Production Under the Controlled Materials Plan

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I. Delegation of Authority

The events of the summer of 1950 led to a reassessment, in Washington as in the nation at large, of the likelihood of our becoming a party to an all-out war, and of the resources needed to meet, if not to forestall, such a contingency. It became the consensus of opinion that national security demanded an immediate rearmament effort of a scope unprecedented in peace-time, as well as a great expansion of our industrial potential. Congress was quick to recognize that the vast defense program it was authorizing, imposed as it would be on an industrial machine operating at full speed, would strain the economy to the utmost and would require the diversion of substantial quantities of certain materials from civilian to military and related uses. It realized that normal civilian production and purchases would have to be curtailed and redirected in order to accomplish such a diversion with a minimum of delay and hardship. Less than three months after the North Korean attack, and before the Chinese openly intervened in the Korean conflict, Congress enacted the Defense Production Act of 1950, vesting in the President the broadest powers over the national economy, among them the powers to establish priorities in the acceptance and performance of contracts, to allocate materials and facilities, and to prevent the hoarding of scarce materials.

Section 101 of the Defense Production Act of 1950 provides:

The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the
purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.²

It is from this one sentence that the President derives the power, which he is presently exercising, to control hundreds of thousands of business enterprises with respect to the type and quantity of products they may produce, the materials they may consume in their production, the persons to whom they may sell, the buildings they may construct, etc.³ Congress was well aware of the sweeping nature of the powers it was conferring. Prior to the enactment of the Defense Production Act in 1950, and again prior to its amendment in 1951, efforts were made to induce Congress to restrict the powers which the President may wield. The Senate Committee on Banking and Currency, rejecting such demands, explained:

Your Committee was urged to amend the language of Title I of the Defense Production Act of 1950 to incorporate specific formulas for the allocation of adequate materials to continue civilian production wherever this is consistent with military needs. It was also urged to make other specific statutory allocations of materials to certain users. Because your committee was of the opinion the inclusion of such provisions in this case might create undesirable inflexibility in the administration of allocation and priority powers, it decided not to recommend amendment of the act in these respects.

Your committee considered the need for flexibility in granting the allocation authority in the Defense Production Act of 1950, and, in presenting S. 3936 on the Senate floor last year, the following statement was made by the chairman of your committee:

"The powers granted in this bill are great. Their very flexibility, so necessary to accomplish our purposes without harm, raises the possibility of abuse. Your committee considered the possibility of limiting the powers or imposing arbitrary restrictions on the President. Your committee did not adopt this negative view. Instead, reliance was placed upon requirements of consultation with industry and other persons affected by regulations and on the 'watchdog committee' set up in the bill. These positive measures to protect the public interest will be more valuable, in our judgment, than any negative measures we could have provided."

While neither your committee, nor those of its members who are

² 64 Stat. 799, 50 U.S.C. App. § 2071 (Supp. 1950). The 1951 amendment added a sentence not relevant to the subject of this article: "... No restriction, quota, or other limitation shall be placed upon the quantity of livestock which may be slaughtered or handled by any processor." (65 Stat. 132, 50 U.S.C.A. App. § 2071 (1951)).

³ Authority to requisition and to control wages, prices and certain other aspects of the economy is contained in Titles II-VII of the Defense Production Act of 1950, as amended.
members of the "watchdog committee" have agreed in every instance with
the decisions of the officials administering the act, we have felt that our
original recommendation was correct—that flexibility of authority, tempered
by consultation with industry (a policy which has been disregarded all too
often and which your committee feels should be emphasized much more)
and tempered by the scrutiny of the "watchdog committee," is far superior
to arbitrary rules and formulas imposed by statute.4

Upon approving the Defense Production Act of 1950, the President
issued Executive Order 10161,5 delegating the various functions conferred
upon him by that act. The priorities and allocations powers granted
by Title I of the Act thus were delegated to the Secretary of Commerce
with respect to the great majority of materials and facilities.6 The secre-
tary thereupon established the National Production Authority within
the Department of Commerce7 to carry out the functions assigned to him
by Executive Order 10161. A few months later, having decided that all
mobilization activities should be coordinated by a "defense czar," the
President created the Office of Defense Mobilization8 and prescribed that
all functions theretofore delegated by Executive Order 10161 were to
be performed by the respective agencies concerned, "Subject to the direc-
tion and control of the Director of Defense Mobilization."9 Shortly
thereafter, the President issued Executive Order 10200,10 establishing
the Defense Production Administration, an independent agency, "subject
to the direction, control and coordination of the Director of Defense
Mobilization."11 Among the functions delegated to the Administrator
of DPA were those relating to priorities and allocations, subject to the
proviso that these powers, with enumerated exceptions, be redelegated to
the offices and agencies to whom they had been delegated by Executive
Order 10161 and to their delegates.12 The functions, redelegation of which
was not required, included the duty to "perform the central programming
functions incident to the determination of the production programs

6 Exec. Order No. 10161 delegated to the Secretary of Interior the functions of Title I
pertaining to petroleum, gas, solid fuel, and electric power; to the Secretary of Agriculture,
the functions pertaining to food and domestic distribution of farm equipment and com-
mercial fertilizer; to a commissioner of the Interstate Commerce Commission, the functions
pertaining to domestic transportation, storage, and port facilities, or the use thereof, but
excluding air transport, coastwise, intercoastal, and overseas shipping.
9 Id. § 3.
11 Id. § 1(b).
12 Id. § 2(c)(1).
required to meet defense needs" and the duty to "make determinations as to the provision of adequate facilities for defense production and as to the procedures and methods followed by the Executive agencies with respect to the accomplishment of defense production programs."\textsuperscript{13}

The activities of DPA and NPA are closely related and overlap at many points. In theory, DPA, with a staff of about 500, is the central programming agency, whereas NPA, with a staff ten times as large, is the operating counterpart. In practice, however, this distinction is not too significant. NPA officials are responsible for the formulation of many fundamental policy decisions. NPA develops, issues and administers most of the regulations and orders governing production. For many months, Manly Fleischmann served as Administrator of both agencies, and some of his top lieutenants wear two hats. The complete fusion of the two agencies has been suggested from time to time. Cooperation is so close that, to all intents and purposes, such a fusion has been accomplished.

II. CONSTITUTIONALITY OF DELEGATION IN THE LIGHT OF STANDARDS FOR THE EXERCISE OF AUTHORITY

Before long an alert counsel, zealously defending a client charged with violations of NPA regulations, will insist that Section 101 of the Defense Production Act represents an unconstitutional delegation of legislative power. While such a defense should not be brushed aside as sheer frivolity, the chances of the violator's escaping conviction on this ground are believed to be slim indeed.

The courts have long adhered to the principle that Congress may not abdicate its policy-making responsibility in any given area. At the same time they have faced the realities of modern government and have, as a rule, been liberal in approving broad delegations of power to the President and to administrative agencies,\textsuperscript{14} whenever it could be shown that Congress had established "an intelligible principle"\textsuperscript{15} whereby discretion must be governed. Conservatively phrased, "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."\textsuperscript{16}

To date, only one federal statute, the National Industrial Recovery

\textsuperscript{13} Id §§ 2(c) (2) and (3).
\textsuperscript{14} The history of this doctrine is traced by Jaffe, An Essay on Delegation of Legislative Power, 47 CoL. L. Rev. 359-376, 561-593 (1947).
\textsuperscript{15} Taft, C.J., in J. W. Hampton & Co. v. United States, 276 U.S. 394 (1927).
Act,\textsuperscript{17} has been invalidated by the United States Supreme Court upon the ground that it constituted an unconstitutional delegation of legislative power.\textsuperscript{18} The NIRA had authorized the President to establish codes of “fair competition” “to promote the policy of this title.” The policy was set forth in Section 1 of the act in such general terms as “to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups,” and “to avoid undue restriction of production (except as may be temporarily required).” “Fair competition” was not defined, and, unlike the concept of “unfair competition,” it had no settled meaning in law. Private groups were authorized to draft codes of “fair competition.” Such codes, upon approval by the President, assumed the force of law. The President’s discretion to approve or disapprove adoption was limited only in some respects. He was required to find that the proponent group was “truly representative,” that the code was not designed to promote monopoly or to discriminate against small business, and that it “will tend to effectuate the policy of this title.” Upon these facts, a Supreme Court basically hostile toward New Deal “experimentation” declared in \textit{A. L. A. Schechter Poultry Corp. v. United States}\textsuperscript{19} that the NIRA involved too broad a delegation of legislative power, with inadequate standards for its exercise. In the words of Mr. Justice Cardozo: “Here in effect is a roving commission to inquire into evils and upon discovery correct them.”\textsuperscript{20}

As might be expected, commentators differed on the correctness of the decision in the light of precedent, and on the extent to which the decision was influenced by the political views of the men who occupied the Supreme Court bench during the first years of the Roosevelt Administration.\textsuperscript{21} In subsequent opinions, the Supreme Court has taken care to distinguish, rather than to overrule, the \textit{Schechter} case. It has been suggested that congressional draftsmen have been taught a lesson by that case and have tried to forestall the recurrence of a constitutional crisis by reciting policy objectives as clearly as the subject matter permits and by imposing

\begin{footnotes}
\item[17] 48 Stat. 195 (1933).
\item[18] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), involving restrictions on interstate transportation of oil; \textit{A. L. A. Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935), involving codes of “fair competition.”
\item[19] 295 U.S. at 529-542.
\item[20] Id. at 551.
\end{footnotes}
such limitations on administrative discretion as are deemed practicable.\textsuperscript{22} To the extent to which this is the case, the effect of the \textit{Schechter} decision has been highly beneficial. The important fact is that this decision has not deterred Congress from making or the federal courts from approving delegations which were sweeping in nature and which endowed the President or an administrative agency with enormous discretionary powers.

The Supreme Court has upheld a delegation empowering the Interstate Commerce Commission to authorize the issuance of railroad securities if it finds such issuance "compatible with the public interest."\textsuperscript{23} The Court approved the Bituminous Coal Act of 1937, requiring the President to fix prices when it is deemed desirable "in the public interest."\textsuperscript{24} The Court validated Federal Communications Commission issuance of radio broadcasting licenses, "as public convenience, interest or necessity requires."\textsuperscript{25} It gave a clean bill of health to a statute permitting the Secretary of Agriculture to establish "parity prices" for certain commodities,\textsuperscript{26} and to another, authorizing the Federal Power Commission to fix "just and reasonable rates."\textsuperscript{27} The Court upheld the Fair Labor Standards Act of 1938, delegating the power to increase minimum wage rates for certain industries from 30 cents to as much as 40 cents.\textsuperscript{28} Upheld, also, was the OPA's wartime power to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents."\textsuperscript{29} Under the Emergency Price Control Act, prices prevailing during a stated base period were to be given consideration, "so far as practicable."

Section 11(b) of the Public Holding Company Act of 1935 directed the Securities and Exchange Commission to require each registered holding company, and each subsidiary thereof, to take such steps as the S. E. C. might find necessary to ensure that the corporate structure of any company in the system does not "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders." Holding that these standards were not too indefinite

\textsuperscript{22} Banta, \textit{supra} note 21.
\textsuperscript{24} Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1939).
\textsuperscript{25} National Broadcasting Co. v. United States, 319 U.S. 190 (1942).
\textsuperscript{26} United States v. Rock Royal Coop., 307 U.S. 533 (1939).
\textsuperscript{27} FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).
\textsuperscript{28} Opp Cotton Mills v. Administrator of Wage and Hour Division, 312 U.S. 126 (1941).
\textsuperscript{29} Bowles v. Willingham, 321 U.S. 503 (1944) (rents); Yakus v. United States, 321 U.S. 414 (1944) (prices).
in the light of the purpose of the act, its factual background, and the statutory context in which they appear, the Supreme Court explained in *American Power and Light Co. v. SEC*:

> These standards are certainly no less definite than those speaking in other contexts in terms of "public interest," "just and reasonable rates," "unfair methods of competition" or "relevant factors." The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue. (cit. om.)

The judicial approval accorded these "broad" standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. [cit. om.]. The legislative process would bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. . . .

The First Renegotiation Act of 1942 authorized administrative determination of what constituted "excessive profits." Section 403 of the Act contained the following definition:

> The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

It would be hard to conceive of less meaningful a definition. Yet the Supreme Court upheld this delegation in *Lichter v. United States*, stating:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. . . . The purpose of the Renegotiation Act and its factual background establish a sufficient meaning for "excessive profits" as those words are used in practice. . . .

As the reader will have gathered, the above cases were cited to show that the Supreme Court has generally spoken softly in demanding legislative beacons as a guide for administrative action and that declarations of policy in preambles to legislation may go far toward satisfying the

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30 329 U.S. 90 (1946).
31 Id. at 105.
32 Added by amendment of October 10, 1942.
33 334 U.S. 742 (1948).
34 Id. at 785.
Court's demands.\textsuperscript{35} It is submitted that the priorities and allocations
dowers conferred upon the President by the Defense Production Act are
sufficiently well hedged to comply with judicial requirements along this
line.

Section 101 of the Defense Production Act of 1950, quoted above,
authorizes the President to establish priorities in the acceptance and
performance of contracts or orders (other than contracts of employment)
"which he deems necessary and appropriate to promote the national
defense" and "to allocate materials and facilities in such manner, upon
such conditions, and to such extent as he shall deem necessary or appro-
riate to promote the national defense." In each instance the promotion
of the national defense is the standard for action. The term "national
defense" is defined in Section 702(d) of the Act, as follows:

The term "national defense" means the operations and activities of the
armed forces, the Atomic Energy Commission, or any other Government
department or agency directly or indirectly and substantially concerned
with the national defense, or operations or activities in connection with
the Mutual Defense Assistance Act of 1949, as amended.

