UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3892.

ALBERT YAKUS,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (HEALEY, J.), APRIL 30, 1943.

TRANSCRIPT OF RECORD.

LEONARD PORETSKY,
FRANCIS P. GARLAND,
JOSEPH KRUGER,
for Appellant.

EDMUND J. BRANDON,
UNITED STATES ATTORNEY,
for Appellee.

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v.
UNITED STATES OF AMERICA,
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TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 16076. CRIMINAL.
UNITED STATES by Indictment,
v.
ALBERT YAKUS.

INDICTMENT.

DISTRICT COURT OF THE UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the first Tuesday of December in the year of our Lord one thousand nine hundred and forty-two

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that

COUNT ONE:

1. Albert Yakus of Boston in the District of Massachusetts, is made defendant herein. The said defendant at all times herein-

after referred to was and is president of the Brighton Packing Co., a Massachusetts corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having an usual place of business at Boston in the District of Massachusetts. The said defendant at all times hereinafter referred to was and he is engaged at said place of business in the sale at wholesale of beef and veal carcasses and wholesale cuts thereof.

2. On or about the tenth day of December, nineteen hundred and forty-two, the Administrator of the Office of Price Administration, pursuant to the authority granted under the Emergency Price Control Act of 1942, as amended, issued Revised Maximum Price Regulation No. 169, effective the sixteenth day of December, nineteen hundred and forty-two, establishing maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof. At all times hereinafter mentioned said Revised Maximum Price Regulation No. 169 has been and is in full force and effect.

3. At all times hereinafter referred to said Revised Maximum Price Regulation No. 169, as amended, was effective under the provisions of Section 2 of the Emergency Price Control Act of 1942, as amended (Public Law No. 421, 77th Congress), approved January 30, 1942.

4. At all times hereinafter referred to Revised Maximum Price Regulation No. 169, Section 1364.401, provides that on or after December 16, 1942, regardless of any contract and agreement, or other obligation, no person shall sell or deliver any beef carcass or beef wholesale cuts, and no person shall buy or receive any beef carcass or beef wholesale cuts at a price higher than the maximum price permitted by Section 1364.451, and no person shall agree, offer, solicit or attempt to do any of the foregoing.

5. At all times hereinafter referred to the sale and delivery of beef and veal carcasses and wholesale cuts thereof was a matter within the jurisdiction of the Office of Price Administration.

6. At all times hereinafter referred to the Office of Price Administration was an agency of the United States by virtue of the provisions of Section 201 of the aforesaid Emergency Price Control Act of 1942, as amended.

7. At all times hereinafter referred to the maximum prices for beef and veal carcasses and wholesale cuts thereof were determined under Section 1364.451.

8. On or about the second day of February in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, said Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Albert Bramson, of Winthrop, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Albert Bramson two forequarters of beef, of Choice Grade, one weighing 194 lbs. and one weighing 182 lbs., for a total price of $127.84.

COUNT TWO:

And the jurors aforesaid, upon their oaths aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count 1 hereof, is reaffirmed, realleged and incorporated as if herein set forth in full.

On or about the eighteenth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Meyer Kramer of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Meyer Kramer two forequarters of beef, of Choice Grade, weighing 282 lbs., for a total price of $90.24.

COUNT THREE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged and incorporated as if herein set forth in full.

On or about the twenty-fifth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Meyer Kramer, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Meyer Kramer two forequarters of beef, the grade of which is to your Grand Jurors unknown, weighing 367 pounds, for a total price of $117.44.

COUNT FOUR:

And the jurors aforesaid, upon their oaths aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive of Count 1 hereof, is reaffirmed, realleged and incorporated as if herein set forth in full.

On or about the fifteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Albert Yakus did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Meyer Kramer of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended; that is to say, the said defendant did sell and deliver to Meyer Kramer two forequarters of beef, of Commercial Grade, weighing 168 pounds, and one forequarter of beef, of Good Grade, weighing 166 pounds, a total weight of 334 pounds, for a total price of $106.88.

A true bill.

EARL B. MUNRO,

Foreman of the Grand Jury.

WILLIAM T. MCCARTHY,

Ass't. United States Attorney for the District of Massachusetts.

DISTRICT OF MASSACHUSETTS.

February 24, 1943.

Returned into the District Court by the grand jurors and filed.

ARTHUR M. BROWN,
Deputy Clerk.

The indictment in this cause is presented by the grand jury at the present December Term, 1942, of this court, when on February 24, 1943, the Honorable George C. Sweeney, District Judge, sitting, the defendant, Albert Yakus, is set to the bar and, the reading of the indictment being waived, says that thereof he is not guilty.

At the same term, on March 1, 1943, the defendant files the following Motion to Quash the Indictment:

DEFENDANT'S MOTION TO QUASH INDICTMENT.

[Filed March 1, 1943.]

Now comes the defendant, Albert Yakus, by his counsel, and moves the court to quash the indictment herein and each and every count thereof, upon the following grounds:

1. That the indictment and no count thereof sets forth a criminal offense against the United States of America.

2. That the indictment and no count thereof sets forth an offense against the United States of America with the certainty, particularity and definiteness required by the rules of criminal procedure and pleading.

3. That the allegations in the indictment and each and every count thereof do not set forth the essential elements of the offense with sufficient clearness, uncertainty and particularity to enable the defendant to understand the nature of the charge against him, more particularly in that

(a) The indictment in each count thereof purports to charge the defendant with a violation of Section 4 (a) of the Emergency Price Control Act of 1942 as amended, in that the defendant is alleged to have sold and delivered

wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended, the sale and delivery of which is prohibited at prices higher than those established by said Section, and

(b) The maximum price of each wholesale beef cut in each of said counts, is therefore an essential element to the commission of the offense stated and various unit prices apply to different wholesale beef cuts but are not set forth in said indictment or any count thereof and does not apprise the defendant of whether the prices charged on each wholesale cut of beef is in fact higher than those provided for by said Revised Maximum Price Regulation No. 169 as amended; and

(c) The maximum price of each of said wholesale beef cuts is determined not only under Section 1364.451 of said Revised Maximum Price Regulation No. 169, as amended, as alleged in paragraph 7 of the indictment and every count thereof, but also under Sections 1364.452, 1364.453 and 1364.454 of said Regulation.

4. In each count of the indictment herein the allegations of fact necessary to constitute a crime against the United States of America are insufficient, uncertain and ambiguous.

5. That the allegations in the indictment and each count thereof are in violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution of the United States in that upon either conviction or acquittal, he would not be able to plead former jeopardy.

6. That the Act of Congress known as the Emergency Price Control Act of 1942 as amended, is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

7. That the Act of Congress known as the Emergency Price Control Act of 1942, goes beyond the Constitutional authority

of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act it seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

8. That the Act of Congress known as the Emergency Price Control Act of 1942 is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the price administrator to pass a prohibitory law, penal in nature.

9. That the Emergency Price Control Act of 1942, insofar as it purports to confer upon the price administrator, pointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

10. Revised Maximum Price Regulation No. 169 as amended, is invalid in whole or in part for the reason that it was founded upon indefinite or indeterminable standards which could not be known or determined at the time of the issuance of the said Regulation and not so sufficiently established as to support an indictment for a criminal offense under any of its terms.

11. Revised Maximum Price Regulation No. 169 as amended, upon which the indictment and each and every count thereof is predicated infringes upon the power of Congress to make and enact laws of the United States.

12. Revised Maximum Price Regulation No. 169 as amended, arbitrarily, capriciously and unreasonably established such low maximum prices in the area where the defendant conducted his business as set forth at the time stated in the indictment as to invade the property rights of the defendant without due process

of law in violation of the Fifth Amendment to the Constitution of the United States.

13. Revised Maximum Price Regulation No. 169 as amended, is unjust and unreasonable and therefore invalid under the Constitution of the United States of America and more particularly under Article I, Section 1 thereof, and the Fifth Amendment thereto, in that although said Regulation fixes maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof and a sale of such carcasses and cuts by the defendant at a price in excess thereof subjects the defendant to criminal prosecution under the provisions of the Emergency Price Control Act of 1942, no maximum price is fixed for the sale at the same time and in the same locality of the livestock from which said carcasses and wholesale cuts are derived by the raiser or producer thereof; nor does the sale of the animal from which said carcasses and wholesale cuts are derived by the raiser or producer thereof at any price whatsoever violate the provisions of said Regulation, nor subject said raiser or producer to criminal prosecution under the provisions of said Act.

14. That the Regulation upon which the indictment and each count thereof is predicated, is dependent upon determinations of fact, which determinations are not shown as required by law.

15. That Revised Maximum Price Regulation No. 169 as amended, issued by the price administrator is based upon a statement of purported consideration representing the opinion of the price administrator and is not in conformity with the Act of Congress known as the Emergency Price Control Act of 1942 as amended.

16. That Revised Maximum Price Regulation No. 169 as amended, issued by the price administrator is based upon a statement of purported considerations representing the opinion of the price administrator and is not supported by a finding or findings of fact which are sustained by any evidence and is insufficient to support a conviction upon an indictment setting forth the violation of said Regulation as constituting a criminal offense.

