV. The constitutionality of an Act under which a person is indicated is always open to question and Congress cannot by legislation take that right away from him.

In addition Section 205 (c) provides:

"The District Courts shall have jurisdiction of criminal proceedings for violation of Section 4 of this Act and concurrently with the State and territorial courts of all other proceedings under Section 205 of this Act."

The Judiciary Act of 1789 R. S. 563 provides that the District Court shall have jurisdiction over all crimes and

offenses cognizable under the authority of the United States. Title 28, U. S. C. Sec. 41 (2).

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 fact.”

The reason given by the Court of Appeals for its interpretation of Section 304 (d) (R. 81) 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 or the enforcement officer cannot determine the constitutionality of the Act or the validity of the Regulation.

The opinion of the Court of Appeals (R. 17) 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 the course of his trade or business in violation of any regulation or order under Section 2”.

The Regulation in question was purportedly issued under Section 2. The penal clause of the Act is contained in Section 204 (b) which provides

“Any person who wilfully violates any provision of Section 4 of this Act . . . shall upon conviction be subject to a fine of not more than 2 years; in case of violation of Section 4 (c) and for not more than 1 year in all other cases or to both such fine and imprisonment.”

The Act itself is innocuous, harmless and ineffective without the Regulation. It is clear that Congress has delegated to the Price Administrator the power to make the Regulation fixing ceiling prices for wholesalers and it is further said that a violation of that Regulation 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.

U. S. v. Grimaud, 220 U. S. 505.

Brodbine v. Revere, 182 Mass. 599.

V. The District Court held that it was precluded from determining the validity of the Regulation or receiving any evidence in support of its invalidity. The Circuit Court of Appeals, in its opinion (R. 78-79), upheld this interpretation of the Act.

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 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 Con-

stitution 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.

They have, at various appropriate stages of the case, endeavored to present their defense and have this question decided.

The denial of the motion for a new trial was not based upon the Judge's discretion. The importance of this proffered evidence is further emphasized by testimony of the Administrator before another Congressional Committee.⁴ The opinion of the Circuit Court does not cover this point raised by the defendants.

In *Panama v. Ryan*, *supra*, at page 433, this Court repeated what was said in *Mahler v. Eby*, 264 U. S. 32, 44;

“ . . . ‘We held that the order in that case made after a hearing and ordering a 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.’ We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.”

Defendants have been denied the right to show the invalidity of the Regulation ever since the return of the indictment against them.

⁴ Hearing before the Select Committee to conduct, study and investigate the National Defense Program in its relation to Small Business in the United States Houses of Representatives, 78th Congress First Session on H. res. 18, April 8 and 9, 1943, part 5 (unrevised).

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.⁵ It has no application to a criminal prosecution.

The indictment was returned on February 24, 1943, more than 60 days after the effective date of the Regulation. The provisions of Section 204 are only applicable after the protest procedure of Section 203 has been followed. No protest can be made after the passage of 60 days, so that no Court, including the Emergency Court, can determine the validity of the Regulation.

The protest and review procedure taking as many as 150 days without accounting for delays or continuances. It affords no relief during the pendency of an appeal or after the appeal has been successfully prosecuted for losses during the period and concludes with the right in the Price Administrator to modify or rescind the Regulation at any time, without notice or a hearing notwithstanding the pendency of review proceeding. This makes the Regulation unworkable, impracticable and impossible to such an extent that it violates the Fifth Amendment in that it deprives the defendant of due process of law.

In connection with the above consideration as to the provisions made by the Act for protest and review and the contended penalties for not following the procedure, attention of the Court is called to the case of

⁵ Raoul Berger, "Exhaustion of Administrative Remedies,"

48 L. Jour. 981, 985-986 (1939)

"Primary Jurisdiction—effect of Administrative Remedies on the Jurisdiction of Courts" 51 Harv. L. Rev. 1251, 1261 (1938).

Washington Terminal Co. v. Boswell, 124 Federal
2nd 235 at 276.

Certiorari granted 315 U. S. 795 and principle laid down
by Mr. Justice Stephens which is supported by a long
line of decisions.

Ex Parte Young, 209 U. S. 123, 146, 147 and 148.

Cotting v. Goddard, 83 U. S. 79. 101.

Wadley Southern Railway Co. v. Georgia, 235 U.
S. 651, 661, 662.

Oklahoma Operating Co. v. Love, 252 U. S. 331,
336, 338.

In *Washington Terminal Company v. Boswell*, Mr. Jus-
tice Stephens in his dissenting opinion said at page 276,

“It is elementary constitutional law that when the
legislature provides a remedy but interposes such con-
ditions precedent to its availability that the hazards
and burdens incident to its points can reasonably be
expected to deter resort to it, the Courts will provide
relief in an appropriate proceeding even though the
statutory remedy is plainly intended to be exclusive.”