The word "materials" is defined\textsuperscript{36} to include "raw materials, articles,
commodities, products, supplies, components, technical information, and
processes." "Facilities" as defined\textsuperscript{37} excludes "farms, churches or other
places of worship, or private dwelling houses." The word "allocate" is
not defined in the Act. As used in the analogous section of the Second
War Powers Act of 1942,\textsuperscript{38} the power to "allocate" was construed to
include "the power to distribute, to assign, to allot."\textsuperscript{39}

Section 101 must be read in the light of the Declaration of Policy
comprising section 2 of the Defense Production Act.\textsuperscript{40} The intent of

\textsuperscript{35} The following exchange during debate on the Defense Production Act of 1950 suggests
that certain members of the Senate are less impressed than the courts by the significance of
preambles to legislation:

\textbf{SEN. TAFT:} I would say that so far as these declarations of policy are concerned I
do not pay too much attention to them, and I do not think most lawyers do, and I
do not think many Government departments do. They look at the language of the
grant of authority. I do not think this limits or expands the grants of authority
contained in the words. It may throw a little light on the subject. Even in its present
form the language is a kind of warning to the President as to what he is expected to do.
Whether he will do it or not, however, is in his own discretion.

\textbf{SEN. FERGUSON:} It certainly is not a limitation.

\textsuperscript{36} 64 Stat. 815, 50 U.S.C. App. \S 2152(b) (Supp. 1950).

\textsuperscript{37} 64 Stat. 815, 50 U.S.C. App. \S 2152(c) (Supp. 1950).


\textsuperscript{39} Gallagher's Steak House, Inc. v. Bowles, 142 F.2d 530 (2d Cir. 1944), cert. denied,
322 U.S. 764 (1944); see also Shreveport Engraving Co. v. United States, 143 F.2d 222
(5th Cir. 1944).

\textsuperscript{40} It is the policy of the United States to oppose acts of aggression and to promote
Congress, as it relates to the priorities and allocations powers, appears clearly from this declaration. It is that means must be found to meet the demands of military, defense-supporting and industrial expansion programs, and that civilian production and purchases must be curtailed to the extent required to meet such demands. The volume of direct military production is, of course, determined largely by the appropriations granted by Congress for this purpose. These appropriations also influence the volume of defense supporting production in a decisive manner. It must be borne in mind that the issue is not, as frequently presented, one of "guns vs. butter," but one of how many "guns" and how much "butter." There is much room for differences of opinion in the case of numerous types of products as to whether each constitutes "guns" or "butter." Frequently, the answer lies not in the nature of the product but in the use to which it is put. Determinations as to the relative essentiality of various products and programs are believed to be a proper area for the application of administrative discretion.

In addition to the requirement that the President's exercise of the powers conferred on him by Section 101 shall promote the national defense, and to the mandates imposed on him by the Declaration of Policy, his exercise of these powers is restricted further by the provisions of Section 701 of the Defense Production Act. Under that section, the President is required to make available for business, "so far as practicable, ... a fair share of the civilian supply based, so far as practicable, on the share received by such business under normal conditions during a representative period preceding June 24, 1950," whenever he finds that his exercise of the power to allocate "will result in a significant dislocation of the normal distribution." In this connection, he must show "due regard to the current competitive position of established business."41

peace by insuring respect for world law and the peaceful settlement of differences among nations. ... The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out this purpose. Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian demand. In order that this diversion and expansion may proceed at once, and that the national economy may be maintained with the maximum effectiveness and the least hardship, normal civilian production and purchases must be curtailed and redirected.

It is the objective of this Act to provide the President with authority to accomplish these adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise.


41 The "current competitive position" provision was added by amendment (65 Stat. 138, 50 U.S.C.A. App. § 2151 (1951)).
However, he "shall not exclude new concerns from a fair and reasonable share of total authorized production." Small business enterprises are to be granted such exemptions "as may be feasible without impeding the accomplishment of the objectives of this Act" and are to be "encouraged to make the greatest possible contribution toward achieving the objectives of this Act." Moreover, "such business advisory committees shall be appointed as shall be appropriate for purposes of consultation in the formulation of rules, regulations, or orders, or amendments thereto." From all these restrictions upon the priorities and allocations powers there emerges a standard for the exercise of these powers which is clearly adequate, be it regarded on its own merits or by way of comparison with standards provided by other statutes which, as we have seen, were upheld by the judiciary.

Section 101 of the Defense Production Act is a streamlined descendant of Section 2(a) of the Second War Powers Act of 1942. The two Sections differ appreciably in form but only slightly in substance. It is therefore of interest to note that the delegation of the power to allocate materials and facilities effected by Section 2(a) was attacked on constitutional grounds in several cases, in each instance without success. In *O'Neal v. United States*, the Court found an adequate standard in the requirement that the President act "in promotion of the national defense" and indicated that "similar broad delegations of power have long been held to be valid."

In *United States v. Randall*, the Circuit Court for the second circuit refused to consider the notion that the delegation of the power to allocate was unconstitutional:

... We entertain no doubt that the standard which the statute sets up is amply sufficient to meet the claim of invalid delegation. ... 

The holdings in the *O'Neal* and *Randall* cases were followed in several other decisions. The question of whether the President could establish an administrative agency to carry out the functions delegated to him by section 2(a) of the Second War Powers Act was also answered in the
The Defense Production Act of 1950 specifically permits the President to delegate the powers conferred upon him by that Act to any government agency, new or old, and to authorize redelegations of such powers.

III. THE PLAN

A. Background and General Principles of CMP

Shortly upon its inception, NPA issued two basic regulations. NPA Regulation 1 was designed to prevent the accumulation of excessive inventories of scarce materials. The regulation listed certain materials as being in short supply and provided that no person may receive delivery of such materials if his inventory thereof was, or by reason of such receipt would become, more than a "practicable minimum working inventory." Provision was made for several exceptions to this broad rule. NPA Regulation 2, issued October 5, 1950, laid down the basic rules for a priorities system. This system, simple in concept, provided that any order bearing a DO (defense order) rating shall take priority over any unrated order. All DO ratings were given equal preferential status, and the recipient of an order bearing a DO rating was authorized to "extend" that rating by applying it to his orders for the materials required to fill the rated order placed on him. Excluded from the DO rating system were products, such as petroleum, solid fuels, and farm equipment, over which NPA lacked jurisdiction, and a few other products and services specifically listed. NPA issued several delegations, authorizing certain other government agencies, such as the Department of Defense, the Atomic Energy Commission and the Civil Aeronautics Administration, to apply the DO rating to their own purchase orders and to grant the right to use the rating to persons performing contracts for these respective agencies. By NPA Regulation 3, issued on November 8, 1950, certain benefits under the priorities system were extended to Canada, and by NPA Regulation 4, issued February 27, 1951, every business enterprise, government agency and institution was granted the

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47 Shreveport Engraving Co. v. United States, 143 F.2d 222 (5th Cir. 1944), holding: (1) that the performance of these functions by the War Production Board instead of by the President in person was not a redelegation but an exercise of authority by the persons in the President's office who were selected to perform these duties; (2) that if it were a redelegation, it would be one specifically authorized by the Act; (3) that even in the absence of specific authorization to redelegate, such a power would be implied, since clearly the President was not expected to attend to these matters in person. See also O'Neal v. United States, 140 F.2d 908, 913 (6th Cir. 1944).


49 Issued Sept. 18, 1950.
right to use a DO rating, within stated dollar limits, in purchasing materials required for maintenance, repair and operating supplies ("MRO"), as well as for "minor capital additions," then defined as capital items costing not more than $750.

This relatively crude system served the purpose for which it was designed; to provide priority assistance, wherever it was deemed desirable, during the early stages of the defense program. In the beginning, the use of DO ratings was restricted to producers of military items. However, as the military program grew, it became increasingly difficult for others to obtain adequate supplies of many vital materials. Accordingly, priorities had to be granted to other selected programs, such as freight car and power equipment production, and to utilities. During World War II it became a well established maxim that "priority breeds priority." This was no less true in 1951. DO rating authority had to be granted without regard to the availability of the materials which were to be acquired by use of the rating. It became clear during the first months of 1951 that, were programs to be approved one by one, with the proponents of each insisting upon its essentiality to national defense, the quantities of copper, aluminum, and several other materials available for civilian production would be reduced to the vanishing point within a brief period. Furthermore, the efficacy of the DO rating was impaired as more concerns were authorized to use it. The use of the DO rating frequently did not assure early delivery, and these ratings came to be deprecated as "hunting licenses." NPA was likened to a theater owner who gave out tickets for a performance without regard to the number of seats in the house. Shortages were, of course, aggravated by industry's tendency to fill its cupboards when it anticipates further shortages or price rises. It was to solve these problems that NPA, drawing heavily on the experiences of World War II, decided to adopt the Controlled Materials Plan, a quantitative scheduling plan designed to match up needs with supplies on an over-all basis to obtain balanced production.

The control is exercised through three metals—steel, copper and aluminum—on the underlying assumption that by controlling the use of these key metals you in fact control practically all production. In other

50 For authoritative analyses of the wartime CMP, see NOVICK, ANSHEN AND TRUPPNER, WARTIME PRODUCTION CONTROLS (1949). Mr. Truppner is now charged with responsibility for developing CMP as DPA-NPA Assistant Administrator for Production Controls. See also INDUSTRIAL MOBILIZATION FOR WAR (Govt. Printing Office 1947).

51 The announcement to the public that CMP would be put into effect with the third quarter of 1951 was made by the then NPA Administrator, Manly Fleischmann, on April 13, 1951.
words, steel, copper and aluminum were chosen as the controlled materials because they are the controlling materials. They are the common currency in terms of which all production and construction programs could be coordinated and adjusted to realistic levels.\textsuperscript{52} 

Centralized administration is inherent in this gigantic allocation operation. Someone must sit on top of the pyramid and must, having estimated how much controlled material will be produced during a given period, determine how this quantity is to be distributed among the many whose hands are outstretched.

If the most important mobilization programs are to be completed on schedule, the Government must act as umpire in the fiercely competitive struggle for material, and must see to it that first things come first. Of equal importance, the Government must provide a balanced program, since the provision of the irreducible minimum of essential civilian goods, such as fire engines and water mains, is of comparable importance to the attainment of military production goals.\textsuperscript{53} 

This overall task of cutting the pie has fallen to the Requirements Committee of DPA. Several months in advance of each calendar quarter, that committee passes upon the requests for controlled materials submitted by the various Industry Divisions of NPA and by numerous government agencies, all of which have been designated as "claimants" for a certain area of the national economy.\textsuperscript{54} The aggregate of these requests for controlled material, to the present, has been far in excess of estimated production of each controlled material for the quarter under consideration. The Requirements Committee therefore has been compelled to screen these requests, and to reduce each one, the extent of the reduction being dependent in large measure on DPA's evaluation of the essentiality of the major program involved and of the quantities of controlled material actually required to meet program objectives. On the basis of its central programming determinations, DPA proceeds to make allotments to each NPA Industry Division and to each Claimant Agency,\textsuperscript{55} in order that they may, in turn, adjust their programs to the

\textsuperscript{52} The ground rules of CMP are spelled out in seven regulations, supplemented by directions and so-called M (material) orders. This material will be discussed in some detail. Each of the seven regulations bears the title, "CMP Regulation No. —," to distinguish it from the series of regulations entitled "NPA Reg. —." 

\textsuperscript{53} Fleischmann, The Mobilization Program and the Public Interest, 100 U. of PA. L. Rev. 483, 487 (1952). 

\textsuperscript{54} The requests submitted by Industry Divisions and Claimant Agencies are based upon requirements data previously channeled to those divisions and agencies through successive levels of producers who need controlled material in their production or in the construction of facilities. 

\textsuperscript{55} The Requirements Committee "overallots" each controlled material by varying per-
quantities of controlled material which will be available and allot to
the prime consumers of controlled material under their respective
jurisdictions.

B. Definitions of General Applicability

The complexities attendant upon a plan such as CMP have given
birth to a jargon which must be studied before the plan can be under-
stood. These new "words of art" are set forth in the definitions section
preceding the text of each regulation and order. The logical point of
departure for a discussion of CMP would seem to be the definition of
controlled material. CMP Regulation No. 1, as originally issued on May
3, 1951, defined "controlled material" as "steel, copper, and aluminum,
in the forms and shapes indicated on Schedule I of this regulation." Schedule I consists of five columns of fine print, breaking down each
basic controlled material into various classes and sub-classes. The above
definition was thought to be sufficiently broad to encompass steel, copper
and aluminum, whether of domestic or foreign origin, and whether new
or used, of first quality or secondary. However, some individuals con-
cluded that imported, used and second quality steel, copper and aluminum
were not subject to control. To remove all doubt on this score, section
2(c) was amended to read:

Controlled material means domestic and imported steel, copper, and
aluminum, in the forms and shapes indicated in Schedule I of this regula-
tion, whether new, remelted, rerolled, or redrawn, including used and second
quality materials, shearings, and material sorted or salvaged from scrap
which are sold for other than remelting, rerolling, or redrawing purposes.

When an airplane manufacturer converts sheets of aluminum into the
wing of a plane, substantial portions of those sheets may be cut off and
become waste, so far as that manufacturer is concerned, but these shear-
ings are still aluminum, and, as such, are subject to the restrictions
which flow from the fact that aluminum is a controlled material, unless
it is sold as scrap in order to be remelted, rerolled or redrawn. The
significant circumstance, therefore, is the purpose for which the material
is being acquired.57

Products containing controlled material are classified as either Class A
or Class B products. Generally speaking, A products are those of special
design for a special purpose, which are sold to one or to relatively few

56 CMP Reg. 1, § 2(c). Non-nickel bearing stainless steel was "decontrolled" on January

57 Under circumstances to be examined below, foreign steel is CMP exempt.
customers. B products, on the other hand, are products of a general design, "shelf items," which are sold to many customers. Military equipment, such as artillery pieces or fighter planes, and components specially designed for a particular end product are typical A products. Automobiles, nuts and bolts and ball bearings would serve as examples of B products. As will appear below, important procedural consequences flow from the classification of an item as either an A or a B product. CMP Regulation No. 1 defines a B product as one listed in the "Official CMP Class B Product List" issued by NPA, "and which contains any controlled material other than any controlled material which may be contained in other Class B products incorporated in it." Thus a person who merely assembles B products, such as the components of a venetian blind, all of which are classified as B products, without using any controlled material (e.g. nails or wire), is not a B product producer. Were one or more of these components A products, the same assembler would be a B product producer. If he not only assembles the components but also fabricates, say the slats, he is a B product producer to that extent, but the finished venetian blind still is not a B product, regardless of whether or not it is listed in the official CMP Class B Product List. It should be remembered that this list includes all products which can be B products. A glass ashtray is certainly not a B product. An ashtray stamped out of copper, on the other hand, would be a B product.