17. That Revised Maximum Price Regulation No. 169 as amended, is invalid because it was issued without prior approval of the Secretary of Agriculture in violation of Section 3 (e) of the Emergency Price Control Act of 1942.

18. That Revised Maximum Price Regulation No. 169 as amended, is invalid because the maximum prices fixed thereby for beef and veal carcasses and wholesale cuts thereof in this District are so unreasonable as to constitute a taking of private property without just compensation, in violation of the Fifth Amendment to the Constitution of the United States of America.

19. Where it does not appear from any Act of or statement of the price administrator in the fixing of the maximum prices as set out in Section 1364.451 relied upon in this indictment and each count therein that he has given consideration as required by the amendment to the Emergency Price Control Acts, Acts of Congress, October 2, 1942, to the relation between the price or prices of livestock and the products resulting from the processing of agricultural commodities so as to provide that a generally fair and equitable margin shall be allowed for such processing then Section 1364.451 is invalid in whole or in part by reason of the failure of the price administrator to so consider.

20. The terms of the Revised Maximum Price Regulation No. 169 as amended, are too vague, indefinite and uncertain

(a) to guide the defendant with reasonable certainty in determining what conduct is permissible and what conduct is punishable so as to enable him to prepare and make his defense, thus depriving him of his property in violation of the Fifth Amendment to the Constitution of the United States of America;

(b) to satisfy the requirement of the Sixth Amendment to the Constitution of the United States of America by apprising the defendant with reasonable certainty of the conduct which will render him liable to punishment for the commission of the offences with which he is charged; and

(c) to enable the defendant to plead an acquittal or conviction to the offenses with which he is charged in the indictment herein in bar to a further prosecution against him based upon the same matters or things or any of them on which the indictment is laid.

21. That the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) insofar as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is void, because of unconstitutional delegation of legislative power.

22. The Emergency Price Control Act of 1942 is invalid because it purports to exercise the police power which is reserved to the states respectively or to the people under the provisions of the Tenth Amendment to the Constitution.

23. That count 1 of said indictment alleges that the defendant sold and delivered "rumps and rounds" at prices higher than set forth by the maximum price determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended, but no such wholesale cut as "rumps and rounds" for which a price can be determined is set forth in said Regulation.

By his Attorneys,

JOHN H. BACKUS,
LEONARD PORETSKY.

On the same day the foregoing motion comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and upon consideration thereof is denied. The defendant thereupon requests leave to file an amendment to his motion to quash, which leave the court grants, but it is ordered that the motion to quash when so amended be denied.

At the same term on March 3, 1943, the defendant files the following Motion to Amend his Motion to Quash:

DEFENDANT'S MOTION TO AMEND HIS MOTION TO QUASH.

[Filed March 3, 1943.]

Now comes the above-named defendant and moves to amend motion to quash by adding thereto the following:

Section 2 (a) Emergency Price Control Act Public Law 421—77th Congress requires as a condition of each regulation or order issued by the price administrator that "Every regulation or order issued under the foregoing provisions of this sub-section (Section 2 (a) shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order".

And it appearing as a requirement of law that such regulation, order or consideration shall be filed with the Division of the Federal Register and it further appearing from the provisions of Revised Maximum Price Regulation No. 169 that such considerations as were determined by the price administrator in the issuance of said Regulation were filed with the Division of the Federal Register and by the provisions of the Act of Congress October 2, 1942, it is required that Section 3 (2) "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 in this Act adequate weighting shall be given to farm labor".

And it appearing from the statement of considerations filed with the Federal Register by the price administrator that no consideration was given to

1st—a generally fair and equitable margin for processing an agricultural commodity including livestock; and

2nd—adequate weighting of farm labor.

Section 1364.451 is invalid and void because of the failure in

whole or in part to so consider and this defendant should not be called upon to plead further and this indictment should be quashed.

By his Attorneys,

JOHN H. BACKUS,
LEONARD PORETSKY.

At the same term on April 6, 1943, it is ordered by the court, the Honorable Arthur D. Healey, District Judge, sitting, that this indictment and indictments No. 16077 and No. 16079 be tried together.

On the same day the defendant is set to the bar to be tried, the Honorable Arthur D. Healey, District Judge, sitting, and the jury is duly empanelled and sworn, videlicit: Wilbur L. Longden, Foreman, Francis O. Conant, Edward Andrews, Chester E. Bigelow, Arthur E. Gaskin, Sr., James J. Sullivan, Harry E. Bryant, Richard T. Morey, Lebarron A. Clarridge, Alexander H. Kingston, Winfield S. Hanson, James W. Stiles.

This cause, together with causes numbered 16077 and 16079 comes on for trial on the pleadings and evidence on April 6 and 7, 1943.

On April 7, 1943, count one of the indictment is nol prossed by Joseph G. Gottlieb, Esq., Assistant, United States Attorney, and thereupon the remaining counts, 2, 3, and 4 are committed to the jury who, after considering all matters and things concerning the same, return their verdict therein and upon oath say that thereof the defendant is guilty on counts 2, 3, and 4 of the indictment.

Said cause is thence continued for sentence to April 30, 1943, when the following Judgment is entered:

JUDGMENT AND COMMITMENT.

April 30, 1943.

On this thirtieth day of April, 1943, came the United States Attorney, and the defendant Albert Yakus appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offense charged in the second, third, and fourth counts of the indictment in the above-entitled cause, to wit, Violation of Emergency Price Control Act of 1942, as amended (Public Law No. 421, 77th Congress), Approved Jan. 30, 1942; Revised Maximum Price Regulation No. 169 it is by the court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the type to be designated by the Attorney General or his authorized representative for the period of six months and to pay a fine of one thousand dollars ($1000.); and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further ordered that the clerk deliver a certified copy of this judgment and commitment to the United States marshal or other qualified officer and that the same shall serve as the commitment herein.

ARTHUR D. HEALEY, *Judge.*

MEMORANDUM April 30, 1943: Sentence and judgment stayed pending appeal.

On the same day the defendant files the following Motion in Arrest of Judgment:

MOTION IN ARREST OF JUDGMENT.

[Filed April 30, 1943.]

Now comes the defendant in the above-captioned cause, and moves that the verdict returned against him by the jury on the seventh day of April, 1943, be set aside, revoked, stopped and stayed, as if no verdict had been returned against him, for the following reasons:

1. The Emergency Price Control Act of 1942, Section 204 (d) is unconstitutional and void in that it provides 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, 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."

Which provision violates the Sixth Amendment to the Constitution of the United States of America by depriving the defendant of a full trial in the State and District in which it is alleged the crime was committed.

2. The provisions of the Emergency Price Control Act of 1942, more particularly Section 204 (d), is unconstitutional and void, in that it violates the defendant's right under the Fifth Amendment to the Constitution of the United States of America to show that Revised Maximum Price Regulation No. 169, as amended, is unreasonable, arbitrary and capricious.

3. The provisions of the Emergency Price Control Act of 1942, more particularly Section 204 (d), is unconstitutional and void, in that it violates the defendant's rights under the Fifth and Sixth Amendments to the Constitution of the United States of America by depriving him in a criminal action of the defense that Revised Maximum Price Regulation No. 169, as amended, is contrary to and not in conformity with the provisions of Section 3 of P. L. 729, 77th Congress, 2nd Session, also known as the McKellar Amendment to the Emergency Price Control Act of 1942.

4. Revised Maximum Price Regulation No. 169, as amended, is unconstitutional and void, for the reason that it violates the provisions of Section 3 of the McKellar Amendment (P. L. 729, 77th Congress, 2nd Session):

> "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"

and fails to allow any margin for processing livestock into dressed beef carcasses and wholesale cuts.

5. The provisions of the Emergency Price Control Act of 1942, more particularly Section 204 (d), is unconstitutional and void, in that it violates the defendant's rights under the Fifth and Sixth Amendments to the Constitution of the United States of America by denying him in a criminal action of the defense that the statement of considerations accompanying Revised Maximum Price Regulation No. 169, as amended, involved in the issuance thereof, does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.

6. Revised Maximum Price Regulation No. 169, as amended, is invalid and void for the reason that the accompanying statement of considerations involved in the issuance thereof does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.

7. Revised Maximum Price Regulation No. 169 as amended, is a mathematical problem of variable content in that Section 1364.451 (b) requires the defendant to determine and fix the maximum ceiling price in accordance with the provisions of paragraph (a) of Section 1364.451 and specified in Section 1364.452 minus the required deductions specified in Section 1364.453 plus permitted additions set forth in Section 1364.454.

8. Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is in violation of the rights of the defendant under the Fifth and Sixth Amendments to the Constitution of the United States of America in that it requires the defendant to define and fix the crime with which he is charged.

By his Attorney,

LEONARD PORETSKY.

On the same day the foregoing motion in arrest of judgment comes on for hearing before the court, the Honorable Arthur D.

Healey, District Judge, sitting, and after consideration thereof, is denied.

On the same day the defendant files a motion for stay of execution of sentence pending appeal which is allowed by the court and the defendant's bail is continued.

From the foregoing judgment the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit.