VI. Finally the petitioner earnestly requests the Court
to review the decision and finding of the Circuit Court of
Appeals upholding the constitutionality of the Emergency
Price Control Act as applied to this indictment also to
determine and settle the question expressly left open by
this Court in *Phillips v. Lockerty*, *supra*, as to whether or
to what extent an appellant may challenge the Regulation
in courts other than the Emergency Court by way of a
defense to a criminal prosecution.

Conclusion.

It is respectfully submitted that the questions raised in this case are of wide public interest and importance and so far as is known have not been determined by this Court and is a case in which Certiorari may be granted.

Respectfully submitted,

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APPENDIX A.

EMERGENCY PRICE CONTROL ACT OF 1942 56 STAT. 26.

[PUBLIC LAW 421—77TH CONGRESS]

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. . . .

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 cost 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.

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, which ever 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 re-

quest 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.

(d) . . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State,

or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

SEC. 205 (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred.

APPENDIX B.

INFLATION CONTROL ACT OF 1942, ~~56~~, STAT. ~~765~~. [PUBLIC LAW 729—77TH CONGRESS]

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

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

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other

agricultural commodities produced for the same general use;

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

. . .

APPENDIX C.

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.

APPENDIX D.

REVISED MAXIMUM PRICE REGULATION 169

SUBPART B—PROVISIONS AFFECTING BEEF

§ 1364.451. *Maximum prices for beef carcasses and wholesale cuts.* Subject to the pricing instructions contained in paragraph (a), the maximum price of each grade of each beef carcass or wholesale cut shall be the maximum price determined as provided in paragraph (b).

(a) *Pricing instructions.* (1) Whenever used in this Revised Maximum Price Regulation No. 169, the term “lower price zone” means a price zone having a lower zone price, and the term “higher price zone” means a price zone having a higher zone price; the words “lower” and “higher” used in the respective terms shall not be construed to refer to the numerical designation of any zone.

(2) Except for the additions permitted in Schedule III hereof, incorporated herein as § 1364.454, the zone price shall be the delivered price anywhere within the zone to which such price applies. Schedule I (paragraphs (a) to (j), inclusive) hereof, incorporated herein as § 1364.452, contains a statement describing the geographical limits of each price zone and the zone prices established therefor.

(3) The applicable zone price shall be the price specified in Schedule I (§ 1364.452) for the zone in which is located the seller’s distribution point:

(i) At which the buyer takes actual physical possession of the meat; or

(ii) From which local delivery to the buyer’s place of business begins; or

(iii) From which the meat, consigned to the buyer, (a) is delivered to a common carrier, other than a railroad, for shipment to the buyer who pays the shipping charges directly to the carrier, or (b) is delivered to a railroad for shipment at the carload rate to the buyer who pays the shipping charges directly to the carrier.

(iv) In the case of a less than carload rail shipment, other than an express shipment to a purveyor of meals, the applicable zone price shall be the price for the zone in which is located the rail unloading station nearest to the buyer's place of business.

(v) On sales to purveyors of meals the distribution point may be, in addition to those listed, the point at which meat consigned to the buyer is delivered to a railway express company for shipment by express to the buyer who pays the shipping charges directly to the carrier.

(4) Except as permitted in paragraphs (l), (m), (n), or (o) of Schedule I (§ 1364.452), regardless of any contract, agreement or other obligation, no person shall sell or deliver any beef or any part or portion of any beef carcass and no person in the course of trade or business shall buy or receive any beef or any part or portion of any beef carcass unless such beef or part or portion is a beef carcass or a beef wholesale cut as defined in § 1364.455, for which applicable prices have been established.

(b) *Maximum price.* The maximum price for each grade of each beef carcass or beef wholesale cut shall be the applicable zone price determined in accordance with the provisions of paragraph (a) of this § 1364.451 and specified in Schedule I (incorporated herein as § 1364.452), minus the required deductions, if any, specified in Schedule II (incorporated herein as § 1364.453), plus the permitted additions, if any, specified in Schedule III (incorporated herein as § 1364.454).

§ 1364.452 *Schedule I: Beef price zones and applicable zone prices—*

(2) *Beef carcass and beef wholesale cut prices applicable in Zone 4.* Subject to the provisions of paragraph (k) the applicable zone prices for Zone 4 are as follows:

[All prices are on dollars per hundredweight bases; the price for any fraction of a hundredweight shall be reduced accordingly]

| | Grade | | | | | |
|-------------------------------------|-----------------|-----------------|----------------------|-----------------|--------------------------|---|
| | Choice or AA | Good or A | Commer- cial or B | Utility or C | Cutter canner or D | Bologna bulls (Equiv- alent cutter and canner grade) |
| Steer or Heifer | | | | | | |
| (i) Beef carcass or side | \$22.00 | \$21.00 | \$19.00 | \$17.00 | \$14.50 | \$16.00 |
| (ii) Hindquarter | 25.25 | 23.75 | 21.25 | 18.75 | 14.50 | 16.00 |
| (iii) Forequarter | 19.00 | 18.50 | 17.00 | 15.50 | 14.50 | 16.00 |
| (iv) Round | 24.25 | 22.75 | 20.25 | 17.50 | | |
| (v) Trimmed full loin | 34.75 | 32.50 | 29.00 | 25.50 | | |
| (vi) Flank | 11.00 | 11.00 | 11.00 | 11.00 | | |
| (vii) Flank steak | 25.00 | 25.00 | 25.00 | 25.00 | | |
| (viii) Short loin | 41.50 | 38.75 | 35.00 | 30.50 | | |
| (ix) Sirloin | 29.25 | 27.50 | 24.25 | 21.50 | | |
| (x) Cross cut chuck | 18.75 | 18.375 | 17.00 | 15.375 | | |
| (xi) Regular chuck | 20.75 | 20.25 | 18.75 | 16.75 | | |
| (xii) Brisket | 16.00 | 16.00 | 14.00 | 13.00 | | |
| (xiii) Foreshank | 10.00 | 10.00 | 10.00 | 10.00 | | |
| (xiv) Rib (Kosher or traefer) | 27.75 | 26.25 | 24.00 | 21.50 | | |
| (xv) Short plate | 11.50 | 11.50 | 10.50 | 10.50 | | |
| (xvi) Back | 22.625 | 21.875 | 20.25 | 18.00 | | |
| (xvii) Triangle | 17.375 | 17.125 | 15.75 | 14.50 | | |
| (xviii) Arm chuck | 19.25 | 18.875 | 17.50 | 15.75 | | |

The applicable Zone 4 price of each cow carcass or wholesale cut of cutter and canner grade or utility grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade; the applicable Zone 4 price of each cow carcass or wholesale cut of commercial grade or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of commercial grade.

The applicable Zone 4 price of each stag carcass or wholesale cut of cutter and canner grade, utility grade, commercial grade or good grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade.

The applicable Zone 4 price of each bull carcass or wholesale cut of utility grade or commercial grade shall be the same as the Zone 4 price of the carcass or corresponding wholesale cut of steer or heifer of the same grade. The applicable Zone 4 price of each bologna bull carcass and wholesale cut, which are equivalent to cutter and canner grade are specified above.

The applicable zone price of each beef carcass or beef wholesale cut which does not bear a grade stamp (required by paragraph (c) of § 1364.411) when offered for sale, sold

or delivered shall be the price of the lowest-priced carcass or corresponding wholesale cut.

(i) *Zone 9.*

(2) *Beef carcass and beef wholesale cut prices applicable in Zone 9.* Subject to the provisions of paragraph (k) of this section, the Zone 9 price for each grade of each class of beef carcass and beef wholesale cut shall be the price specified therefor in paragraph (d) hereof (the applicable Zone 4 price) plus \$1.50 per cwt.

(k) *Applicable zone price of miscuts.* For any beef wholesale cut which has been miscut or for any piece or portion of beef which has been cut in a manner not authorized by this Revised Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest priced wholesale cut.

§ 1364.453 *Schedule II: Amounts which must be deducted from zone prices listed in Schedule I.* As hereinafter provided, the following shall be deducted from the applicable zone prices:

(a) *For beef carcasses and beef wholesale cuts not graded by an official grader.* For the sale of any beef carcass or beef wholesale cut other than cutter or canner grade, which does not bear the grade mark and identification of an official grader of the United States Department of Agriculture at the time of sale, the seller shall deduct 12½ cents per cwt. from the applicable zone price.

(b) *Carload discount.* For all beef carcasses and/or beef wholesale cuts, and/or other meat items subject to this subpart B delivered in a straight or mixed carload shipment or sold as part of a straight or mixed carload sale, the seller shall deduct 75¢ per cwt. from the applicable zone price.

(c) *Wholesaler's quantity discount.* For beef carcasses and/or beef wholesale cuts sold to a wholesaler in a straight or mixed less-than-carload sale, the seller shall deduct 50¢ per cwt. from the applicable zone price.

§ 1364.454 *Schedule III: Amounts which may be added to zone prices listed in Schedule I.* Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:

(2) For transportation from the point at which the meat was slaughtered in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing

or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25¢ per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the designated delivery point of a war procurement agency, or other government agency: the seller may add 25¢ per cwt.

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, 2, 5, 6, 7, 8, 9 or 10, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point: the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt.

(6) Notwithstanding any of the provisions of paragraph (a) (1) to (a) (5), inclusive, of this § 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the

point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, other government agency or commercial user of more than 50¢ per cwt. in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, or 75¢ per cwt. in Price Zone 3 or 4. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis, and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: *Provided*, That the seller shall itemize separately on an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law, the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged.

[Subparagraph (6) amended by Amendment 2, 8 F.R. 164, effective 1-8-43]

APPENDIX E.

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.

FIFTH AMENDMENT.

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

SIXTH AMENDMENT.

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.