A Class A product is defined in the negative as any product which is not a Class B product, "and which contains any controlled material, fabricated or assembled beyond the forms and shapes specified in Schedule I of this regulation, other than any controlled material which may be contained in Class B products incorporated in it." An "allotment" is the quantity of controlled material which the allottee is authorized to acquire or to re-allot to others. Allotments are normally made in terms of a breakdown into seven basic categories of controlled material. They are always made for a specified calendar quarter and, as a rule, are valid only in relation to orders for controlled material placed for delivery during the quarter. An "authorized controlled material order" is an order for controlled material placed pursuant to an allotment. A "prime consumer" is a person who receives an allotment directly from an Industry Division of NPA or from a "Claimant Agency"—a government agency other than DPA or NPA authorized to

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58 CMP Reg. 1, § 2(k).
59 CMP Reg. 1, § 2(j).
60 CMP Reg. 1, § 10(b).
61 CMP Reg. 1, §§ 2(g), 19.
make allotments. A "Secondary consumer" is one who receives allotments from a prime consumer or from another secondary consumer. It is quite possible for a person to be a prime consumer with regard to some of his allotments and a secondary consumer with regard to others.

Allotments are made in order to enable the recipient to use controlled materials in his production or construction activities. A person who makes an allotment for production must accompany that allotment by a statement of the quantity of an item which may be produced by the allottee. Such a statement constitutes an "authorized production schedule." A statement by anyone making an allotment to a contractor of the construction project or projects to be provided by the latter with the use of that allotment is an "authorized construction schedule."

C. Allotments and Authorized Production Schedules

1. General

Basically, CMP is vertical in concept because the burden of responsibility is placed on the prime consumer in terms of the end products to be produced at a given time, in a given quantity. He is required to pass on authorized production schedules and allotments for controlled material procurement to his secondary consumers or subcontractors. These subcontractors in turn pass on authorized production schedules and allotments to their subcontractors so that materials will be used and delivered in the right quantity and at the right time to meet authorized program objectives. Experience indicates that this procedure—the Class A product procedure—is the most efficient method for assuring balanced production and thus the greatest possible utilization of our resources. It is recognized, however, that products which are mass produced and sold "off the shelf" to many different customers do not lend themselves to this vertical treatment. Such products have been established as Class B products, to be accorded horizontal treatment and their production authorized directly by an NPA Industry Division.

Subject to certain exceptions, no person may produce an A or a B product unless he has received an authorized production schedule for such production, and no person who has received such a schedule "shall produce more than the quantity of the particular product or products provided for in such authorized production schedule." An authorized

62 CMP Reg. 1, § 2(g).
63 CMP Reg. 1, § 2(h).
64 CMP Reg. 1, § 2(o).
65 Revised CMP Reg. 6, § 2(d).
66 CMP Reg. 1, § 3(c).
production schedule goes hand in hand with a related allotment of the quantity of controlled material required to fulfill the schedule. This allotment is comparable to a bank account. It constitutes the quantity of controlled material available to the allottee, and all controlled materials ordered or re-allotted must be charged against it. This is true even of purchases of controlled material without authorized controlled material orders, from persons other than regular suppliers of such materials, and of imported copper and aluminum. The allotment account may not be overdrawn.

Allotments to prime consumers are normally made about two months prior to the first day of the quarter for which they are valid, in order that such prime consumers may re-allot to their A product subcontractors and may place orders for controlled materials within lead times. These "current" allotments are generally accompanied by "advance" allotments for quarters subsequent to the one for which the current allotment is made. Advance allotments are expressed in terms of a certain percentage of the current allotment. Such advance allotments are tentative in that the final allotment for any quarter may be higher or lower than the advance allotment for that quarter. However, advance allotments do enable the allottee to make production plans, to place orders for controlled material for delivery during the quarter for which such allotments are valid and to make advance allotments to subcontractors.

In order to be entitled to an allotment and an authorized production schedule, an applicant must be a "producer." Frequently, companies such as engineering firms, whose traditional function it is to design equipment and to control or supervise production by others, request allotments. Such requests have been denied whenever it appeared that the applicant did not perform a manufacturing operation resulting in the production of an A or B product. A different policy would lead to the...

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67 CMP Reg. 1, § 6(e).
68 Every allotment to a prime consumer bears an allotment symbol, generally consisting of a letter and a digit, such as C-2 or H-3, which identifies the authorized program under which the allotment is made. Every allotment made to a secondary consumer on the basis of such an initial allotment must bear the same symbol and must indicate the calendar quarter for which the allotment is valid. An authorized controlled material order placed pursuant to such an allotment must also show the related allotment symbol and the quarter for which the allotment is valid. A typical designation would be C-2-3Q52. See CMP Reg. 1, § 11(c).
69 CMP Reg. 1, § 3(c). An exception permitting the ex-allotment purchase of foreign steel under certain circumstances will be discussed below.
70 CMP Reg. 1, §§ 12(b), 19(f).
71 CMP Reg. 1, § 10(d).
issuance of allotments to two or more persons for the production of one and same item.

In accordance with Section 9(b) of CMP Reg. 1, an authorized production schedule “may be exceeded in any quarter to the extent necessary to make up for failure to meet such schedule in any prior quarter.” This provision grew out of the recognition that a producer should not be penalized for delays in his production resulting from delivery of certain materials or components toward or after the end of the quarter for which such production was authorized. However, this Section does not extend the validity of allotments, nor does it confer additional allotment authority. An allotment is valid only for the quarter for which it was issued, and suppliers of controlled material may not accept authorized controlled material orders calling for delivery in a quarter other than the quarter for which the related allotment is valid. Therefore, a person who did not meet his authorized production schedule for a particular quarter in consequence of failure to use his entire allotment authority, whether for reasons within or beyond his control, may not by virtue of this fact order controlled materials for delivery in a subsequent quarter in an amount exceeding his allotment for that quarter.

Allotments, being in the nature of a “privilege” rather than of a “vested right,” are not regarded as “property” and may not be transferred except as provided by NPA.72 They are transferable without specific approval “in connection with the transfer or assignment of a business as a going concern where the transferree continues to operate substantially the same business in the same plant.” 73 In a matter involving the sale of a bankrupt business, NPA’s General Counsel took the view that a concern may be regarded as a “going concern” for purposes of this provision, notwithstanding the fact that operations had been interrupted for a period of 90 days. At what rate, in relation to its capacity, must a concern be operating in order to be considered a “going concern”? Conceivably, the continued existence of an administrative staff would suffice. However, we may assume that a concern which hung to life by a technicality for an appreciable period would not have needed allotments and would therefore have been required to return the allotments it had received.74 NPA does not, as a rule, make any attempt to

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72 The "transfer" of an allotment must be distinguished from the "making" of an allotment, discussed elsewhere in this article. NPA Reg. 6, dealing with the transfer of quotas and ratings, does not apply to transfers of CMP allotments (NPA Reg. 6, § 3).

73 CMP Reg. 1, § 14(b).

74 CMP Reg. 1, § 18(b) provides in part: "If a consumer finds that he has been allotted substantially more than he needs, he must return the excess."
“pierce the corporate veil.” A transfer of the stock of a corporation, as distinguished from a transfer of the corporation, would have no effect on the corporation’s right to use allotments received theretofore. A line of distinction must be drawn between the transfer of an allotment and the inheritance of such claims as the transferred business may have had to future allotments. The latter problem will be discussed hereafter.

Except as indicated above, no consumer may transfer an allotment unless:

(1) delivery orders for Class A products placed with him, in connection with which the allotment was made to him, have been transferred or assigned to another consumer; (2) the authorized production schedules of the respective consumers have been duly adjusted; and (3) the transfer or assignment is approved in writing by the person who made the allotment. 76

The word “and” preceding the numeral (3) indicates that compliance with all three conditions is required. However, the first condition is clearly inapplicable to B product allotments, and a B product producer would be permitted to transfer an allotment if the production schedules of the respective consumers have been adjusted and the written approval of NPA has been obtained.

2. Class A Product Procedure

An A product manufacturer receives his allotments and authorized production schedules from his customers, be they themselves A or B product producers or a Claimant Agency, such as the Department of Defense. 76 The allotments enable the A product producer to purchase the controlled material which he requires for his own fabrication, and to make allotments to his subcontractors who produce A product components for him. 77 He does not make allotments to subcontractors who produce B product components, since such producers receive allotments from NPA and are not permitted to look to others for additional allotments. 78

75 CMP Reg. 1, § 14(a).
76 CMP Reg. 1, §§ 6(a) and (b). It follows that an A product producer may receive two or more authorized production schedules for the production of the same product. Sec. 6(b) permits a producer who has received more than one authorized production schedule bearing the same allotment symbol to authorize a single production schedule for his subcontractor pursuant thereto.
77 CMP Reg. 1, § 12(a). As a rule, a producer who has several A product subcontractors in different degrees of remoteness will make allotments only to his immediate subcontractors who will, in turn, allot to their immediate subcontractors. However, in accordance with § 16 of CMP Reg. 1, a producer may elect to authorize production schedules and make direct allotments to his A product subcontractors of all degrees of remoteness on the basis of requirements information furnished to him.
78 CMP Reg. 1, § 12(d).
A Claimant Agency may request any prime consumer to whom it makes allotments for the production of A products to submit an application for an authorized production schedule and a related allotment on Form CMP-4A, or on such other form as it may prescribe, setting forth his controlled material requirements for the fabrication of the particular A products. Such a prime consumer must, in turn, obtain similar information from his subcontractors of A product components, unless he is prepared to furnish such data on his own responsibility. B product producers also may request their A product component suppliers to furnish them with "4A" applications or with less formal statements of controlled material requirements.79

An authorized production schedule for A products is commonly expressed in terms of units, such as "100 jet engines." How do we determine the quantity of controlled material to be allotted by the purchaser for the production of these engines? "The basis for an allotment to a consumer shall be his actual requirements for controlled materials in connection with the fulfillment of an authorized production schedule, after taking inventories into account to the extent required by CMP Regulation No. 2.80 If the A product producers' inventories are within the prescribed limitations, he may demand an allotment in the full amount required to fabricate the products which his customer is ordering, including not only the weight of controlled material in the finished product, but also the quantity which is normally consumed or turned into scrap in the course of processing. How large an allotment should the A product producer request if his inventory is so high that his receipt of additional controlled material would violate the inventory regulation? The mandate on the A product producer to consider inventory in stating his controlled material requirements must be read in the light of Direction 6 to CMP Reg. 1. That direction proceeds from the assumption that an A product producer may fulfill an authorized production schedule with materials in his inventory, using the related allotment to replace those materials. It permits the producer to request an allotment valid during the calendar quarter in which the order for the A product is placed, or an allotment valid during any of the subsequent three quarters.81

The question is occasionally asked, may the customer of an A product producer sell the producer the controlled material which he requires to

79 CMP Reg. 1, §§ 5(a) and (b), Form CMP-4A Instruction Sheet, "General Instructions."
80 CMP Reg. 1, § 4(a). The inventory limitations are examined below.
81 Direction 6 to CMP Reg. 1, § 1. Direction 6 in effect authorizes delivery of an A product in a quarter earlier than the one for which the purchaser's allotment is valid.
fill that customer's order, instead of making an allotment to him? The General Counsel of NPA has ruled that the allotment procedure described in CMP Regulation No. 1 is mandatory and that such a deviation is not permissible without the approval of the administrator of the regulation. The A product producer should concur in any application for approval of such a practice. A product fabricators who produce a large variety of items which are sold to many customers may find the vertical allotment procedure onerous. Such producers may request to be treated as producers of B products. A request of this nature is to be distinguished from one for reclassification of the product into a B product. The general A product procedure is inapplicable to A products which are sold to distributors or for use as MRO (maintenance, repair, or operating supplies). Such products are treated like B products. The producer receives his allotments and authorized production schedules from an Industry Division of NPA and not from his customers.

A product producers who themselves manufacture certain B product components for incorporation into their A products are not permitted to request allotments for such components from their customers. They must apply to NPA for such B product allotments.

3. Class B Product Procedure

As a rule, B product fabricators must apply for quarterly allotments and authorized production schedules to an NPA Industry Division or field office. The application must include the controlled material requirements of the applicant, as well as those of subcontractors who fabricate A products to be incorporated into his B product. It is filed on Form CMP-4B, and allotments and production schedules are authorized on the same form. On this form there appears the following legend:

The production of the product class specified in Item 3 is hereby authorized in whatever amount can be made with the above allotment plus your previous net allotments for the specified quarters plus controlled material properly contained in your inventory (pursuant to the provisions of CMP Reg. 2). This is your authorized production schedule as defined in CMP Reg. 1.

82 CMP Reg. 1, §§ 10 and 12.
83 CMP Reg. 1, § 24(b).
84 CMP Reg. 1, § 15.
85 Form CMP-4A Instruction Sheet, as revised August 27, 1951.
86 CMP Reg. 1, § 5(c).
87 CMP Reg. 1, § 4(b).
88 Allotments and production schedules for a few industries, including the automotive industry, are authorized on form CMP-10 which, unlike form CMP-4B, limits the number of units which may be produced by the allottee.
It will be noted that production is authorized, not by product, but by product class. The producer is given a substantial degree of flexibility by being permitted to use his allotment to produce any of the items falling within the same class. NPA Order M-47B gives producers of certain consumer durable goods an even wider berth by permitting them, subject to stated limitations, to use allotments for the production of products not in the product class for which the allotment was made, provided they fall into one of four broad groups established by that order.