On May 24, 1943, the defendant files a bill of exceptions which on the same day is duly allowed by the Honorable Arthur D. Healey, District Judge.

On June 2, 1943, the Honorable Arthur D. Healey, District Judge, upon motion of the defendant extends the time for filing and allowance of the defendant's bill of exceptions to June 2, 1943.

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed May 24, 1943.]

This is an indictment brought under the Emergency Price Control Act of 1942, as amended, wherein the defendant is charged with violating Section 4 (a) of the same Act and Section 1364.401 of Revised Maximum Price Regulation No. 169, as amended, hereinafter called the "Regulation", by wilfully, knowingly and unlawfully selling and delivering wholesale cuts of beef at prices in excess of the maximum prices permitted under Section 1364.451 of said Regulation;

COUNT II charging that on or about December 18, 1942, the defendant did sell and deliver to Meyer Kramer 2 forequarters of beef, choice grade, weighing 282 pounds for a total price of $90.24;

COUNT III charging that, on or about December 25, 1942, the defendant did sell and deliver to Meyer Kramer 2 forequarters of beef of unknown grade, weighing 367 pounds, for a total price of $117.44;

COUNT IV charging that, on or about January 15, 1943, the defendant did sell and deliver to Meyer Kramer 2 forequarters

of beef of commercial grade, weighing 168 pounds, and 1 forequarter of beef of good grade, weighing 166 pounds, the total weight being 334 pounds, for a total price of $106.88.

The defendant, Albert Yakus, was president of the Brighton Packing Company, duly incorporated under the laws of Massachusetts on April 14, 1942, and the defendant owned twenty-five per cent of the capital stock. The regulations in question appear in 7 Federal Register, beginning on page 10381 and 10709—8 Federal Register 164 and 491, which were marked as Government Exhibit 2 and offered for the purposes stated in Section 307 of Title 44 of the U.S.C.A.

The defendant seasonably filed a motion to quash the indictment as a whole and to each count thereof. The motion came on for hearing on March 23, 1943, and was denied after argument. By leave of court, the defendant was permitted to file an amendment to his motion to quash, which was also denied. The defendant being aggrieved by the court's denial of the defendant's motion to quash and defendant's motion to amend, duly claimed exceptions. Thereafter, the defendant, having pleaded "Not Guilty", was set to trial before Healey, J., and a jury on the sixth day of April, 1942, with two other cases wherein Brighton Packing Company and Joseph Keller were the named defendants.

The indictment and all pleadings and motions are made a part of this bill of exceptions and may be referred to.

There was evidence from which the jury could have found that one Kramer purchased each of the items for a sum in excess of the price established by the regulation as the maximum.

At the conclusion of the government's case, the following took place:

Mr. Garland. The defendant's offer of proof, which applies in all of these cases, and it may be considered that all of the defendants are offering this offer of proof. Right at this point I will let you insert this offer of proof.

United States District Court for the District of Massachusetts
Criminal No. 16,071

United States of America
vs
Brighton Packing Company

DEFENDANT'S OFFER OF PROOF

The defendant offers to prove through the testimony of Prentiss M. Brown, Price Administrator, that the Maximum Price Regulation No. 169, as amended December 10, 1942, effective December 16, 1942, Sections 1364.451 to 1364.455 inclusive, setting forth the maximum prices for beef processed from livestock, does not provide an equitable margin for the processing of beef in accordance with the Emergency Price Control Act of 1942, as amended October 2, 1942 (McKellar Amendment).

The government does not object to this evidence on the ground of competency, but does object to it as irrelevant, by reason of the Emergency Price Control Act of 1942, as amended, Section 204 (d) of which provides in part 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, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The court excluded the foregoing evidence and offer of proof as irrelevant by reason of the Emergency Price Control Act of 1942, as amended, Section 204 (d), subject to the defendant's exception.

The Court. Do you want to make objection?

Mr. McCarthy. Yes, I do, your Honor. The government objects to this for two reasons; first because this is a matter which cannot properly be raised in these proceedings, secondly we ob-

ject to the form of the defendant's offer of proof because it has contained in it these words, "The government does not object to this evidence on the ground of competency, but does object to it as irrelevant." We do object to it on the ground of competency.

The Court. You do object?

Mr. McCarthy. Yes, because, your Honor, upon the assumption that Mr. Brown—we would object to the admissibility of this testimony on the ground that he was not qualified in the light of his previous background to set himself up as an expert.

The Court. Perhaps you had better leave that out.

Mr. Thompson. I want it in the record.

Mr. McCarthy. I am not opposed to it; I mean it seriously. We do not consider this competent. I don't agree it is competent.

The Court. Can we sum it up this way, that you object to this evidence on the ground of competency; you do object on the ground of competency and also that it is irrelevant by reason of the provisions of the Emergency Price Control Act of 1942 as amended by Section 204 (d)?

Mr. McCarthy. Right.

The Court. I am going to exclude the testimony, the evidence in the offer of proof as irrelevant by reason of Section 204 (d) of the Emergency Price Control Act of 1942 as amended, and will save the defendant's exceptions.

Thereupon, the defendant Albert Yakus offered to prove, by the testimony of SYDNEY H. RABINOVITZ, that compliance by the defendant with Revised Maximum Price Regulation No. 169, as amended, would require the defendant, in the efficient conduct of his business, to sell his product at a price lower than the actual cost of production. The offer of this testimony was submitted in writing, a copy of which is as follows:

Said Rabinovitz would testify that he is president of the Colonial Provision Company, a corporation organized under the laws of Massachusetts in 1917, with a place of business in Boston, Massachusetts; that he is president and treasurer of Girard Packing Company, a Pennsylvania corporation with a usual place of

business in Philadelphia, Pennsylvania; that he is a director of the New England Wholesale Meat Dealers' Association, an organization composed of wholesale meat dealers in New England; that he is a member of the executive committee of said association, and has served on committees taking up the problems of the meat industry at Washington, D. C.; that he has been engaged in the wholesale meat business for thirty-six years, and during that time has bought and sold beef carcasses and wholesale cuts thereof, has slaughtered beef, and has processed beef and pork; that the Colonial Provision Company, the Boston concern with which he is connected, does a business of approximately $8,000,000 a year; that he is familiar with slaughtering, with the cattle yield of dressed beef in Boston, and with the cost of dressed beef to the trade in Boston; that he is also familiar with the methods employed in purchasing, processing, and marketing livestock; that he follows all market quotations on livestock and dressed beef daily, and has done so for a good many years prior to this date, and is familiar with livestock markets and the publication of market prices issued by the United States Department of Agriculture, and trade and newspaper reports; that he is familiar with the grades and classes of livestock used in the Boston market and slaughtered locally, and the market prices of livestock to the slaughterer.

Said Rabinovitz would also testify that for the period from December 10, 1942, to early February, 1943, the average market prices to the slaughterer, based on the average market price of livestock purchased in Chicago, Illinois, of the type which would produce the grade of meat specified, were as follows:

Grade	Livestock Weight at Chicago	Av. Price per cwt.	Av. Total Price at Chicago	Expenses commission, insurance taxes & feeding) at 15¢ per cwt.	Livestock wt. at Boston 5% Shrinkage)	Freight based on wt. at Boston 56¢ per cwt.	Expenses at Boston (yarding, slaughtering, dressing, overhead - exclusive of capital investment of slaughterer) $1.00 per cwt.	Average Gross cost at Boston	Credits-based on wt.at Chicago Hides-$1 per cwt. Offal-.70 " " Tallow, fat & bones-.30 per cwt. Total $2. per cwt.	Average Net Cost at Boston	Dressed yield based on wt. at Chicago	Average cost-dressed per cwt. Carcass	Hind	Fore
AA Choice Steer	1200	$16.70	$200.40	$1.80	1140	$6.38	$11.40	$219.98	$24.00	$195.98	59% - 708 lbs.	$27.70	$30.95	$24.75
AA Choice Heifer	900	$15.75	$141.75	$1.35	855	$4.79	$ 8.55	$156.44	$18.00	$138.44	57% - 513 "	$26.99	$30.25	$24.00
A Good Steer	1200	$15.50	$186.00	$1.80	1140	$6.38	$11.40	$205.58	$24.00	$181.58	57% - 684 "	$26.52	$29.25	$24.00
A Good Heifer	900	$14.75	$132.75	$1.35	855	$4.79	$ 8.55	$147.44	$18.00	$129.44	55% - 495 "	$26.15	$28.90	$23.65
B Commercial Steer	1200	$13.50	$162.50	$1.80	1140	$6.38	$11.40	$181.58	$24.00	$157.58	55% - 660 "	$23.88	$26.13	$21.88
B Commercial Heifer	900	$12.63	$113.67	$1.35	855	$4.79	$ 8.55	$128.36	$18.00	$110.36	53% - 477 "	$23.14	$25.39	$21.14
B Commercial Cows	1000	$12.50	$125.00	$1.50	950	$5.32	$ 9.50	$141.32	$20.00	$121.32	54% - 513 "	$23.65	$25.90	$21.65
C Utility Cows	900	$11.15	$100.35	$1.35	855	$4.79	$ 8.55	$115.04	$18.00	$ 97.04	51% - 459 "	$21.15	$22.90	$19.65
Cutters & Canners	800	$ 9.58	$ 76.64	$1.20	760	$4.26	$ 7.60	$ 89.70	$16.00	$ 73.70	44% - 352 "	$20.94	$20.94	$20.94

Said Rabinovitz would also testify that the foregoing schedule represents the method of computation generally followed by the trade, showing average costs and expenses, the yield returned as the result of the slaughter of the various classes of livestock, the cost of dressed beef and wholesale cuts known as fores and hinds, based upon the trade experiences and methods employed for many years by an efficiently conducted business; that the cost of production is further increased by shrinkage between the time of slaughter and delivery to the customer.