It is also significant that the B product schedule is geared to what can be produced with allotments received "plus controlled materials properly contained in your inventory," rather than to a specified number of units. This form of authorization places a premium on conservation of controlled materials by providing an inducement to the producer to stretch his supply and to use substitutes, wherever possible. He may also be able to increase his production appreciably by using controlled materials in inventory. The clause, "controlled materials properly contained in your inventory," refers to controlled materials acquired without charging the allotment balance, or prior to the quarter for which the allotment is valid. What are controlled materials "properly" contained in inventory? A person does not violate CMP Regulation No. 2 by having a high inventory, but by accepting delivery of additional controlled materials if his inventory is, or by such receipt would become, in excess of the prescribed limitations. Presumably, therefore, only materials delivered in violation of the regulation would not be properly contained in inventory. However, if a producer reduces his inventory to a 60-day (or 45 day) supply or a "practicable minimum working inventory," whichever is less, by placing materials "properly contained in inventory" into production, the materials obtained in violation of the regulation may become materials properly contained in inventory which, thereupon, could also be used to augment allotments.

On January 5, 1952, NPA issued an amendment to CMP Reg. 1 which provided, in substance, that a B product producer may not place into production during any quarter a quantity of controlled material greater than the quantity allotted, unless his production schedule expressly states that production is authorized in whatever amount can be made with specific allotments plus controlled materials properly con-

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89 Related products are grouped into classes in the Official CMP Class B Product List. Examples are "small household electrical appliances, except fans" and "textile machinery."

90 Pursuant to Direction 4 to CMP Reg. 1.
tained in inventory. This amendment, which gave rise to much confusion, is informative and, unless implemented by a change in the Form CMP-4B definition of an authorized production schedule, has no substantive effect. It was issued to give B product producers notice that NPA may, at some future time, delete the words, “plus controlled materials properly contained in your inventory,” from Form CMP-4B. Such action is not contemplated at this time.

“The basis for an allotment to a consumer shall be his actual requirements for controlled materials in connection with the fulfillment of an authorized production schedule, after taking inventories into account to the extent required by CMP Regulation No. 2.”91 It was the intention of the creators of CMP, as expressed in the above provision, that an applicant whose inventory of certain items of controlled material is above permitted levels, shall reduce his requests for allotments accordingly. However, this requirement, by its nature, can relate only to the applicant’s inventory level during the quarter for which he is requesting allotments. Inasmuch as applications for B product allotments must be submitted several months in advance of the quarter for which they are issued,92 it may be difficult for the applicant to estimate his inventory situation for that quarter.

Such DO rated orders as a producer of B products may receive from his customers must be filled in preference to unrated orders in accordance with the provisions of NPA Regulation No. 2. Contrary to those provisions however, the producer may not “extend” his customers’ ratings to obtain materials needed to complete his B products. He is wedded to the allotment symbol and DO rating (consisting of the same allotment symbol, e.g., DO-K2) assigned to his authorized production schedule.93 B product fabricators who receive rated orders bearing military symbols94 objected to this prohibition on the extension of their customers’ ratings, inasmuch as authorized controlled material orders and DO rated orders identified by military allotment symbols are entitled to “super-preference” under circumstances discussed elsewhere in this article.95

91 CMP Reg. 1, § 4(a).
92 The deadline for submission of initial applications for the third calendar quarter of 1952 was March 1, 1952.
93 CMP Reg. 1, § 11(d)(1); CMP Reg. 3, § 6(f)(1).
94 The Department of Defense and the Atomic Energy Commission are assigned use of allotment symbols consisting of the letters A, B, C, or E and of a one digit numeral identifying the program under which the order is placed. The allotment symbol Z-2, assigned to the machine tool production program, is given equal preferential status with military symbols and is deemed to be a military symbol for purposes of this discussion.
95 See section on preference status of authorized controlled material orders, below.
In recognition of the merits of these objections, and in order to expedite deliveries to the military, CMP Regulations Nos. 1 and 3 were amended recently to require manufacturers of B products who receive rated orders bearing military designations to attach the suffix B-5 to their own orders for controlled materials and other materials needed to fulfill such military orders, or to replace in inventory material consumed in fulfilling such orders.\textsuperscript{96} Orders bearing the suffix B-5 are given equal status in all respects with military orders.\textsuperscript{97} The B-5 procedure is not mandatory if the quantity of material required to fulfill the military order is insignificant in relation to the B product fabricator’s total procurement.\textsuperscript{98}

The Instruction Sheet to Form CMP-4B fills in some of the details left blank by the regulations. It provides that “A single application may cover any number of products or the production of any number of the applicant’s plants, provided all such products fall within one product class code.”\textsuperscript{99} However, if practicable, a separate form must be submitted for the production of repair parts within the same product class.\textsuperscript{100} This is generally to the advantage of the applicant, inasmuch as allotments for repair parts are made on a more liberal basis than allotments for most civilian-type products. Separate applications are required for each product class, with the exception that allotment requests for components falling into one class, which are produced by the applicant for incorporation by him into an end product classified under another, should be included in his application under the latter.\textsuperscript{101} Separate applications may be submitted for individual plants “under the same ownership.”\textsuperscript{102}

If this practice is followed, each plant is treated as a separate entity.

It was recognized from the outset that users of small quantities of controlled material should be relieved from much of the paperwork required by CMP procedures. Direction 1 to CMP Regulation No. 1, which has been amended repeatedly, now authorizes a B product producer to obtain priority assistance through “self-authorization” during any quarter “in which his total requirements for delivery from suppliers of each kind of controlled material” for the production of each and all

\textsuperscript{96} CMP Reg. 1, § 11(d); CMP Reg. 3, § 6(f).
\textsuperscript{97} CMP Reg. 1, § 11(d)(5); CMP Reg. 3, § 6(f)(5).
\textsuperscript{98} CMP Reg. 1, § 11(d)(8); CMP Reg. 3, § 6(f)(8).
\textsuperscript{99} Form CMP-4B Instruction Sheet (Third Quarter—1952), § D(f).
\textsuperscript{100} Id. § A(b).
\textsuperscript{101} Id. §§ D(d) and (f).
\textsuperscript{102} Id. § D(f). Occasionally, two or more corporations wish to consolidate their applications and request joint allotments. The General Counsel of NPA has ruled that such a practice is not permissible, even if such corporations are owned by the same persons, unless an exception has been granted by the administrator of CMP Reg. 1.
products in any one product class do not exceed 30 tons of carbon steel, 8 tons of alloy steel, 500 pounds of stainless steel, 3000 pounds of copper, and 2000 pounds of aluminum. This authorization is subject to the limitation that no producer may self-authorize orders for controlled material in a quantity "which exceeds his average quarterly use of such material in the manufacture of the same product and all other products in the same product class during the calendar year 1950." However, regardless of past use, self-authorization is permitted during any quarter, in any product class in which the producer's requirements for delivery do not exceed 5 tons of carbon steel, \( \frac{1}{2} \) ton of alloy steel, 0 pounds of stainless steel, and 500 pounds each of copper and aluminum.

A Class B product producer operating under Direction 1 may, without filing any applications and without receiving allotments, place authorized controlled material orders and make allotments to A product component producers, within the quantitative limitations indicated above. Direction 1 is geared to "total requirements for delivery" rather than to total use. A producer who avails himself of the self-authorization procedure can place into production more than the quantity of controlled material which he may acquire, provided the excess is taken out of inventory. He is free, furthermore, to self-authorize during one calendar quarter and to apply for an authorized production schedule and allotments during the next. If he produces B products falling into several product class codes, he may be eligible for self-authorization under one or more such codes, notwithstanding the fact that his purchases of controlled material under other codes exceed the self-authorization limits. However, his requirements for delivery of each kind of controlled material must be within the limits. If his purchase requirements in one or more of the five categories listed exceed these quantities, he may not self-authorize at all, but must apply to NPA for an authorized production schedule and allotments for the product class in question. The exception authorizing ex-allotment acquisition of foreign steel applies to concerns operating under Direction 1. Consequently, steel purchased pursuant to this exception need not be charged against the self-authorization quantities. The right to use a DO rating in purchasing production materials is accorded by Direction 1 to "Any producer of Class B products who,

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103 Sec. 2(b) of Dir. 1 to CMP Reg. 1. Commencing with the third quarter of 1952, these limits will be doubled for carbon steel, alloy steel and aluminum.
104 Sec. 2(a) of Dir. 1 to CMP Reg. 1. Commencing with the third quarter of 1952, these limits will be raised for carbon steel, alloy steel and aluminum.
105 Sec. 4 of Dir. 1 to CMP Reg. 1.
106 Dir. 4 to CMP Reg. 1.
pursuant to this direction, may obtain priority assistance without filing a Form CMP-4B. May a producer who, having on hand all the controlled materials he requires during a certain quarter, does not place any authorized controlled material orders, nevertheless DO-rate his orders for production materials? Since such a producer "may obtain priority assistance without filing a Form CMP-4B," he should be permitted to use the rating although he does not avail himself of the right to obtain such assistance.

4. Use of Foreign Steel

The United States imports substantial quantities of steel, copper and aluminum. These quantities are, in effect, part of our national supply. As indicated above, imported steel, copper and aluminum are included in the definition of controlled material. Imports of steel constitute a relatively small percentage of the total supply and most types of steel are not as scarce as copper and aluminum. It was therefore decided to permit a person who has received an authorized production schedule to exceed the quantity limitations set by that schedule with the use of foreign steel. This exception is well hedged. Direction 4 to CMP Reg. 1 authorizes such additional production under the following conditions: (1) The steel must have been produced outside of and imported from outside of the United States, its territories and possessions, and the Dominion of Canada. (2) The steel must have been acquired "prior to landing" by the user or by the person from whom he purchases the same. (3) No copper and aluminum may be used for the additional production made possible by the use of foreign steel. (4) No B products containing steel, copper or aluminum, except for steel fastening devices such as nuts and bolts, may be used for such additional production. Direction 4 authorizes the importation of steel, ex-allotment, only when such steel is in the controlled material form. It has no effect on the importation of steel in the form of a Class A product. Consequently, the purchaser of an imported Class A product containing steel must deduct the steel content, as well as the copper and aluminum content, of the A product from his allotment balance. The General Counsel has construed Direction 4 as applying to steel which, after importation, had been converted from one controlled material shape into another. Thus, if the steel was imported in the form of bars, it could still be purchased

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107 Sec. 4 of Dir. 1 to CMP Reg. 1.
108 CMP Reg. 1, § 2(c).
109 Dir. 4 to CMP Reg. 1.
110 CMP Reg. 1, § 12(e).
ex-allotment and used to exceed an authorized production schedule after it had been drawn into wire. The technique used in Direction 4 is one well suited to relaxation of controls on marginal products. Currently under consideration is a proposal to expand the applicability of the direction by permitting ex-allotment purchases of used steel and of secondary carbon steel and the ex-allotment importation of A products made of steel.

D. Authorized Controlled Material Orders

1. General

Any order for controlled material placed pursuant to an allotment or an MRO quota is an authorized controlled material order. It is marked as such by an allotment symbol, such as N-2, U-4 or SU, identifying the major program under which the allotment was made or the quota established, and, if based on an allotment, by a designation of the calendar quarter for which the allotment is valid.

"No person shall place an authorized controlled material order unless the amount of controlled material ordered is within the related allotment received by him, after deducting all allotments made by him and all orders for controlled material placed by him pursuant to the same allotment."

The question is raised repeatedly whether a person placing an order must charge his allotment at the time he requests a supplier to deliver a specified quantity of controlled material, or when the supplier notifies him of the acceptance of that order. The General Counsel of NPA has ruled that the prospective purchaser must charge his allotment when he places the order and without awaiting notification of acceptance. In the event the order is rejected, the customer may credit his allotment balance with the same quantity. The alternative procedure would encourage the placing of duplicate orders with the intention of cancelling one if both should be accepted. Such a practice, were it to be sanctioned, might jeopardize the success of CMP.

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111 CMP Reg. 1, § 11(b).
112 CMP Reg. 1, § 19(f).
113 This interpretation is supported by Section 17(a) of CMP Reg. 1, which provides, in part: "In no event shall a consumer request delivery of any controlled material in a greater amount or on an earlier date than required to fulfill his authorized production schedule...." (Emphasis added).
114 Controlled material producers are required to accept or reject all orders "promptly." Upon such acceptance or rejection they must notify the customer "immediately." As here used, "... the word 'promptly' shall be deemed to mean as quickly as possible, but in no event later than 13 consecutive calendar days after receipt...." To this effect, see Order M-1, § 8(b); Order M-5, § 12(c); and Order M-11, § 5(b).
Controlled material producers are not required to accept, but if able may accept, orders placed after the expiration of the lead times or for less than the minimum mill quantities set forth in CMP Regulation No. 1.

If a consumer requires less than a minimum mill quantity of any controlled material and the material is not procurable from a distributor, he may accept delivery of the full minimum mill quantity. It is clear that if a minimum mill quantity of a certain type of steel is greater than the purchaser's allotment of such steel, he cannot charge the whole quantity against his allotment. How much material must he deduct from his allotment balance if he has been allotted 50 tons of carbon steel but requires only two tons of carbon steel reinforcing bars of a type not obtainable from distributors, the minimum mill quantity on such bars being five tons? The General Counsel has ruled that, in a case such as the one presented, the purchaser would still have to debit only two tons, inasmuch as he was allotted the remaining 48 tons to enable him to purchase other types of carbon steel. It should be pointed out, however, that such a purchaser would have to take his inventory of reinforcing bars into account in filing future applications for allotments.

If a consumer finds after he has placed an order for a controlled material that his needs for that material have decreased, he is required to cancel such order. If this proves impracticable "because of shipments already made, he may accept delivery" but must use or dispose of the material in the manner prescribed by CMP Regulation No. 1.

2. Preference Status

CMP serves two closely related functions. The first is to reduce the volume of orders for controlled material, so as to bring it into line with available supply. The second is to ensure that authorized orders find a home. One of the major problems which NPA has had to resolve is the standing which authorized orders shall have with controlled material suppliers. CMP Regulation No. 3 accords all authorized controlled

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115 Schedule III. Lead times on a majority of controlled material items expire 45 or 60 days prior to the first day of the month in which delivery is requested.

116 Sec. 20(d)(1) and Schedule IV.

117 CMP Reg. 1, § 17(a). In placing an authorized controlled material order under such circumstances, the purchaser must indicate what portion of the order is covered by an allotment. (CMP Reg. 1, § 19(g)). This section prohibits the combining of orders not covered by allotments with authorized controlled material orders under other circumstances.