The court excluded the foregoing evidence and offer of proof as irrelevant and immaterial by reason of the Emergency Price Control Act of 1942, as amended, Section 204 (d), subject to the defendant's exception, in which the court stated:

The Court. I am excluding it because of its immateriality, and it is immaterial, in my judgment, because of the verbiage of this statute. The stenographer will note I have excluded the testimony which their offer of proof makes on the ground that the testimony is immaterial by reason of the language of the statute which is contained in the Emergency Price Control Act of 1942, as amended, Section 204 (d), which is 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 (Section 902 of this Appendix), of any price schedule effective in accordance with the provisions of Section 206 (Section 926 of this Appendix), 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. January 30, 1942, c. 26, Title II, section 204, 56 Stat. 31."

Thereupon the defendant rested, and the foregoing is all of the evidence which is material to the issues on this appeal.

Thereafter, the defendant seasonably filed the following requests for instructions to the jury, which instructions were denied, and the defendant's exceptions thereto were duly noted:

14. If the maximum prices established by Revised Maximum Price Regulation as amended, and set forth in Section 1364.-451 were so low that it was impossible for the defendant in the efficient conduct of his business to comply with said regulation without incurring loss then said regulation and the maximum prices established thereby were unreasonable, arbitrary and capricious as to this defendant and in violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States of America and invalid and of no effect.

15. If the maximum prices for wholesale cuts of beef established by Revised Maximum Price Regulation No. 169 Section 1364.451 are less than the cost of production in the efficient conduct of the defendant's business, said regulation and the maximum prices established thereunder are unreasonable, arbitrary and capricious as to this defendant and in violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States of America and invalid and of no effect.

16. The Emergency Price Control Act of 1942 as amended, is unconstitutional and void if contrary to the provisions of the Constitution of the United States of America and more particularly Article I, Section 1 thereof, said Act purports to authorize the price administrator to pass a prohibitory law, penal in nature.

17. The Emergency Price Control Act of 1942 as amended, is unconstitutional and void if it deprives the defendant of his right under the Fifth Amendment to the Constitution of the United States of America to show that Revised Maximum Price Regulation No. 169 as amended is unreasonable, arbitrary and capricious.

18. The Emergency Price Control Act of 1942 is unconstitutional and void particularly Section 204 (d) if it deprives the defendant of his right under the Fifth Amendment to the Constitution of the United States of America to show in his defense of a criminal action that the statement of considerations accompanying Revised Maximum Price Regulation No. 169 as amended, involved in the issuance thereof does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.

19. The Emergency Price Control Act of 1942 is unconstitutional and void particularly Section 204 (d) if it deprives the defendant of his right under the Sixth Amendment to the Constitution of the United States of America to show in his defense of a criminal action that the statement of considerations accompanying Revised Maximum Price Regulation No. 169 as amended, involved in the issuance thereof does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942.

20. The provisions of the Emergency Price Control Act of 1942, particularly Section 204 (d) is unconstitutional and void if it deprives the defendant of his right under the Fifth Amendment of the Constitution of the United States of America to show in his defense of a criminal action that Revised Maximum Price Regulation No. 169 is contrary to and not in conformity with the provisions of Section 3 of the McKellar Amendment so-called, to the Emergency Price Control Act of 1942 (P.L. 729, 77th Congress, Second Session).

21. The provision of the Emergency Price Control Act of 1942, particularly Section 204 (d) is unconstitutional and void if it deprives the defendant of his right under the Sixth Amendment of the Constitution of the United States of America to show in his defense of a criminal action that Revised Maximum Price Regulation No. 169 is contrary to and not in conformity with the provisions of Section 3 of the McKellar Amendment so-called, to the Emergency Price Control Act of 1942 (P.L. 729, 77th Congress, Second Session).

22. If the accompanying statement of considerations involved in the issuance of Revised Maximum Price Regulation No. 169 as amended does not show compliance with the provisions of Section 2 (a) of Title I of the Emergency Price Control Act of 1942, said regulation is invalid and void.

23. The Emergency Price Control Act of 1942 is unconstitutional and void if it deprives the defendant of his right under the Fifth Amendment to the Constitution of the United States of America to show that Revised Maximum Price Regulation No. 169 as amended is unreasonable, arbitrary and capricious.

24. The Emergency Price Control Act of 1942 is unconstitutional and void for the reason that, contrary to the provisions of the Constitution of the United States of America, and more particularly of Article I, Section 1 thereof, by specific reference to enumerated subjects set out in Section 1 of said Act, Congress seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

25. The Emergency Price Control Act of 1942, as amended, insofar as it confers authority upon the price administrator, provided for in Section 2(a) of Title I of said Act, to establish

such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act, is invalid as an unconstitutional delegation of the legislative power, which, under the provisions of Article I, Section 1 of the Constitution of the United States of America is vested exclusively in the Congress.

27. The Emergency Price Control Act of 1942, as amended, insofar as it confers authority upon the price administrator, under Section 2 of Title I of said Act, to establish regulations or orders in such form and manner, containing such classifications and differentiations, providing for such adjustments and exceptions as in the judgment of the administrator are necessary or proper in order to effectuate the purposes of this Act, is invalid as an unconstitutional delegation of the legislative power, which, under the provisions of Article I, Section 1 of the Constitution of the United States of America is vested exclusively in the Congress.

28. The Emergency Price Control Act of 1942, as amended, insofar as it purports to confer authority upon the price administrator, provided for in Section 2 (a) of Title I of said Act, to 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, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

29. If the jury finds that the wholesale beef cuts referred to in the indictment could only be used within the confines of the boundaries of Massachusetts, then the Emergency Price Control Act of 1942 as amended insofar as it applies to this defendant is unconstitutional and void for the reason that it purports to exercise the police power which is reserved to the states respectively or to the people under the Tenth Amendment to the Constitution of the United States of America.

30. If Revised Maximum Price Regulation No. 169 fails to conform to the standards and mandates set therefor by and contained in the provisions of the Emergency Price Control Act of 1942 as amended said regulation is invalid and void.

31. If it does not appear from the statement of considerations filed with the Federal Register by the price administrator that in fixing the maximum price or prices thereunder that he has given consideration to the matters established under Section 2 (a) of the Emergency Price Control Act of 1942 and the relation between the price or prices of livestock and the products resulting from the processing thereof so as to provide a generally fair and equitable margin for such processing as required by Section 3 of the McKellar Amendment (P. L. 729, 77th Congress, Second Session), Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended and relied upon in this indictment is invalid in whole or in part.

32. If Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended requires the defendant to define and fix the crime with which he is charged then said regulation is unconstitutional and void in that it is a violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States of America.

33. If Revised Maximum Price Regulation No. 169 as amended compels the defendant in the efficient conduct of his business to sell wholesale cuts of beef below the actual cost of producing such cuts said Regulation is unreasonable, arbitrary and capricious.

34. If Revised Maximum Price Regulation No. 169 as amended fails to comply with the requirements of the Emergency Price Control Act of 1942 as amended, said Regulation and the maximum prices established thereunder are invalid and of no effect.

On the seventh day of April, 1943, the jury returned a verdict

of "Guilty" on counts 2, 3 and 4 of the indictment, and thereafter on the thirtieth day of April, 1943, the defendant seasonably made a motion in arrest of judgment, which was denied, and exception thereto was duly claimed by the defendant. On the same day, the defendant was sentenced to imprisonment for a term of six months, and to pay a fine of $1,000, which sentence, on motion of the defendant, was stayed. Thereafter, on the fourth day of May, 1943, notice of appeal was filed by the defendant.

The defendant, being aggrieved by the overruling of the defendant's motion to quash the indictment as a whole and to each count thereof, the denial of his amended motion to quash the indictment, by the exclusion of his offers of proof, by the rulings and refusals to rule as requested, by the denial of his motion in arrest of judgment, now presents this, his bill of exceptions, and prays that the same may be allowed.

ALBERT YAKUS,
by his Attorneys,
HUBERT C. THOMPSON,
LEONARD PORETSKY.

The court then charged the jury as follows:

Mr. Foreman and Gentlemen, the indictments on which these cases were founded originally presented forty-three counts against the Brighton Packing Company. That is the corporate defendant, and I shall hereafter refer to the Brighton Packing Company as the corporate defendant in these cases. There were presented thirty-nine counts against the defendant Keller and four counts against the defendant Yakus. Now the government, through its prosecuting officer, through devices of law known as *nolle prosequi* has elected to present only certain counts in all of these cases against all of these defendants, and has offered no evidence for your consideration on the balance of the counts which have been nol prossed. Now, whether the government has elected to do this for the purpose of shortening the case, expediting it, or

whatever reason it may have had, they are not presenting evidence on these particular counts, and that is not for your consideration. You are to confine your deliberation to the other charges on the evidence that has been offered by the government in support of those other charges.