118 CMP Reg. 1, § 17(c). This Section refers only to cancellation of orders. However, if the adjustment to reduced requirements can be achieved through postponement of delivery, the less drastic measure should be permissible.
material orders "equal preferential status" and provides that they shall "take precedence over other delivery orders for controlled material previously or subsequently received." The "equal preferential status" clause reflected NPA's initial determination that controlled material suppliers should accept authorized orders strictly on a first-come-first-served basis. This decision was modified in August, 1951, in the light of experience. It was impossible to make all allotments for any one quarter at the same time. Consequently, the companies which were late to receive allotments had a seven goal handicap in the scramble to get orders placed. The first-come-first-served system encouraged the illicit practice of placing several orders with different suppliers to make sure that at least one such order would be accepted and delivery made thereon. The suppliers complained that they were besieged by new customers, and firms with longstanding supplier relationships complained because their old sources of supply were booked to capacity and they were compelled to locate new ones, which was not always easy. In an effort to remedy this situation, NPA issued directions120 which were designed to preserve the established flow of controlled material and to minimize disruption of established customer relationships. Controlled material producers now have the option of determining which authorized controlled material orders, or portions thereof, they will accept, without regard to the dates on which such orders were received. However, unless their order books for a product are filled for a particular month, producers may not reject orders bearing allotment symbols which identify them as having been placed pursuant to a military or a machine tool production program.121 They also may not reject orders placed pursuant to special NPA directives and orders from their distributors, subject to limitations which appear elsewhere. Furthermore, during the fifteen days immediately preceding the expiration of lead times, producers who are not then booked to capacity must accept all authorized controlled material orders tendered, in order of receipt.122 It is apparent that orders bearing military or machine tool program symbols are preferred

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119 CMP Reg. 3, § 4(a). In accordance with NPA Reg. 2, § 3(c), a DO rating has no effect on an order for controlled material calling for delivery after September 30, 1951.

120 Directions to NPA Orders M-1 (steel), M-5 (aluminum) and M-11 (copper). These directions have been revoked in the meantime, and these three orders were amended to cover the same subjects.

121 Allotments issued by the military bear symbols consisting of the letters, A, B, C or E and a digit. Machine tool allotments bear the symbol Z-2.

122 See Order M-1, § 8(a); Order M-11, § 4; § 12 of Order M-5 requires aluminum producers to accept orders for at least 15 percent of their scheduled production during the 15 days immediately preceding the expiration of lead times.
over other authorized orders, but this "super preference" is limited in scope. Producers may not reject military or machine tool orders if they have space on their books. However, such orders cannot replace other authorized controlled material orders previously accepted, and, once accepted, no further differentiation is made with regard to the sequence in which the various authorized controlled material orders must be filled.\footnote{123}

Repeated reference to orders which a producer "must" accept raises the interesting question of whether the President or NPA could require a concern to continue to produce certain products or materials against its will, or for that matter, whether such a concern could be compelled to stay in business. We may assume for purposes of this discussion that the impact of a regulation which requires a producer to accept certain types of orders, is, in effect, to inform him that if he is going to produce a certain product or material, he must sell it to persons who present specified types of orders. The question of just compensation under the Fifth Amendment to the U.S. Constitution was eliminated by the provision that such orders may be rejected "if the person seeking to place the order is unwilling or unable to meet such producer's regularly established prices and terms of sale or payment."\footnote{124}

3. Limitations on Placement of Orders

In order to spread the load on controlled material suppliers fairly evenly over each quarter, certain restrictions have been imposed upon the quantity of controlled material which an allottee may order for delivery during the first two months of any quarter. Direction 3 to CMP Regulation No. 1 prohibits a prime consumer who has received an allotment from placing orders "calling for delivery of more than 40 percent of the quantity of controlled material stated in such allotment during each of the first two months of the quarter for which the said allotment is valid." It is frequently overlooked that Direction 3 applies only to prime consumers. No similar restrictions exist on placement of orders by prime contractors\footnote{125} or by secondary consumers. It should be observed, furthermore, that the limitation is couched in terms of placement of orders calling for delivery of

\footnote{123} The contrary rule applies with regard to DO rated orders for materials and products other than controlled materials. Under NPA Reg. 2, all DO rated orders have the same status for purposes of acceptance. However, in accordance with § 15(d) of that regulation, a person who finds that he cannot fill on schedule all DO rated orders which he has accepted must give preference to orders bearing military and machine tool program ratings.

\footnote{124} CMP Revised Reg. 1, § 20(d) (2).

\footnote{125} Under Revised CMP Reg. 6.
more than 40 percent, not in terms of the acceptance of delivery of
more than 40. If Anaconda has accepted my second quarter orders
calling for delivery of 40 percent of my copper allotment during April
and 30 percent during each of the subsequent two months, and they find
thereafter that they cannot fill the April order until May, I am not pro-
hibited by Direction 3 from accepting delivery during May of a quantity
of copper representing 70 percent of my allotment.

A prime consumer who has received an advance allotment is authorized
by Direction 3 to place orders "calling for delivery of not in excess of
50 percent of the quantity of controlled materials stated in such advance
allotment during any one month of the quarter for which the said advance
allotment is valid." Frequently, a current allotment is no larger, or
only slightly larger, than the advance allotment which had been issued
several months earlier for the same quarter. If I received a third quarter
advance allotment of 100 tons of carbon steel in February and I thereupon
placed orders calling for delivery of 50 tons in July and another 50 tons
in August, must I reduce these orders to 40 tons per month and place
another order calling for delivery of 20 tons in September if my final
allotment for the third quarter should also be only 100 tons? The
General Counsel of NPA has interpreted Direction 3 as not requiring
such adjustment. Orders placed pursuant to the 50 percent limitation on
advance allotments need not be reduced later to comply with the 40
percent restriction on final allotments. Exempted from both the 40 per-
cent and the 50 percent limitations, in accordance with the terms of
Direction 3, are orders for minimum mill quantities,\(^2\) orders for carload
lots of carbon steel and orders for controlled material placed pursuant
to a supplemental allotment. The direction does not indicate how allot-
ments should be broken down for purposes of computing the 40 or 50
percent limitations. It is suggested that this breakdown should be made
into the classes of steel, copper and aluminum, in terms of which the
allotments were granted.

4. **Carry-over Orders**

An authorized controlled material order may not call for delivery
during a quarter other than the one for which the allotment is valid.\(^3\)
During the first two quarters of CMP, controlled material producers
were not permitted to accept orders in excess of their capacity to produce,
with the result that a few authorized controlled material orders failed

\(^2\) Minimum mill quantities are specified in CMP Reg. 1, Schedule IV.

\(^3\) CMP Reg. 1, § 20(c). The word "delivery" refers to the date of delivery to the
rendee, rather than to the date of shipment by the rendor.
to find a home. During the first quarter of 1952, NPA took further steps to make good on its assurances that CMP allotments were "certified checks." By amendment of the three controlled material M orders, it authorized controlled material producers to accept orders in excess of 100% of capacity, on the understanding that, if necessary, delivery on some of these orders would have to be delayed to the first month of the subsequent quarter.\textsuperscript{128}

The subject of "carry-over" of authorized controlled material orders is one on which there have been several changes in policy. As originally issued, CMP Regulation No. 1 provided that if a controlled material producer found after he had accepted an authorized order that, "due to contingencies which he could not reasonably have foreseen," he was obliged to postpone the delivery date to a quarter subsequent to the one indicated on the order, such carry-over order was to be filled in preference to orders originally scheduled for the later date, and the customer was not required to charge his allotment for the quarter during which delivery was actually effected.\textsuperscript{129} During September of 1951, it became evident that carry-overs might cause serious delay in the filling of fourth quarter orders. In order to start the new quarter with a relatively clean slate, the applicable section was amended to provide that carry-over orders shipped after October 7, 1951, had to be charged to the customers' fourth quarter allotments. A number of companies were hard-hit by this amendment, and a few exceptions were granted. Aware of the inequities caused by the October 7th cut-off, NPA reverted to its original position and removed the restrictions on shipment of carry-over orders, effective with the transition to the first quarter of 1952.\textsuperscript{130}

\textbf{E. Use of the DO Rating}

The \textit{DO} priority rating system devised during NPA's infancy\textsuperscript{131} blossomed into full flower under CMP. While \textit{DO} ratings have no effect on deliveries of controlled materials,\textsuperscript{132} every production schedule and related allotment, whether authorized by NPA, a Claimant Agency, or a

\begin{itemize}
\item \textsuperscript{128} Steel producers are required by Section 8(a)(2) of Order M-1 to accept authorized controlled material orders aggregating not less than 110 percent nor more than 115 percent of the tonnage to be produced. Aluminum producers are required by § 12(a)-(f) to accept up to 100% of their production schedules or production directives without regard to the volume of orders carried over from a previous quarter. A copper producer's books are deemed filled when he has accepted orders up to 115% of his production limitation.
\item \textsuperscript{129} CMP Reg. 1, § 20(f).
\item \textsuperscript{130} \textit{Id.}, amendment of January 5, 1952.
\item \textsuperscript{131} This system is outlined at p. 583 \textit{supra}.
\item \textsuperscript{132} NPA Reg. 2, § 3(c).
\end{itemize}
consumer, permits the recipient to apply a DO rating to his orders for "production material" in the minimum quantity which he requires to fulfill such a schedule.133

This broad grant of priority rating authority emanates from one of the fundamental principles of CMP; that steel, copper and aluminum are the key materials through which over-all production is controlled. It follows that a recipient of controlled material allotments should be given some assurance of timely delivery of other materials required to complete the products he may produce with such controlled materials. In theory, if authorized programs are adjusted in terms of steel, copper and aluminum, there will generally be enough non-controlled materials to permit the fulfillment of the programs as so adjusted. It was recognized from the outset, however, that in certain areas the widespread use of DO rating authority would entail undesirable results. The material to be obtained on DO rated orders may be in shorter supply than the controlled materials. In that event, one of several supplementary regulatory devices may be invoked. NPA could issue a "conservation" order, listing the uses to which the material may, or may not, be put; or a "limitation" order, limiting the volume of production of items containing such material. Control could also be exercised through an "allocation" order which would prohibit delivery of the material except on specific authorization of NPA, or would require the producer of such material to set aside a "kitty" of a specified percentage of his production for defense orders, leaving him free to dispose of the remainder on civilian orders bearing DO ratings and conceivably even on unrated orders.134 Finally, the scarce material could be added to the list of materials, on orders for which only DO ratings bearing military program identifications will be honored.135

133 CMP Reg. 1, § 6(f); CMP Reg. 3, §§ 6(a) and (b). "Production material," as defined in CMP Reg. 3, § 2(a), consists primarily of components and material (other than controlled material) which will be physically incorporated into the end product, including material consumed or converted into scrap in the course of processing. It also includes containers and packaging materials. A and B products may be production materials, and if they are, may be acquired on DO rated orders. However, as explained above, the purchaser of an A product is normally required to give an authorized production schedule and related allotments to the producer of such a product. Not included in the definition of production material are "MRO" supplies and machines or other equipment which may be required for the fabrication of the product in question.

134 For a discussion of the relative merits of these various types of orders, see O'Brien and Fleischmann, The War Production Board Administrative Policies and Procedures, 13 Geo. Wash. L. Rev. 1 (1944).

135 The "exclusion list" contained in Dir. 3 to NPA Reg. 2. The rating DO-Z1, issued by NPA on a "spot assistance" basis, may also be applied to orders for materials on this list.
A different problem arises in connection with A and B products, the controlled material content of which is insignificant in relation to the content of other materials, and in connection with products which may, but need not, contain controlled material. The case of the leather billfold is a classic. Jones, who makes billfolds with steel or brass corners, is fabricating a B product. Consequently, he may apply a DO rating to his orders for the leather and for such other production materials as he requires. Smith, whose billfolds are not equipped with similar corners, is denied rating authority. In the first place, this may result in a discrimination against Smith. Secondly, both producers are given an incentive to use controlled material, when in the interest of the economy, use of these materials for non-essential purposes should be discouraged. In the third place, there is little reason why a producer of billfolds should receive priority assistance in obtaining leather and other production material. Where the quantity of controlled material used is de minimis in relation to other materials, production is not effectively controlled through restrictions on the use of controlled material, since the producer is likely to be well within the self-authorization limits of the “small user” direction\(^\text{136}\) and can therefore obtain all the controlled material he may wish to use. Some producers even find it to their advantage to contrive to use small quantities of controlled material, for which they may “self-authorize,” in order to be able to rate their orders for components and other materials. NPA officials are aware of these problems, and remedial action is being considered. One step which is contemplated in order to keep the use of DO ratings within bounds is the publication of a list of products and materials, in the acquisition of which only ratings issued by NPA on a spot assistance basis and military DO ratings may be applied. A more drastic action, but one less likely to be taken, would be a total denial of rating authority to producers of B products which have small controlled material content, such as luggage and wooden furniture. The requirements that he give preference to rated orders restricts the businessman’s traditional privilege of choosing the customers with whom he wishes to deal. The widespread use of DO ratings tends to disrupt established supplier-customer relationships and to reduce the effectiveness of the rating. It may well be desirable for NPA to show less generosity in granting DO rating authority.

\textbf{F. Allotment Criteria}

In determining the quantities of controlled materials to be allotted to individual companies for the production of specific products, a host of

\(^{136}\) Dir. 1 to CMP Reg. 1.
factors claim consideration. To list only a few: essentiality of the product to the military, to defense supporting activities, or to the civilian economy; past volume of production; backlog of demand; possibility and feasibility of using substitute materials; possibility of obtaining defense contracts or of making other consumer products; break-even point of the enterprise; ability to weather financial storms; direct effect on employment in the company; reemployment possibilities in region for employees discharged in consequence of cut-backs. An analysis of each of these and other elements raises subsidiary factors which might well be taken into account. Conclusions reached are likely to be speculative and subject to controversy. A balancing of all the valid considerations as they pertain to a single concern, and in relation to a multitude of competing concerns, would confound an Einstein. Manifestly, the exigencies of administration demand reliance on a limited number of standards, preferably mechanical in nature, which can provide a safeguard against arbitrary action and guarantee a fair measure of equality in treatment.