Now there remains certain counts which are numbered in the indictment—I will speak of those later, the number of counts that you are to consider, and I am going to ask the clerk to give you a record of the counts which have been eliminated, and the remaining ones that you are to consider in each of these cases against the defendants.

Now, you must consider each defendant's case separately, and you ought to consider each count and each separate indictment separately. Each count is based on a transaction, and you should thoroughly analyze and weigh the evidence supporting each separate count of each separate indictment. Those indictments charge the corporate defendant and each of the individual defendants, Keller and Yakus with having wilfully violated Section 49 of the Emergency Price Control Act of 1942, as amended, by having sold and delivered different cuts of beef at prices exceeding the ceiling prices fixed by the Revised Maximum Price Regulation 169, which became effective December 16, 1942. The latter regulation was issued by the administrator of the Office of Price Administration pursuant to the authority granted under the Emergency Price Control Act of 1942. In other words, Congress enacted this Act known as the Emergency Price Control Act of 1942, and delegated to an agency known as the Office of Price Administration the duties of fixing these ceiling prices. Obviously a large body, consisting of the Senate and House of Representatives, ninety-six members of the Senate and four hundred and thirty-five members of the House of Representatives could not possibly be expected to make ceilings on prices and to carry out the many other details that are necessary under this Act, and so Congress delegated these duties to this agency known as the Office of Price Administration.

Now, certain price ceilings were fixed on beef carcasses and wholesale cuts of beef, and they became effective—they were fixed by the administrator of the Office of Price Administration, and they became effective on December 16, 1942, and fixed or established the maximum price for the sale of beef and wholesale cuts thereof.

At all times referred to in these indictments the ceiling prices fixed by the Revised Maximum Price Regulations were in full force and effect, that is, during all the time mentioned in these indictments, and at all times when the transactions mentioned in these indictments occurred those ceiling prices remained in force and effect.

Now, the Revised Maximum Price Regulation No. 169, Section 1364.401 provides that on and after December 16, 1942, regardless of any contract or agreement or other obligation, no person shall sell or deliver any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451. Let me say that that section prescribed a certain formula by which the persons engaged in this trade were enabled to arrive at the ceiling price, and no person shall either slaughter or attempt to do any of the foregoing. The Office of Price Administration is an agency of the United States government, established by Section 201 of the Emergency Price Control Act of 1942.

Now, the validity or the constitutionality of the Emergency Price Control Act, the Act itself, or the general Maximum Price Regulation 169, which happens to be the violation that is charged here, or any of the regulations that are established pursuant to the authority conferred by that Act, are not for your consideration. It is not your concern to decide whether or not these regulations are valid, whether the law itself is valid or constitutional. That is for the court to decide. It is for you to consider, and to determine whether these defendants have wilfully violated the Emergency Control Act of 1942, as amended, by selling and delivering wholesale cuts of beef to persons at prices higher than the maximum prices determined by the regulations, as charged in the various

indictments by the government. In other words, you will determine by the evidence whether the corporate defendant and the defendant Keller and the defendant Yakus wilfully sold and delivered, at various times, wholesale cuts of beef, as charged in the indictments, to various persons at prices exceeding the ceiling prices.

Now, I have a chart here which represents the ceiling prices prevailing at the time when these transactions are charged to have taken place, and this ceiling price is fixed by the hundredweight, —by removing the decimal point over two points you will have it by the pound, the price for a pound. It is agreed by all parties here that these two represent the ceiling prices at the time of these transactions without taking into consideration the sets. You have evidence about the sets. Counsel have agreed that if the sets were included with these cuts, these forequarters, that the prices, additional prices would be three cents a pound.

When you take into consideration the ceiling price as established according to this schedule you will further take into consideration that they do not include these sets.

Now, the defendants' counsel, and they are all very skilful counsel who have established excellent reputations at this bar, have not cross-examined the witnesses, and they have elected not to put on a defense to these charges, and that is within their rights not to do that. Nor have the defendants taken the stand, and let me caution you with reference to the latter matter, the fact that the defendants did not take the stand. That does not warrant you in drawing any inference of guilt because of their failure to take the stand; that is a right which they have, and you are not to hold that against them by drawing any inference of guilt merely because they didn't take the witness stand. And even though no defense has been offered here the defendants have all entered pleas of not guilty, and that challenges the government on the facts as well as the law, the fact that they have entered pleas of not guilty. Now, of course, a presumption of innocence attaches itself to all of these defendants. In our jurisprudence a man is

presumed to be innocent until proven guilty, and the government has the burden of proving beyond a reasonable doubt the guilt of these defendants on each and every count in these indictments.

Now, reasonable doubt. A reasonable doubt is not a doubt which is founded on any frivolous matter; it is a doubt that is founded on reason and on logic, and because you are a new jury I am going to read you a definition that was used by the court in a case in one of our federal courts:

> "If the evidence produced be of such a character that it produces in your mind a certainty upon which you would unhesitatingly be governed in your weighing the important concerns of life then you may be said to have no reasonable doubt concerning the guilt or innocence of the accused."

Now you cannot convict these defendants on any counts contained in these indictments unless you are convinced on all of the evidence, beyond a reasonable doubt, that the defendants are guilty of the violations charged in that count.

Now, gentlemen, these defendants are charged with wilfully violating the provisions of a section of the Emergency Price Control Act by exceeding prices fixed by the Maximum Price Regulations. Let us first consider the case of the corporate defendant. When does a corporation wilfully violate a statute? A corporation is inanimate; it is a theoretical entity. A corporation must necessarily act through individuals. The question for you to determine is did the individuals, acting for the corporation, act wilfully? If you find that they did act wilfully then their acts will be imputed or charged to the corporation.

Now, what does wilfully mean, as charged in criminal statutes? Wilfully means knowingly, and implies on the part of the actor knowledge of the purpose to do wrong. You must find on the evidence that those who acted for the corporation acted with knowledge of the regulations. With knowledge of the regulations a corporation may be found to have wilfully

violated the statute if one of its agents or officers, acting for it, acted wilfully. In this case if you find that the defendant Keller as an officer and stockholder of the corporation, acted for the corporation in making sales of meat above the ceiling prices, and that he acted wilfully in violation of the regulations it follows that the corporation wilfully violated the regulation; if you find the defendant Yakus, acting for the corporation in the performance of such acts he wilfully violated the regulation and then you can impute it as acts of the corporation and find it violated the statute wilfully.

Now you must consider the evidence as it affects the individual defendant; you must determine whether the defendant Joseph Keller wilfully violated the statute as charged in the indictment. Keller, according to the evidence, was president of the Brighton Packing Company and a large stockholder of the corporation. The fact, however, that a man is an office holder, director, or stockholder of a corporation which has committed a crime, if you find the corporation has committed a crime, does not necessarily mean that he himself has committed a crime. Officers will not be liable for acts of which they have no knowledge, at least, where the crime requires a clear knowledge or a criminal intent. The question for you to determine is whether he had knowledge of the wilful violation of the statute by the corporation, or whether as an officer he had the duty and the power to supervise that particular conduct and did nothing to correct that conduct, or whether he used the corporation purposely to wilfully violate the statute. If you find on the evidence he possessed the knowledge of a wilful violation by the corporation and either acquiesced or that he himself was the actual person who took cover behind the corporation then you could find him guilty of wilfully violating the statute as an individual. In other words, it is not sufficient merely to find that he was an officer or stockholder of a corporation which was wilfully violating the statute; you must find that he had knowledge of the violation and did nothing to prevent such violation, or that he purposely used the corporation as

an instrument for the accomplishment of the wilful violation of this statute.

What I have said concerning the defendant Keller, of course, applies to the defendant Yakus. Yakus, according to the evidence, is the treasurer and a stockholder of the corporation defendant. If you find on all the evidence that the defendant Yakus used the corporation as a means of wilfully violating the statute you may find him guilty as charged in the indictment of wilfully violating the statute. Or, if you find that he knew about that wrong and knew about the wilful violation by the corporation and had the duty and power to supervise that particular conduct and did nothing to correct the matter then you could find him guilty as charged in the indictment. Now I want to say to you that if on the evidence you are convinced that the defendant Yakus did nothing other than to weigh and deliver these cuts of meat, that he didn't participate in any attempt, or actually participated in the act of violation of this statute then the government has not made out its case against Yakus. You must find that he had the knowledge of what was going on or that he actually himself used the corporation to perpetrate the violation against this statute.

Now, as I have stated before, you must take each and every separate count of every indictment. And, perhaps at this juncture I ought to say to you that the counts which still remain in the indictment against the corporate defendant, which you are to consider, are as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. Will you make a note, Mr. Clerk, right away?

The Clerk. Yes, your Honor.

The Court. 1 to 12, inclusive still remain in the indictment against the corporation which you gentlemen are to consider; then you will consider 14, 15 and 16 of that indictment, and counts 29, 31, 35, 38, 39, 40, 41, and 42. In other words there are twenty-three counts remaining for your consideration against the defendant corporation, and you are to consider each and every separate count in the indictment. I want to say to you that

the counts, remaining counts which have been disposed of by the *nolle prosequi* are not to be considered at all by you, and you are not to be concerned about them or the motive for taking the action which the United States Attorney has resorted to.

Now, in the Keller indictment there still remains for your consideration counts 1 to 11 inclusive, 13 to 15 inclusive and 34 to 39 inclusive. In all that is twenty counts against the defendant Keller. The other counts contained in this indictment, and you will have these indictments in the jury room, have been disposed of by the same method that I referred to.

In the indictment against Yakus, which originally contained four counts, count 1 has been nol prossed, and there remains counts 2, 3 and 4 for your consideration.

You have heard the evidence of the various witnesses produced here by the government; you have heard their evidence as to these transactions that were given to you, with the corporate defendant and with its officers, the defendants Yakus and Keller. You will have in the jury room, as I stated, the indictments; you will have all the exhibits that have been produced by the government. Of course, you are not required to believe any of the witnesses. Their credibility is entirely for you to determine. Or, you may believe any or all of them and disbelieve any or all of them, or you may believe and accept any part of their testimony or reject any part of their testimony.

Now, at this time I want, for the purposes of the record, to refer to the schedules of prices, ceiling prices that obtained at the time it is alleged these transactions took place. I am going to ask that the stenographer embody in the record this schedule, and it is my purpose that the jury may have this schedule with them to aid them in determining the issues presented by this case.

Now, gentlemen, I don't think it is necessary for me to dwell very long on the fact of the type of consideration you ought to give this case. Serious violations are charged here, criminal violations on the part of these defendants. You have a duty to perform as citizens of this country. You must consider these

matters in a calm, deliberate manner, free from passion or prejudice, free from public clamor, in the light of the facts that have been developed only; you must permit no outside influence or anything that is extrinsic to influence your considered judgment.

Now, if counsel care to confer with me, or have anything they may suggest.

[Counsel confer with court at bench.]

Mr. Thompson. We want to note our exception to your refusal to include those things which you have already disregarded when we were outside, so that our failure to object specifically to each one does not indicate our waiver of those.

Mr. McCarthy: Are there any of those requests which his Honor said he would give that you are not satisfied with?

Mr. Thompson. No, he has covered them all right.

Mr. Garland. It is understood that the defendants do not waive any of the rights they have saved during the trial by their failure to take exceptions to any part of the charge.

Mr. Poretsky. These remarks by Mr. Thompson and Mr. Garland also cover Yakus.

The Court. Gentlemen, my attention has been called by one of the United States attorneys that Yakus is the president and Keller is the treasurer. I think I stated it the other way but, after all, you are the judge of the evidence, but I feel I should make that correction to you.

One of defendants' counsel has requested me to give you certain requests. I have agreed to do that, and I am going to read them to you verbatim, and give them to you verbatim.

> "The jury should not rest its verdict upon conjecture or suspicion alone and if you find that all the evidence offered by the government merely creates a suspicion that the defendant may have committed the offense alleged, with respect to each such count, you must find him not guilty."
>
> "Where all the evidence is as consistent with innocence as with guilt, then it is the duty of the jury to return a verdict of not guilty."

NOTICE OF APPEAL.

[Filed May 4, 1943.]

Name and Address of Defendant-appellant:

Albert Yakus, 36 Litchfield Street, Brighton, Mass.

Name and Address of Defendant-appellant's Attorney:

Leonard Poretsky, Esquire, 6 Beacon Street, Boston, Mass.

Offense:

Wilfully, unlawfully and knowingly violating Section (4A) of the Emergency Price Control Act of 1942 as amended, in that the defendant sold and delivered wholesale cuts of beef to Morris Kepnes and others at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended.

Date of Judgment:

April 30, 1943.

Brief Description of Judgment or Sentence:

The defendant-appellant was sentenced to confinement for six months in such institution as the Attorney-General of the United States shall designate, and to pay a fine of ($1,000) one thousand dollars.

Upon application by defendant-appellant, defendant-appellant was admitted to bail pending his appeal to the United States Circuit Court of Appeals for the First Circuit, from the judgment of conviction herein.

I, the above named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the First Circuit from the judgment above-mentioned on the ground set forth below.

Dated at Boston, Massachusetts, this fourth day of May, 1943.

ALBERT YAKUS,

by LEONARD PORETSKY,

Attorney for Defendant-Appellant.

GROUNDS OF APPEAL. The Defendant-appellant alleges the court erred in the following.

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendant-appellant objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

a. By denying the defendant-appellant the right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

b. By rejecting the offer of proof of defendant-appellant in substantiation of his claim that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

4. The court erred in denying the defendant-appellant's motion to direct a verdict on counts 2, 3 and 4 of the indictment on the ground of variance.

5. The court erred in denying the defendant-appellant's motion to instruct the jury to return a verdict of not guilty on counts 2, 3 and 4 of the indictment.

6. The court erred in denying the defendant-appellant's requests for instructions numbered 14 to 34 inclusive.

7. The court erred in denying the defendant-appellant's motion in arrest of judgment.

8. The appeal will be based on additional errors set forth in detail in the assignment of errors.

ASSIGNMENT OF ERRORS.

[Filed May 24, 1943.]

The defendant-appellant alleges that the trial court erred in its orders, decrees, rulings and instructions, and assigns as errors the following:

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred on the rejection of evidence, to which the defendant-appellant objected and took exception during the trial of this cause, to the specific evidence, and the objection thereto are as follows, to wit:

a. In ruling that the defendant-appellant had no right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169, as amended, is arbitrary and capricious.

b. In ruling that the defendant-appellant had no right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169, as amended, was not in conformity with the Emergency Price Control Act of 1942, as amended.

c. In rejecting the offer of proof of the defendant-appellant in substantiation of his claim that Revised Maximum Price Regulation No. 169, as amended, is not in conformity with the provisions of the Emergency Price Control Act of 1942, as amended.

4. The court erred in denying the defendant-appellant's requests for instructions numbered 14 to 34, inclusive, as are more specifically set forth in the bill of exceptions.

5. The court erred in denying the defendant-appellant's motion in arrest of judgment.

By his Attorneys,

LEONARD PORETSKY,
HUBERT C. THOMPSON.

CLERK'S CERTIFICATE.

DISTRICT COURT OF THE UNITED STATES.
DISTRICT OF MASSACHUSETTS.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the record on appeal in the cause entitled:

No. 16076, CRIMINAL.

UNITED STATES, by Indictment,

v.

ALBERT YAKUS,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said District, this eleventh day of June, 1943.

[SEAL] JAMES S. ALLEN, *Clerk.*

[fol. 42] Proceedings in Circuit Court of Appeals.

On May 12, 1943, duplicate notice of appeal and statement of docket entries were filed.

Thereafter, to wit, on June 29, 1943, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on August 23, 1943, the following opinion of the Court was filed:

[fol. 43] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1942

No. 3885

BENJAMIN ROTTENBERG, et al., Defendants, Appellants,

v.

UNITED STATES OF AMERICA, Appellee

No. 3892

ALBERT YAKUS, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the District of Massachusetts

Before Magruder, Mahoney and Woodbury, JJ.

Leonard Poretsky, John H. Backus, William H. Lewis, for Benjamin Rottenberg et al. Leonard Poretsky, Francis P. Garland, Joseph Kruger, for Albert Yakus. Robert L. Wright, Special Assistant to the Attorney General, Edmund J. Brandon, U. S. Attorney, William T. McCarthy, Joseph J. Gottlieb, Assistant U. S. Attorneys, for United States of America.

OPINION OF THE COURT—August 23, 1943

MAGRUDER, J. In these criminal prosecutions for viola-
[fol. 44] tions of § 4(a) of the Emergency Price Control Act (56 Stat. 28) by making sales at prices in excess of those

prescribed by an applicable price regulation, the question is squarely presented whether, or to what extent, the trial court may entertain a defense based upon the alleged invalidity of the regulation. The point was left open in *Lockerty* v. *Phillips*, — U. S. —, decided May 10, 1943.

No. 3885 embraces two indictments, one against Rottenberg, who was president and treasurer of B. Rottenberg Co., Inc., and one against the corporation. The two indictments were consolidated for trial and are here on a consolidated appeal. Each defendant was convicted on several counts of making sales of wholesale cuts of beef in December, 1942, and January, 1943, at prices higher than the maximum prices as determined under Revised Maximum Price Regulation No. 169,[1] in willful violation of § 4(a) of the Act. Sentence of six months in jail and a fine of $1,000 was imposed upon the individual defendant. The corporate defendant was fined $1,000.

No. 3892 embraces a similar indictment against Yakus, who was president of the Brighton Packing Company. He was convicted on three counts of making sales of wholesale beef cuts in December, 1942, and January, 1943, at prices higher than the maximum prices established by the aforesaid regulation and was sentenced to jail for six months and fined $1,000.

The cases were heard together on appeal in this court. They involve essentially the same questions, and hereafter in this opinion reference will be made only to the proceedings in Rottenberg's case.