In wartime, furtherance of the military effort becomes the principal objective and standard for allocation. The guns and butter (and a few Hershey bars) equation of limited mobilization creates a variety of problems not encountered by the War Production Board. At the same time, fairness in the distribution of materials in short supply assumes a paramount importance. The accent being on national defense, it is inevitable that some should thrive and others suffer. But equity demands that, insofar as possible, persons similarly situated be treated alike. NPA's objective has been "to achieve, insofar as possible in the application of priorities and allocations, a government of laws rather than men, with personal actions by the individual official governed to the maximum extent by stated and written standards and criteria narrowing the area of personal administrative discretion."\textsuperscript{137}

The Defense Production Act of 1950, as amended, clearly expresses the intention that defense and defense supporting industries shall have the first call on supplies of critical materials. With regard to distribution among producers of civilian products, section 701(c) of the Act provides,

\begin{quote}
(c) Whenever the President invokes the powers given him in this Act to allocate, or approve agreements allocating, any material, to an extent which the President finds will result in a significant dislocation of the normal distribution in the civilian market, he shall do so in such a manner as to make available, so far as practicable, for business and various segments
\end{quote}

\textsuperscript{137} Address of Henry H. Fowler, Administrator of NPA, before the New York Bar Association, January 26, 1952.
thereof in the normal channel of distribution of such material, a fair share of the available civilian supply based, so far as practicable, on the share received by such business under normal conditions during a representative period preceding June 24, 1950 and having due regard to the current competitive position of established business: Provided, That the limitations and restrictions imposed on the production of specific items shall not exclude new concerns from a fair and reasonable share of total authorized production. (Emphasis added.)

Section 701(c) has been subjected to careful scrutiny by the defense agencies. Manly Fleischmann, Administrator of DPA, has expressed the firm opinion that "the statute was not intended to prevent administrative decisions giving different amounts of material to various civilian items based on comparative essentiality." As he points out, "metal for plumbing supplies and metal for ash trays and window shades are obviously not of equal importance in a mobilization economy." The clause "having due regard to the current competitive position of established business" has been interpreted by the General Counsel of NPA as qualifying the requirement that civilian allocations be based, so far as practicable, on the share received by a concern during a representative period preceding June 24, 1950. The General Counsel has taken the position that post-Korea variations in competitive position should be disregarded in computing allotments, where such variations appear to be attributable to changes brought about, directly or indirectly, by hostilities in Korea or by the national defense program. He is of the opinion that the word "current" does not relate to the date of enactment of the amendment to the Defense Production Act and that it would be proper to consider competitive changes which have occurred subsequently. He points out, furthermore, that inasmuch as the requirement is one of "due regard," post-Korea developments are not controlling. The selection of a "representative period preceding June 24, 1950" is essentially an administrative function. The base period used by NPA as a standard for allotments to most civilian type industries is the first six months of 1950.

The requirement that new concerns shall not be excluded "from a fair

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138 65 STAT. 138, 50 U.S.C. App. § 2151(c) (1951). This paragraph had no counterpart in wartime legislation. The italicized portion was added by amendment in 1951. It took the place of a requirement of "due regard to the needs of new business."


140 Ibid.

141 This clause is the subject of a memorandum, dated October 2, 1951, from John G. Alexander, General Counsel of NPA, to Courtney Johnson, Director of the Motor Vehicle Division of NPA.
and reasonable share of total authorized production” presents some delicate problems. The General Counsel has construed the term to apply to enterprises established in the post-Korea period, but not to established companies which have branched out into new lines. He has ruled that if a new corporation is “so owned or controlled as to be in reality but a further business venture of an existing company or the latter’s owners, it would not qualify as a ‘new concern’ inasmuch as this would involve merely a change in legal form.” The General Counsel has taken the position, moreover, that section 701(c) does not apply to new producers of basic forms and shapes, such as copper wire and aluminum rolled bar, since that section relates only to civilian supply, and since it is not possible to ascertain what portion of such basic materials will be used to meet civilian demand. It must be assumed that a high percentage of most types of controlled materials will find its way into military or defense supporting items. There exists, of course, much room for divergencies of opinion as to what constitutes a “fair and reasonable share of total authorized production” for new concerns, particularly in industries in which the use of copper by established enterprises has been curtailed by as much as 90% of pre-Korea use, and in which the apportionment of the limited materials available among an increased number of users is likely to hasten the demise of certain established companies. New concerns are free to take advantage of the self-authorization privileges granted by Direction 1 to CMP Regulation No. 1. Consequently, each new enterprise is automatically entitled to procure limited quantities of steel, copper and aluminum. In areas of the civilian economy in which established producers have been compelled to operate on a starvation diet of controlled materials, allotments to new concerns in excess of the self-authorization quantities may be inadvisable.

NPA has succeeded in avoiding the imposition of so-called “death sentences” even on producers of least essential items. The term “death sentence” has been used to denote absolute denial of controlled materials allotments. However, during several quarters, allotments of copper for some non-essential civilian products reached a low of 10% of base period use. Drastic cuts in production over a prolonged period may, of course, be tantamount to a death sentence for certain enterprises.

142 Note the discrepancy between the language of § 701(c) and that of § 714(f)(4) of the same Act. The latter section is less restrictive in that it demands only that “due consideration” be given to the needs of new concerns.

143 The subject of “new concerns” under § 701(c) is discussed in a memorandum, dated January 11, 1952, from John G. Alexander, General Counsel of NPA, to Dean O. Bowman, NPA Assistant Administrator for Policy Coordination.

144 Materials purchased prior to CMP have served as a cushion for many companies.
The criterion for allotments to manufacturers of most civilian type products has been their average quarterly use of steel, copper and aluminum during the first half year of 1950. For the second quarter of 1952, the standard allotment pattern for such manufacturers, regardless of the essentiality of the product, was 50% of base period consumption of steel, 30% of base period usage of brass mill, copper foundry and aluminum products, and 35% of the copper wire mill base. However, where it was thought practicable for producers to substitute other materials for copper or aluminum, or to stretch the supply of these metals, allotments of copper were reduced to a range between 10% and 25%, depending on the extent of substitution known to be feasible, and allotments of aluminum were reduced to a minimum level of 25% of base use. In each instance, allotments for consumer goods based on pre-Korea use were made in addition to allotments required by the allottee to fulfill direct military orders for the same products. Producers who have received a substantial volume of DO rated orders bearing military designations are thus placed in an advantageous position vis-a-vis competitors who have received few or no such orders. Allotments of steel to consumer goods producers are high in relation to those of copper and aluminum. It is evident that if a producer's ratio of use of these metals is unalterable, he will have been allotted more steel than he can put into production. He is required, under such circumstances, to return excess allotments. Experience has shown, however, that many producers find it possible to adjust their proportionate consumption of controlled materials in such a way as to enable them to utilize the additional steel allotted. In any event, the scarcest of the three metals becomes the bottleneck and in effect determines the number of units which can be produced.

145 Allotment percentages for civilian type products for the second quarter of 1952 were announced in NPA Press Release 1895, Feb. 21, 1952, and in NPA Press Release 1900, Mar. 5, 1952.

146 This is one of the reasons why producers of civilian type items are required to submit quarterly applications for allotments, notwithstanding the fact that their stated requirements for the production of items not earmarked for the military may be disregarded in favor of the base period use formula.

147 Several of the steel, copper and aluminum producing companies have divisions or subsidiaries which produce A and B products. Such divisions and subsidiaries are treated as autonomous units and are subject to the same rules and limitations on use of controlled materials as any independent manufacturing concern. This is true, also, of integrated manufacturers, e.g., Kaiser and Ford, who have their own controlled materials producing facilities. See CMP Reg. 1, § 20(g).
One of the most intricate aspects of the CMP operation is the scheduling of production of thousands of B product components, such as ball bearings, in such a manner as to gear such production in time and volume to the production of the diverse end items to which the components are indispensable. The base period approach discussed above is not applicable to this area of the economy, and other formulae have had to be devised for allotments to component fabricators. In the case of many types of components, screened allotment requests are granted in full.

Much of the equipment purchased by the military consists of A products for which the Department of Defense distributes allotments it received from DPA for that purpose. Needless to say, such allotments are made in accordance with entirely different criteria from allotments for consumer goods. DPA's primary function in this connection has been to "screen" military requests in order to ascertain whether they accurately reflect the amounts of material needed to fulfill stated production goals. In appropriate cases, the attainability of such goals may also be questioned. As a rule, allotment requests from the military, as well as those from the Atomic Energy Commission, have been granted with only minor reductions, if any.

G. Inventories

Businessmen, not unlike housewives, are prone to engage in "scare buying" when shortages of price increases appear to loom. A stampede for merchandise, occurring at a time at which restraint should be the order of the day, is bound to aggravate such shortages or inflationary pressures as may exist. Conscious of these dangers, NPA's first step was to prohibit the accumulation of more than a "practicable minimum working inventory" of materials in short supply. With the advent of CMP, the imposition of more stringent controls on the accumulation of controlled material was deemed advisable. Section 3(a) of CMP Regulation No. 2 provides, in part:

No user of controlled material shall accept delivery of any item of steel listed in Schedule I of CMP Regulation No. 1, if his inventory of such item is, or by such receipt would become, in excess of the quantity of such item necessary to meet his deliveries, supply his services, or perform his operations, on the basis of his currently scheduled method and rate of operation.

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148 NPA Reg. 1. Section 2(b) of that regulation defines "minimum working inventory" as the smallest quantity of material from which a person can reasonably meet his deliveries or supply his services on the basis of his currently scheduled method and rate of operation. In the absence of unusual circumstances, a person's inventory will be considered more than a practicable minimum working inventory if the ratio of his inventory to his currently scheduled operations is substantially greater than the ratio which he normally maintained between his inventory and his operations during the recent past.
during the succeeding 45-day period, or in excess of a "practicable minimum working inventory" (as defined in NPA Reg. 1), whichever is less. . . .

Paragraphs (b) and (c) of Section 3 spell out analogous rules for the acceptance of copper and aluminum, respectively, in terminology identical to that of paragraph (a), with the exception that a 60-day period is prescribed for copper.\textsuperscript{149} Section 3 deserves careful scrutiny. Many of the laments raised over the alleged severity of CMP inventory controls proceed from the erroneous premise that any person whose inventory exceeds the prescribed limits is in violation of CMP Regulation No. 2. In fact, the mere possession of excessive inventory violates no order or regulation of NPA. The prohibition, as appears from section 3, is on the acceptance of delivery under specified circumstances.

The words "user of controlled material" are defined as "any person who uses any item of controlled material for production, construction, or maintenance, repair, or operating supplies."\textsuperscript{150} This definition has been interpreted by NPA's General Counsel to exclude producers of controlled material and converters—persons who convert controlled material from one shape into another. Such persons, therefore, are not subject to inventory control under CMP Regulation No. 2.\textsuperscript{151} "Item of controlled material" means any item in any class of controlled material "which is different from all other items in that class by reason of one or more of its specifications, such as length, width, thickness, temper, alloy, or finish." This definition was born of the realization that a large inventory of steel plates is of no use to a manufacturer when he needs steel wire and that, consequently, he should be permitted to accept wire even if his plate inventory is in excess of a 45-day supply. Under this definition, he even may accept half inch steel plate, regardless of whether his inventory of 5/8 inch plates is higher than a 45-day supply. This breakdown of inventory into a great many different "items" of steel, copper and aluminum is to the advantage of most users of controlled material, notwithstanding the extensive records they are required to maintain. However, some companies have suggested that the regulation be amended to give producers the option of limiting themselves to a 45 or 60-day supply (or a practicable minimum working inventory) on the basis of broad "classes," rather than "items," of controlled material.

\textsuperscript{149} A 60-day period is also authorized for aluminum used in the aircraft production program.

\textsuperscript{150} CMP Reg. 2, § 2(b).

\textsuperscript{151} See also CMP Reg. 2, § 4(c). Persons who convert controlled material into different forms or shapes as part of the process of fabricating such material into an A or a B product are subject to control.
Issuance of such an amendment is under consideration. A person who has more than one operating unit may maintain separate inventory records for each such unit. If he elects to do this, each unit is treated as an autonomous entity for purposes of CMP Regulation No. 2.\footnote{152}{\text{CMP Reg. 2, § 6(a).}}

As of when must an item of material be included in inventory and when may it be deemed to have been taken out? The General Counsel has taken the view that material in transit from seller to purchaser need not be included in the latter's inventory. However, physical possession is not essential in determining his inventory. A person must include material "held for his account" by another, and he may exclude material held by him for the account of another.\footnote{153}{\text{CMP Reg. 2, § 6(b).}} An item leaves inventory when it is put in process. At what point does this occur? CMP Regulation No. 2 answers this question in the negative by providing that "any item of controlled material in which minor changes or alterations have been effected, shall be included in inventory."\footnote{154}{\text{NPA Reg. 1, § 5(c).}} NPA Regulation No. 1 elaborates on this point in providing:

A material which is to be further processed is considered to be in inventory until actually put into process or actually installed or assembled. For the purpose of this regulation, processing does not include minor initial operations, such as painting, and does not include any shearing, cutting, trimming, or other operation, unless such initial operation is a part of a continuous fabrication or assembling operation; nor does it include operations such as inspection, testing, and aging, or segregation or earmarking for a specific job.\footnote{155}{\text{CMP Reg. 2, § 3(b).}}

This provision embodies the interpretation which should be placed on the terse paragraph covering the same subject in CMP Regulation No. 2. CMP Regulation No. 2 "does not provide for disposal of excess inventories which may be on hand."\footnote{156}{\text{NPA Reg. 1, § 5(e).}} It does, on the other hand, require cancellation, reduction or postponement of delivery of orders placed, if acceptance of the materials ordered on the scheduled delivery date would result in a violation of the regulation.\footnote{157}{\text{CMP Reg. 2, § 8.}} It is explained that this requirement "does not confer an absolute right to cancellation of an order in any case, but offers to both parties the alternatives of reduction and deferment, thereby enabling the parties to hold to a minimum the interference with existing contracts. Consequently, since any adjustment
of purchase orders which prevents accumulation of excessive inventories serves the purpose of the regulation, no particular form of adjustment is prescribed, but the matter is left to mutual agreement of the parties.\footnote{158}

Provision is made for several exceptions to the rule prohibiting acceptance of controlled materials in excess of the limits prescribed by section 3. Whereas the basis for a majority of these exceptions is that it would be inequitable to prohibit the described supplier from making delivery under the circumstances indicated, persons whose permitted inventories will be exceeded are authorized to accept delivery under these circumstances. The excess may be accepted if it results from shipment by a producer 15 days or less in advance of the requested delivery month,\footnote{159} or if the material had been loaded for shipment before the vendor received instructions to cancel, reduce or postpone delivery.\footnote{160} Delivery of such excess may also be accepted if the item is one which the producer does not usually make, stock or sell, which he cannot readily dispose of and which he had produced or had in production, or for the production of which he had requested special materials, prior to the receipt of instructions to cancel, reduce or postpone delivery.\footnote{161} A producer may accept delivery of a full minimum mill quantity if delivery of a lesser quantity would not result in a violation and the controlled material involved is not procurable from a distributor.\footnote{162} Finally, there is no inventory limitation on the acceptance of imported controlled

\footnote{158} The quoted language appears in Interpretation 1 to NPA Reg. 1, the regulation limiting inventories of products and materials other than controlled materials. However, the substance of the statement is equally applicable to CMP Reg. 2. CMP Reg. 2, § 7, also provides that "No person shall deliver any item of controlled material if he knows or has reason to believe that acceptance of such delivery would be in violation of this regulation." Although this language encompasses deliveries not only by the vendor but by independent carriers, it appears unlikely that action would be taken against a carrier who delivered controlled materials although he had reason to believe that acceptance would be in violation of CMP Reg. 2.