At various appropriate stages in the proceedings Rotten- [fol. 45] berg challenged the constitutionality of the Emergency Price Control Act. The District Court upheld the Act.

The Government introduced sufficient evidence to warrant verdicts of guilty on all the counts which were submitted to the jury.

Rottenberg introduced no testimony except an offer of proof of detailed economic data designed to show that Revised Maximum Price Regulation No. 169 was arbitrary and capricious and failed to provide a fair and equitable margin of profit to slaughterers and wholesalers conducting their business in an efficient manner. The court

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[1] 7 F. R. 10,381. The regulation was issued December 10, 1942, to become effective December 16, 1942.

declined to receive the offer of proof on the ground that § 204 of the Act deprived it of jurisdiction to entertain such a defense. Rottenberg duly took exception to this ruling, the correctness of which is the most serious question now before us.

There is first the inquiry whether the Act as a matter of interpretation precludes this sort of defense to the indictments now before us. If so, then we must decide whether it was competent for Congress so to provide "in a statute born of the exigencies of war." *Scripps-Howard Radio Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 17 (1942).

On July 30, 1941, many months before our country was attacked at Pearl Harbor, the President transmitted to Congress a message setting forth the necessity of legislation to control prices. H. Doc. No. 332, 77th Cong., 1st Sess. He submitted figures to show that inflationary price rises were threatening to undermine our defense effort "unless we act decisively and without delay." After extended consideration the House passed on November 28, 1941, a bill to control prices and rents. H. R. 5990, 77th Cong., 1st Sess. This bill contained quite a different scheme for review of price regulations from what was ultimately enacted. In the first instance review was to be had before a Board [fol. 46] of Administrative Review; any person aggrieved by the decision of such board might petition for review in the appropriate circuit court of appeals. The bill contained no provision corresponding to that now found in § 204(d) of the Act upon which the court below relied in excluding the offer of proof.

On January 2, 1942, the Senate Committee on Banking and Currency reported out the House bill, with substantial amendments, including the review provisions which eventually became law, and which we shall examine in detail later.

The Senate committee report (Sen. Rep. No. 931, 77th Cong., 2d Sess.) pointed out that the House bill had been passed before we entered the war and that the bill needed to be strengthened now that we were embarked upon an "unlimited national mobilization in a war for survival." While the country was concerned with the danger of inflation even before December 7, 1941, "the pressures on the price structure, already enormous, will be multiplied" now that we are engaged in a world war. The committee pictured in vivid terms what would be the disastrous consequences of

inflation by way of sapping our national strength and effort and morale. "Effective price control, under these circumstances, must no longer be delayed." The report added: "Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those who defy regulation to proceed at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency."

The Emergency Price Control Act of 1942 became law on January 30, 1942.

Section 1(a) of the Act sets forth its purposes and declares that price and rent control are "necessary to the effective prosecution of the present war."

The temporary, emergency character of the legislation was emphasized by the provision in § 1(b) that the Act [fol. 47] "shall terminate on June 30, 1943", or upon such earlier date as the President by proclamation, or the Congress by concurrent resolution, may prescribe.[2]

Section 2(a) provides that whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of the 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." In establishing any maximum price, he is directed, so far as practicable, to ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, and to make adjustments for such relevant factors as he may determine to be of general applicability. The Administrator is also directed, so far as practicable, before issuing any price regulation, to consult with representative members of the industry affected. Further to assure that no price regulation would be issued without due consideration by the Administrator of the factors involved, it is required that every price regulation issued by him "shall be accompanied by a statement of the considerations involved in the issuance of such regulation". After a regulation is issued the Administrator is required, if requested by any substantial portion of the industry affected, to appoint an advisory committee truly repre-

[2] This terminating date has since been extended to June 30, 1944. 56 Stat. 767.

sentative of the industry with whom he shall advise and consult from time to time with respect to the regulation, the form thereof, and classifications, differentiations and adjustments therein. Under § 2(c) any price regulation "may contain such classifications and differentiations, and may provide for such adjustments and reasonable excep-
[fol. 48] tions, as in the judgment of the Administrator are necessary and proper in order to effectuate the purposes of this Act."

Section 4(a) provides that it shall be unlawful "for any person to sell or deliver any commodity * * * in violation of any regulation or order under section 2, * * *" This subsection is implemented by § 205(b) which provides that any person "who willfully violates any provision of section 4 of this Act" shall, upon conviction thereof, be subject to a fine or imprisonment or both. In § 205(c) it is provided that "the district courts shall have jurisdiction of criminal proceedings for violation of section 4 of this Act."

Sections 203 and 204 provide in detail the procedure for administrative review, and ultimate court review, of price and rent regulations, first in a special court of the United States known as the Emergency Court of Appeals, and then in the Supreme Court, upon certiorari. This special court, created by § 204(c), consists 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. It is given the powers of a district court with respect to the jurisdiction conferred upon it, except that it "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."

Under § 203(a), within a period of sixty days after the issuance of any regulation under § 2, "any person subject to any provision of such regulation" may "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." Within thirty days after the filing of such protest "the Administrator shall either grant or deny such protest, in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in
[fol. 49] 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."

If the Administrator denies such protest, in whole or in part, any person aggrieved by such denial may within thirty days thereafter, under § 204 (a), file a complaint with the Emergency Court of Appeals, specifying his objections and praying that the regulation protested be enjoined or set aside in whole or in part. Upon receipt of service of such complaint it is the Administrator's duty to certify and file with the court a transcript of such portions of the protest proceedings as are material to the complaint. The 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." No objection to such regulation, 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." Appropriate provision is made for applications by either party for leave to adduce additional evidence.

Section 204 (b) provides that no such regulation shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation "is not in accordance with law, or is arbitrary or capricious." The effectiveness of any such judgment by the Emergency Court "shall be postponed until the expiration of thirty days from the entry thereof", except that if petition for certiorari is filed with the Supreme Court [fol. 50] 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."[3]

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[3] With respect to this provision the report of the Senate committee states: "This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme

The particular provision of the Act upon which the controversy turns in the present cases is found in § 204 (d) 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 * * * issued under section 2 * * * and of any provision of any such regulation. * * * 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 * * *, 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 any provision of any such regulation * * * or to restrain or enjoin the enforcement of any such provision."

Section 205 contains several subsections in aid of enforcing the Act. Subsection (a) authorizes the Administrator to make application to any appropriate court for an order enjoining violations of § 4. Subsections (b) and (c) contain the provisions for criminal prosecution already referred to. Subsection (d) refers to litigation between private parties in which some provision of the Act, or a regulation issued thereunder, may be involved. Subsection (e) [fol. 51] provides that a buyer of a commodity who has paid more than the applicable maximum price may, with some limitations, bring suit against the seller for treble damages in any court of competent jurisdiction. Subsection (f) contains detailed and carefully guarded licensing provisions.

It is the contention of appellants that since the provision of § 204 (d), above quoted, is contained in a section of the Act prescribing a special procedure by which a person subject to a price regulation may invoke the judicial power to have the regulation set aside, it should be read as meaning no more than that this special statutory procedure is the only means by which such a person may maintain a suit directed to that end; in other words, that none of the regu-

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Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court." Sen. Rep. No. 931, 77th Cong., 2d Sess., p. 24.

lar courts shall have jurisdiction to entertain a suit by such person to set aside any provision of the Act or a regulation thereunder or to restrain the enforcement thereof.

This argument overlooks the breadth of the language in § 204 (d). The subsection provides, affirmatively, that the Emergency Court of Appeals, and the Supreme Court on certiorari therefrom, "shall have exclusive jurisdiction to determine the validity of any regulation." Then follows the negative statement of the same idea, significantly expressed in three distinct clauses: Except as provided in § 204, (1) "no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation"; (2) "or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of the Act or of a regulation thereunder"; (3) "or to restrain or enjoin the enforcement of any such provision." (2) and (3) refer aptly to injunction suits brought by a person subject to a regulation. (1) is much broader and seems clearly enough to say that no other court shall have jurisdiction or power to consider the validity of any regulation, however the litigation may originate. Since this is a blanket provision it is natural that it is placed in a section which prescribes the [fol. 52] only proceduce by which the validity of a regulation may be subjected to court review. It thus became unnecessary to write the same limitation into each of the subsections of § 205 dealing with the various methods of enforcement.

Our interpretation of § 204 (d) is confirmed by the legislative history, if confirmation were necessary. The report of the Senate Committee on Banking and Currency (Sen. Rep. No. 931, 77th Cong., 2d Sess.) states (p. 7):

"The Emergency Court is established in order to avoid the confusion which would result from conflicting decisions in different circuits on the same regulations. It will also permit the expeditious consideration and disposition of problems arising under the statute by a court familiar with its provisions and operation."

And, again, in the same report (pp. 24-25), emphasizing the distinct clauses in the last sentence of § 204 (d):

"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity,

constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

It is thus clear that the limitations of § 204 (d) were intended to apply not only to injunction suits brought by a person affected by a regulation, but also to enforcement proceedings, both criminal and civil, brought under § 205. Any court in which criminal or civil enforcement proceedings are brought may determine the constitutional validity [fol. 53] of the Act itself, but in such proceedings consideration of the validity of a regulation is precluded.