\footnote{159} CMP Reg. 2, § 4(a). CMP Reg. 1, § 20(f) gives the producer the right to ship 15 days prior to the requested delivery month.

\footnote{160} CMP Reg. 2, § 4(b).

\footnote{161} CMP Reg. 2, § 4(c).

\footnote{162} CMP Reg. 2, § 4(d). Analogous provisions in NPA Reg. 1 have been interpreted as follows:

Where a person, having placed orders with an intervening dealer who does not take the material into his physical inventory, gives instructions to adjust such orders under Section 8 of NPA Reg. 1, the intervening dealer may likewise adjust the order which he has placed for the specific material to fill his customers' order. Correspondingly, where the supplier described in Section 9 is entitled to make delivery in spite of the instruction to adjust, such intervening dealer has the same right, so that the material may ultimately be received by the person initiating the instruction to adjust. NPA Reg. 1, Int. 2, § d.

A similar interpretation of §§ 4(a)–(d) of CMP Reg. 2 would appear appropriate.
materials which the user "acquired prior to landing."  However, "he may not accept further deliveries of such controlled materials from domestic sources until his inventory thereof is reduced to permitted levels."  

Some critics have found fault with the basic standard for inventory control, "the quantity of such item necessary to meet [the user's] deliveries, supply his services, or perform his operations, on the basis of his currently scheduled method and rate of operation during the succeeding 45 [or 60] day period."  It has been pointed out that a manufacturer's rate of operation may be dependent in large measure upon the quantity of raw materials available to him, and that he may well be able to increase the rate as additional controlled materials are delivered.  A 45-day supply may be 100 tons today and 150 tons tomorrow.  Should we conclude, then, that the proverbial tail is wagging the dog?  Not necessarily.  In the first instance, the production of a majority of A or B products requires the use of more than one type of material.  The producer's rate of operations hinges upon the availability of all the materials he consumes, and the scarcest of them is likely to become the bottleneck, the determining element.  Secondly, producers of A and B products are required, as noted above, to take their inventories into account in requesting allotments.  If it is apparent to a producer that he will enter the quarter for which he is submitting an application with an excessive inventory of carbon steel, he should reduce the quantity of carbon steel for which he is requesting an allotment.  In the third place, the controlled material allotments granted a producer impose a ceiling upon the amount of steel, copper or aluminum he may acquire, which ceiling necessarily has a direct bearing upon his scheduled rate of operation.  In the final analysis, why should a person who is able to step up his scheduled rate of operation without exceeding his authorized production schedule be denied the right to do so, provided the schedule is bona fide in that it represents the number of units he actually plans to produce, and is realistic in that the goal is attainable in terms of availability of all materials required, of labor and of production facilities?

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163 The word "landing," as used in a similar context in NPA Reg. 1, § 10, is defined in Interpretation 2 to NPA Reg. 1.  Although this interpretation technically does not apply to CMP Reg. 2, there is no reason to believe that the same word, as used in CMP Reg. 2, should be interpreted differently.

164 CMP Reg. 2, § 4(f).  It must be borne in mind that § 4(f) relates only to inventory accumulation of imported controlled materials.  The rules governing acquisitions of imported steel, copper and aluminum are discussed in other parts of this article.

165 Except on types of steel which may be purchased ex-allotment in accordance with Dir. 4 to CMP Reg. 1.
The objective of inventory control is not to limit production but to prevent the amassing of materials against a rainy day, when it is in the interest of the economy that such materials be placed into production as rapidly as possible. "Scheduled method and rate of operation" is not a totally objective standard, in that it is founded on the intent of the individual, governed by the factor outlined above. An examination of a producer's inventory records covering a period of a month may not bring to light dramatic evidence of such transgressions as he may in fact have committed. However, if records over a longer period disclose an improper ratio between volume of production and materials in inventory, a violation may well be indicated.

The best solution to the inventory problem is, of course, to minimize the incentive for accumulating excess materials. CMP on one hand curtails the quantity of controlled materials—and thus indirectly of other materials—which a producer may acquire; on the other hand, it enables him to count on mill acceptance of his authorized orders. OPS price ceilings provide assurance against run-away prices. Authorized production schedules for B products permit the producer to use materials already in inventory in addition to materials obtained pursuant to CMP allotments. CMP Regulation No. 2 is designed to supplement this positive program through the imposition of quantitative limits. NPA officials believe that the regulation is a reasonably effective tool for the accomplishment of this task.

H. "MRO," Installation and Capital Additions

That time-tested proverb, "a stitch in time saves nine," applies to commerce and industry as well as to the home. Recognizing the paramount importance of maintenance and repair to the welfare of the economy, NPA lost no time in issuing an "MRO" (maintenance, repair and operating supplies) regulation, NPA Regulation No. 4, which was later replaced by CMP Regulation No. 5.166 Under the latter regulation, every lawful business enterprise, government agency and institution is given a quarterly quota for its purchases of MRO materials. Within this quota, it may apply the allotment symbol MRO to orders for controlled materials and the rating DO-MRO to orders for products and materials other than controlled materials. Once again, reference to pertinent

166 Certain industries which did not fit into the pattern established by CMP Reg. 5 receive MRO priority assistance under separate NPA orders. Among these are M-46 and M-46A (petroleum and gas industry), M-50 (electric utilities), M-70 (marine), M-73 (rail transportation systems), M-77 (communications), M-78 (mining industry), M-79 (MRO for export), M-81 (solid fuels industry).
definitions is in order. "Maintenance" is defined as "the minimum up-
keep necessary to continue any plant, facility, or equipment in sound
working condition." Maintenance is defined as "the minimum up-
keep necessary to continue any plant, facility, or equipment in sound
working condition." Repair," on the other hand, includes "with
respect to any person, the restoration of any plant, facility, or equipment
to sound working condition when it has been rendered unsafe or unfit
for service by wear and tear, damage, failure of parts, or the like, when
such repair is not capitalized according to his established accounting
practice." It is emphasized that maintenance and repair do not include
the replacement of a plant, facility or equipment, nor the improvement
thereof "by replacing material which is still in sound working condition
with material of a new or different kind, quality, or design." The line
between restoration and replacement is sometimes a hard one to draw,
especially in the case of a partially destroyed building. Major reconstruc-
tion may well be excluded from the repair category on the ground that
it is capitalized in accordance with the owner's accounting practice. In
any event, the project cannot be considered "repair" if the plan calls
for a structure substantially different from the old one in size or function.
Operating supplies" is defined to include any material carried by a
business enterprise as an operating supply in accordance with its estab-
lished accounting practice. The quarterly MRO quota consists of an
amount equal to 30% of the amount which the enterprise spent on MRO
during the year 1950 or during the last fiscal year ending prior to March
1, 1951. Special provision is made for enterprises which were not in
operation during the base period, and for enterprises which prefer to
establish seasonal quotas. A person whose quarterly MRO quota,
calculated as indicated above, is less than $1000, may nevertheless order
or receive MRO materials costing not more than $1000. CMP Regulation
No. 5 represents a departure from CMP philosophy inasmuch as

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167 CMP Reg. 5, § 2(f).
168 Ibid.
169 Ibid.
170 CMP Reg. 5, § 2(g). In the case of government agencies and institutions, operating
supplies are items which cost less than $50 or are normally consumed within one year,
and which are not carried as capital equipment in accordance with the agency's or
institution's established accounting practice.
171 CMP Reg. 5 §§ 7(a)-(c). The quota base must exclude expenditures made during
the base period for items on the NPA Reg. 2 exclusion list (List A). DO ratings may not
be applied to orders for such items. The base must include, however, expenditures for
items on the CMP Reg. 5 exclusion list (Schedule I), although the rating DO-MRO may
not be used in purchasing such items.
172 CMP Reg. 5, § 7(f).
173 CMP Reg. 5, § 7(e).
174 CMP Reg. 5, § 7(g).
control is exercised, not through a limitation on the quantity of controlled materials which may be acquired, but through a dollar quota. No restriction is imposed on the quantity of any one material which may be acquired, provided the material is needed for maintenance, repair or operating supplies, as defined.

An enterprise which uses the MRO allotment symbol and rating to order for delivery, or to receive, during any quarter MRO materials aggregating not more than 20% of its quota, may purchase additional MRO materials on unrated orders without regard to its quota limitations.\footnote{175} Subject to this exception, persons who manufacture A or B products solely for their own use as MRO must use the MRO allotment symbol and rating in ordering the materials they require for such production.\footnote{176} A person may apply for an increase of his MRO quota upon the ground that such quota "works an undue or exceptional hardship upon him not suffered generally by others in the same industry, or that its enforcement against him would not be in the interest of the national defense or in the public interest."\footnote{177} Such an increased quota, if granted, is not retroactive but becomes the applicant's standard quota unless the authorization indicates otherwise.\footnote{178} If an enterprise such as a repair shop performs maintenance, repair or installation work for a person who is authorized to use the MRO allotment symbol and rating, such enterprise may apply the symbol and rating of its customer, the cost of the materials thus obtained being chargeable to the MRO quota of the latter.\footnote{179} This provision is construed as being permissive, and a service shop which produces A or B product repair parts for its customers may also obtain allotments for the production of such parts by filing an application on Form CMP-4B with NPA.

CMP Regulation No. 5, in addition to an MRO quota, also establishes separate quotas for "minor capital additions" and installation of equipment. The limitation on each of these two quotas is $1000 or 10% of the MRO quota, whichever amount is greater. A "minor capital addition" is defined as "any replacement, improvement, or addition of a kind carried by a person as capital according to his established accounting practice, the total cost of which (excluding the purchaser's cost of labor) does not exceed $1000 for any complete capital addition."\footnote{180} What

\footnote{175}{CMP Reg. 5, § 8(c).}
\footnote{176}{CMP Reg. 5, §§ 3(b) and 4(b). This is also true of products manufactured for use as installation material or "minor capital additions."}
\footnote{177}{CMP Reg. 5, § 15(a).}
\footnote{178}{CMP Reg. 5, §§ 7(h) and (i).}
\footnote{179}{CMP Reg. 5, § 9(a).}
\footnote{180}{CMP Reg. 5, § 2(h).}
constitutes one complete capital addition? If I place an order for ten typewriters, each of which costs less than $1000, but the aggregate cost of which is in excess of that figure, am I making ten minor or one major capital addition? The General Counsel has taken the position that the answer depends on the intent of the purchaser. If the acquisition is made pursuant to one plan, if it constitutes one project, it must be treated as one capital addition for purposes of CMP Regulation No. 5. Minor capital additions which are purchased without use of the rating DO-MRO need not be charged against the vendee's quota.\(^{181}\) However, if an order for any part of such an addition is rated, the cost of the whole addition is chargeable to the quota.\(^{182}\) If a minor capital addition involves construction, as defined in Revised CMP Regulation No. 6, the procedure here described is not applicable.\(^{183}\) There is no "major capital addition" quota. A person who requires priority assistance in placing an order for capital equipment costing more than $1000 must apply for a DO rating on a "spot assistance" basis, unless the equipment is being acquired in connection with a construction project, in which event he may be authorized to use the DO rating assigned for such project.\(^{184}\)

The installation quota covers the setting up or relocation of equipment in an existing building, where the total cost for installation materials does not exceed $1000 for one complete installation. For an installation in a non-industrial building, not more than two tons of carbon steel, 200 pounds of copper, and no aluminum, stainless steel or alloy steel may be used.\(^{185}\) Installations made in connection with the erection or extension of a building are excluded from the installation quota, but this quota is not limited to the installation of minor capital additions. The value of the equipment to be installed is without relevance in this connection. CMP Regulation No. 5 provides MRO assistance for all lawful business enterprises. This includes retail stores, apartment houses, farms and any other business activity which may come to mind. Not included, however, are home owners and owners of passenger cars and other equipment not used in commerce.

\(^{181}\) CMP Reg. 5, § 6(b).
\(^{182}\) CMP Reg. 5, § 2(h).
\(^{183}\) Ibid.
\(^{184}\) It should be noted that § 2(j) of Revised CMP Reg. 6 defines "construction" very broadly to include any alteration "through the incorporation-in-place on the site of materials which are to be an integral and permanent part of the building, structure, or project." Consequently, if the installation of a machine requires the erection of a foundation which becomes a permanent part of the plant, the project is a construction project unless it falls within the CMP Reg. 5 definition of "installation."
\(^{185}\) CMP Reg. 5, § 2(j).
CMP Regulation No. 7 supplements Regulation No. 5 inasmuch as it describes the rules under which a person in the business of making repairs or installations may obtain materials for use in work for customers who are not entitled to an MRO quota. The Regulation No. 7 definitions of “maintenance,” “repair” and “installation” are analogous to the Regulation No. 5 definitions of the same terms. Each “repairman,” a term defined to include installers of equipment, is authorized to use the allotment symbol RE to obtain limited quantities of controlled materials, and the rating DO-RE to obtain products and materials other than controlled materials in quantities limited only by the requirements of his business.