Section 4 (d) provides: "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." Appellants, therefore, were not required to act, but, in effect, the Congressional command to them was that if they chose to act they must act in accordance with an outstanding price regulation until the same is set aside in proceedings directed to that end in accordance with the provisions of §§ 203 and 204.

It is contended that such a command constitutes a denial of due process of law in violation of the Fifth Amendment. We do not think that this is so.

It is beyond all doubt that Congress in the exercise of its war power may control prices as part of a war-time anti-inflation program. *United States* v. *Macintosh,* 283 U. S. 605, 622 (1931); *Taylor* v. *Brown,* United States Emergency Court of Appeals, July 15, 1943. This power is "a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation." *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 426 (1934). The

validity under the due process clause of the methods selected by Congress for effectuating price control cannot be judged apart from a consideration of the practical necessities of administration. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 299, 301 (1920). "The Constitution as a continuously operating charter of government does not demand the impossible or the impracticable." *Hirabayashi* v. *United States*, U. S. , June 21, 1943. In *Nebbia* v. *New York*, 291 U. S. 502, 539 (1934), the court said, "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual [fol. 54] liberty." Since the war-time power of Congress to control prices includes the power to adopt such means to this end as might rationally be considered necessary for the effective administration of the regulatory program, the only question remaining to the courts, under the Fifth Amendment, is whether Congress had any rational basis for its judgment that administrative necessities in a scheme of nation-wide price regulation require that price regulations issued by the Administrator must be generally observed until the regulations are set aside pursuant to the orderly review procedure set forth in the Act. Nothing would seem to be gained by expressing the issue in more esoteric terms to disguise the non-technical nature of the judgment the courts are called upon to make under the Fifth Amendment.

It is common knowledge that the danger of runaway inflation was acute when Congress passed the Emergency Price Control Act. The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities, affecting a wide range of industries, the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started.

Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and

sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. [fol. 55] It was not to be anticipated that he would glory in being "arbitrary or capricious", or that he would be loathe to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not "generally fair and equitable". He is at least as much interested as anybody else in the successful administration of his office.

Furthermore, the Administrator alone has power to recast regulations as circumstances may indicate the need. All that a court could do would be to strike down; it could not draft and put in force a substitute regulation. If a violator could procure an acquittal in a criminal case by convincing the particular district court or jury that the regulation is arbitary or capricious or not generally fair and equitable, the Government could not appeal; and for practical purposes enforcement of the regulation in that district would be at an end. In other districts the regulation might be upheld. As the Government well says in its brief: "The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the area in which higher prices prevailed. Producers in low-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would be the more acute because of wartime shortages in many commodities." The same damaging results would follow if the ordinary courts were empowered to set aside a regulation or grant injunctions against its enforcement. If some commodities thus got released from price control, even temporarily, the consequences might well be irretrievable, and, our economy being all of a piece, pressures would develop on other commodities to break through their ceilings. Hence, even the Emergency Court of Appeals (which alone has been given power to set aside a regulation on grounds [fol. 56] not involving the constitutional validity of the Act itself) is not empowered to grant a stay pending the litigation.[4]

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[4]See footnote 3, *supra.*

If in every proceeding, civil or criminal, to enforce compliance with the regulations, the Administrator had to present the mass of economic data which might be required to establish the validity of the regulation, and to try the issue *de novo* as against each defendant, his predominant occupation would become fighting litigation rather than fighting inflation.

In view of these considerations, it is easy to see why Congress chose the particular review procedure set forth in §§ 203 and 204. If a person subject to a regulation believes that it is not generally fair and equitable or causes avoidable hardships or dislocations, he must first make his protest to the Administrator, who is thus given the opportunity to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. The Administrator and his staff, the collective entity known as the Office of Price Administration, develop day by day an expertness in the whole field of price regulation certainly beyond that of the courts, which makes it reasonable that a protest should first be reviewed by this agency. Furthermore, as already pointed out, the Administrator is the only one with power to make adjustments or amendments. The Administrator may be convinced by the protest, and take appropriate action. If so, well and good. If not, further review is available in the Emergency Court and finally in the Supreme Court, on the basis of a proper administrative record and with the benefit of a considered written opinion by the Administrator explaining why he deemed the protest not to be well taken. We have already quoted from the Senate [fol. 57] committee report the reason why judicial review is channeled through this special court.

No doubt, the judicial review thus provided takes some time before a final adjudication can be reached. But it was not to be supposed that meritorious protests would, in the great majority of cases, have to be pressed to the stage of judicial review. As it has worked out, considering the great number of commodities that have had to be regulated and the milions of people who have been subjected to the regulations, there have been surprisingly few complaints filed in the Emergency Court.[5] So far as individuals may suffer hardship and inconvenience because of the delay involved in

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[5]To date 79 complaints have been filed.

the review procedure, this they must bear in the interest of the greater public good resulting from general compliance with the regulations until they are set aside or amended in an orderly way.

The District Court pointed out that in the present cases the regulation was not invalid on its face, but that the question whether it was arbitrary or capricious or failed to conform to the statutory standards depended upon a consideration of extrinsic economic data. In view of the broad separability clause in §303 of the Act, the court quite properly confined its ruling under the Fifth Amendment to the facts of the cases before it. We shall observe the same caution. There might be a difference if the regulation as a pure matter of law were invalid on its face; if, for example, it covered a commodity which, under a proper construction of §302(c), was exempted by Congress from price regulation. *Cf. Davies Warehouse Co.* v. *Brown,* United States Emergency Court of Appeals, May 28, 1943. We intimate no opinion on this.

We conclude that §204(d), as applied to these appellants, is not bad under the Fifth Amendment.

[fol. 58] The Government has cited many cases as furnishing analogies bearing more or less directly on the present problem. See *Johnson* v. *United States,* 126 F. (2d) 242 (C. C. A. 8th, 1942); *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374 (1931); *Bradley* v. *City of Richmond,* 227 U. S. 477, 485 (1913); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 440-41 (1907); *United States* v. *Vacuum Oil Co.,* 158 Fed. 536 (W. D. N. Y., 1908); *Lehigh Valley R. R. Co.* v. *United States,* 188 Fed. 879 (C. C. A. 3d, 1911). *Cf. White* v. *Johnson,* 282 U. S. 367, 373 (1931). It would unduly prolong this opinion to discuss the arguments and asserted distinctions which counsel have addressed to us with reference to these cases. We are satisfied with the conclusion we have reached, without relying on the props of precedent which some of these cases might afford us.

It is not amiss to note that in *Hirabayashi* v. *United* State, — U. S. —, June 21, 1943, under the war powers of the President and Congress, the Supreme Court upheld a military order which applied discriminatory treatment to citizens of the United States on the basis of their racial origin, a discrimination which would ordinarily be abhor-

rent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress.

As a further argument against § 204(d) appellants contend that when Congress in § 205(c) vested in the district courts jurisdiction of criminal proceedings, the judicial power which such courts are thus called upon to exercise is derived from Article III of the Constitution and not from Congress; that the question of the relevancy of evidence offered in a criminal trial raises a question of law which must necessarily be decided by the court in the exercise of its judicial power; and that it is unconstitutional for Con- [fol. 59] gress to take from a court having jurisdiction to try a criminal indictment its judicial power to decide a question of relevancy.

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. Congress has said that it shall be a crime willfully to sell a commodity for a price in excess of that established by an outstanding price regulation, as long as such regulation has not been set aside by the statutory procedure. This is clearly the meaning and effect of the Act, though in § 204(d) Congress has expressed it in terms of denying "jurisdiction or power" to the courts to consider the validity of the regulation. Hence it was entirely immaterial to the criminal liability of these appellants whether Revised Maximum Price Regulation No. 169 might have been set aside had appellants chosen to avail themselves of the procedure set forth in §§ 203 and 204 of the Act.

Nor have appellants been denied the right of a jury trial as guaranteed by the Sixth Amendment. They have had a jury trial on all the issues relevant under the statute.

Finally, the Act is challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator. This point is not well taken. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941); *Sunshine*

Anthracite Coal Co. v. *Adkins,* 310 U. S. 381 (1940); *Mulford* v. *Smith,* 307 U. S. 38 (1939); *Hirabayashi* v. *United States,* — U. S. —, decided June 21, 1943. The Emergency Price Control Act was upheld as against the challenge of [fol. 60] unconstitutional delegation in *Taylor* v. *Brown,* decided by the United States Emergency Court of Appeals, July 15, 1943. There is no need to repeat or elaborate what was said there.

The judgments of the District Court are affirmed.

On the same day, to wit, August 23, 1943, the following Judgment was entered:

JUDGMENT—August 23, 1943

This cause came on to be heard June 29, 1943, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof It is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court, Arthur I. Charron, *Clerk.*

Thereafter, to wit, on August 28, 1943, appellant filed a motion for stay of mandate, which was allowed on August 30, 1943; and on August 30, 1943, appellee filed a motion to vacate stay of execution, which was denied on the same day.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is consolidated with No. 375 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.