As a corollary to Reg. 7, NPA Order M-89 provides retailers, such as hardware stores, with a means of obtaining controlled materials. Consequently, a person who does not have an MRO quota is able to obtain materials for maintenance, repair and installation purposes “on the open market,” either through his repairman or through a retail store.

IV. TYPES OF RELIEF

A. Public Participation In Policy Formulation

The private citizen can exert a significant influence on the formulation of defense policies, as reflected in NPA orders, regulations and procedures. Many objectives can be attained in one of several ways, and the most effective “relief,” in the broadest sense of the word, which a company or trade association can seek is to try to induce the responsible officials to adopt whichever course of action it believes would achieve the desired result with the least hardship to industry as a whole, and to its own industry, in particular.

The exigencies of national defense have compelled NPA to adopt a series of measures which spell a radical departure from “business as usual” for a major segment of American industry. Recognizing that, insofar as possible, emergency regulations should not be imposed “without the consent of the governed,” that active cooperation between Government and business is of immeasurable benefit to both, and that the

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186 As was noted above, a repairman may obtain materials for work for customers who have an MRO quota by using the MRO allotment symbol and rating of such customers.
187 CMP Reg. 7, §§ 2(d) and (g).
188 A repairman's quarterly quota of controlled material consists of 20 tons of steel (to include not more than 3 tons of alloy steel and 1 ton of stainless steel), 500 pounds of aluminum, 500 pounds of copper brass mill and foundry products, and a quantity of copper wire mill products costing $150 or equal to 20% of his use during the year 1950, whichever is greater (CMP Reg. 7, § 3(a)).
189 CMP Reg. 7, § 4(a).
success of the mobilization program depends in great measure upon the understanding and support of business, Congress provided that "such business advisory committees shall be appointed as shall be appropriate for purposes of consultation in the formulation of rules, regulations, or orders, or amendments thereto issued under the authority of this Act."\(^{100}\) It was stipulated that in the formation of such committees, "there shall be fair representation for independent small, for medium, and for large business enterprises, for different geographical areas, for trade association members and non-members, and for different segments of industry."\(^{101}\) The Congressional mandate has been implemented by the appointment of over 500 industry advisory committees, each of which meets periodically with NPA officials in Washington to consider the impact of the defense program upon its area of the economy. These committees play an important role in the defense program. Systematic consultation with representatives of all industries affected is, of course, an impossibility in cases such as the CMP regulations which relate to hundreds of different industries. However, a committee is generally convoked when an order affecting its particular industry is in the discussion stage. Members are urged to comment on drafts which are laid before them, and on many occasions their advice has led to significant modifications or even to fundamental changes in approach. The possibility of violations of the anti-trust laws by industry committees is recognized. Government attorneys in attendance at committee meetings regularly stress the advisory nature of each committee's functions. At these meetings, Government policies are frequently subjected to outspoken criticism. However, as one who has taken part in the deliberations of many of these committees, the writer is able to testify to the willingness to make sacrifices when the need for those sacrifices is understood, and to the deep concern for the national welfare displayed by most industry representatives.

It would be a mistake to assume that industry advisory committees are the only medium through which businessmen, their counsel, or their trade associations can exercise a legitimate influence on the formulation of policies. The unique problems presented by a "limited mobilization" of indefinite duration have compelled the Government to sail upon uncharted seas, and most defense officials, conscious of the experimental flavor of their actions, are prepared to lend a receptive ear to proposals as to the course.\(^{102}\) It is not likely that any one individual would succeed

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\(^{101}\) Ibid.

\(^{102}\) The directors of most NPA Industry Divisions are "WOC's" (without compen-
in reversing a basic policy, such as CMP, to which the Government is firmly committed. However, the constant informal exchange of ideas between these officials and the business executives with whom they meet has borne fruit in the form of improvements in orders and procedures which, in turn, have mitigated the hardships to which one or another industry is of necessity subjected.

B. Applications for Adjustment or Exception or for Supplemental Allotments

Every NPA regulation or order contains certain “boilerplate” clauses, including an “adjustment or exceptions” section which provides that any person subject to the particular regulation or order

... may file a request for adjustment, exception, or other relief upon the ground that such provision works an undue or exceptional hardship upon him not suffered generally by others in the same trade or industry, or that its enforcement against him would not be in the interest of the national defense or in the public interest. In examining requests claiming that the public interest is prejudiced, consideration will be given to the requirements of public health and safety, civilian defense, and dislocation of labor and resulting unemployment that would impair the defense program.\textsuperscript{193}

Applicants who request relief on the grounds of “undue hardship” frequently overlook that they must show hardship “not suffered generally by others in the same trade or industry.” Whereas the submission of elaborate evidence is not required, the unsupported claim that a certain provision works a hardship not suffered by competitors or that its enforcement against the applicant would not be in the public interest, does not suffice. “Each request... shall set forth all pertinent facts and the nature of the relief sought, and shall state the justification therefor.”\textsuperscript{194}

Many applicants do harm to their own cause by failing to delimit the relief they seek. Blanket exemptions are rarely, if ever, granted. For instance, no user of controlled materials can expect to be relieved completely from the requirement of complying with inventory restrictions. If, on the other hand, he applies for authorization to maintain a 90-day supply of copper, instead of the 60-day supply prescribed by CMP Regulation No. 2, and properly supports the request, his chances of obtaining relief are very good.\textsuperscript{195} This is not to say, of course, that the relief

\textsuperscript{193} CMP Reg. 1, § 24(a) and analogous sections in other regulations and orders.
\textsuperscript{194} Ibid.
\textsuperscript{195} The percentage of applications for adjustment or exception granted in full or in
THE CONTROLLED MATERIALS PLAN

granted may not be more limited in scope than that requested. However, the applicant should definitely set some bounds to his request. An administrator has been appointed for each NPA regulation and order. It is these administrators who entertain and pass upon all applications for adjustment or exception from their respective regulations or orders. Most applications are processed within less than two weeks.

The type of adjustment most frequently sought is an increase in the quantity of controlled materials allotted for the production of a particular B product. Such an increase can be requested of the Industry Division responsible for the product in question by applying for a supplemental allotment. Since each Industry Division is given only a limited quantity of material to allot, no supplemental application can be granted unless the division has sufficient material to cover the additional allotment. In order to ensure equality of treatment between all applicants for supplemental allotments, detailed internal criteria have been established for the processing of these applications. Relief in the form of additional allotments may be granted if the applicant establishes hardship not suffered generally by others in the same product class or that the essentiality of his product exceeds that of others in the same class. No adjustment can be granted if it appears that in recognizing an individual applicant's claim, adjustments would be required for the entire product class.

"Hardship" may be established on the ground that the base period used by NPA in making allotments was abnormal insofar as the applicant is concerned. Such abnormality can arise from the fact that the concern commenced business or that the product in question was introduced during the base period, that the base does not adequately reflect the seasonal pattern of the business, or that operations during the base period were interrupted in consequence of a strike, fire, technical difficulties, conversion, or for other reasons. Since all companies can expect part is extremely high. The administrator of CMP Reg. 1 has received a total of 303 applications, as of April 1, 1952, of which 224 were granted in full, 39 were denied, 13 dismissed and 19 cancelled or withdrawn. Of the 320 applications passed upon by the administrator of CMP Reg. 2, through April 1, 1952, 263 were granted in full or in part, 13 were denied, and the remainder disposed of in other ways. The administrator of CMP Reg. 5 processed a total of 1880 applications between October 1, 1951, and March 1, 1952, including applications for increased MRO quotas. Of this total, 1143 were granted in full, 419 were granted in part, 153 were denied, 153 were dismissed, and 12 were cancelled or withdrawn. Applications classified as dismissed are those which were improperly filed. The volume of applications received by the administrators of the other CMP regulations is insignificant.

106 Each division establishes a small reserve to provide for contingencies.

to encounter some interruptions in production, an adjustment of the base is deemed justified only when the deviation from the normal level of operations was substantial. As a rule, a shutdown of less than one twelfth of the base period is not considered significant enough to warrant adjustment. If a company has acquired the plant and physical assets of another business producing B products falling into the same product class, the bases of the two concerns may be consolidated.

Supplemental applications pleading hardship only on the basis of a low allotment do not warrant consideration except in cases involving small "single-line" producers who have received insufficient materials to continue minimum operations. Under certain circumstances, such producers may receive additional allotments from their Industry Division. Furthermore, a special "Small Business Hardship Account" has been established by the Office of Small Business of NPA to assist firms threatened with failure or prolonged shutdown in consequence of low allotments. Enterprises which fall within the Department of Commerce definition of a "Small Business" may be eligible to draw on this account.

Basic "essentiality" determinations are made in terms of product classes. Individual adjustment on this ground is justified only when such a determination does not correctly measure essentiality for the individual applicant. Essentiality is measured in relation to defense production, defense supporting production, civilian defense, public health and safety, the civilian economy, and exports, in that order of importance. Where a relatively small amount of additional scarce material will enable a plant to continue to operate and to employ its work force, relief may be granted in order to provide continuing employment. As a rule, relief is also granted to keep a labor force intact during conversion to essential production or while action on a defense contract is awaited, especially in cases involving lay-offs of skilled workers and possible dilution of their skills in other employment. It must appear from the application that defense work will be forthcoming within a reasonable period.

It became apparent, after allotments for the second quarter of 1952 had been issued, that the anticipated supply of certain controlled material shapes, notably of carbon steel sheet and strip, would have justified a higher allotment level to users of these materials. Companies which

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198 See Dept. of Commerce Business Information Service, November, 1951, Subject: "Size Classification of Manufacturers."

199 As of April 14, 1952, 374 cases were approved for grants from the Small Business Hardship Account. (NPA P.R. 2100.)
needed additional quantities of sheet or strip were "invited" to apply for supplemental second quarter allotments. Such applications were, of course, processed in accordance with criteria quite different from those used in processing supplemental applications based on hardship or essentiality.

C. Miscellaneous Forms of Relief and Assistance

Persons who require DO rating assistance to which they are not automatically entitled under an authorized production schedule or under a quota, such as the MRO quota, may apply to their Industry Division or Claimant Agency or to the NPA Priorities and Directives Division for authority to apply a DO rating on a "spot assistance" basis.

The steel, copper and aluminum divisions of NPA are prepared to assist persons who have been unable to place authorized controlled material orders by helping them locate sources of supply. The Priorities and Directives Division will, in appropriate cases, issue directives on certain producers of controlled material or finished products, directing them to accept or fulfill specified orders in preference to other orders bearing DO ratings or allotment symbols. Such directives are issued in a relatively small number of cases, generally at the request of the person seeking expeditious fulfillment of the order in question, and with the concurrence of a Claimant Agency or Industry Division which attests to the essentiality of the order to a military or other vital program. In an effort to break the machine tool production bottleneck which was confounding Government officials from the President down, NPA established the DX rating which takes precedence over all DO ratings. It is contemplated that authority to use this super-rating will continue to be granted only in furtherance of one or another top priority program.

D. Appeals

A person whose application for an adjustment or exception or for a supplemental allotment has been denied may, within 45 days of such denial, file a notice of appeal with the NPA Appeals Board, indicating, among other things, the nature of the action appealed from and the grounds of appeal. The Appeals Board, consisting of three members,

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200 NPA Reg. 2, §§ 3, 10(a).
201 In certain instances, the submission of a supplemental application for an allotment is an empty gesture. However, the Appeals Board takes jurisdiction of the matter only on an appeal from the Industry Division's decision on such a supplemental application. See NPA Reg. 5, § 2(a).
202 NPA Reg. 5, § 4(b)(2).
203 NPA Reg. 5, § 4(a).
CORNELL LAW QUARTERLY

is responsible only to the Administrator of NPA. The Board does not make policy and looks to the General Counsel for interpretations of NPA regulations and orders. Its function is to correct such inequitable treatment as an applicant may have received at the hands of an Industry Division or of the administrator of a regulation or order. Grounds for appeal are that the decision of such division or administrator "works an exceptional and unreasonable hardship . . . not suffered generally by others in the same trade or industry, or in the same relative position," that such decision "results in unreasonable discrimination," or that it "is not in the public interest or in the interest of national defense." The appellant may request a hearing in his notice of appeal, but the holding of a hearing, whether or not requested, rests in the discretion of the Board. Hearings, if held, are public unless otherwise ordered by the Board. These hearings are more reminiscent of a round table discussion than of a judicial proceeding. No formal examination and cross-examination of witnesses takes place, and judicial rules of evidence are not observed. In fact, the appellant need not be represented by counsel. Decisions are made by a majority of the Board members who heard or considered the appeal. In the event of a tie, the appeal is considered denied. The Board is not required to furnish written opinions. It recognizes that delay may frequently be the equivalent of denial of relief, and most cases are disposed of within a matter of weeks after the notice of appeal is filed. The Appeals Board has at its disposal a special reserve allotment account on which it may draw in making allotments of controlled materials in cases which, it has decided, merit relief. However, the extent of relief is contingent on the availability of such allotments. A person who wishes to construct a 60 story skyscraper may be able to present a heartrending case of hardship, yet it is unlikely that the Board would be able to afford him relief. To date, 477 cases have been submitted to the Appeals Board. Of these, 96 have been granted in whole or in part; 189 have been denied; 34 are pending; 158 have been dismissed or withdrawn. Most appeals are based upon

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204 NPA Reg. 5, § 2(a).
205 NPA Reg. 5, § 4(a) (5).
206 NPA Reg. 5, § 7.
207 Ibid.
208 NPA Reg. 5, § 8.
209 NPA Reg. 5, § 5(b).
210 NPA Reg. 5, § 5(d).
211 These figures were compiled as of April 4, 1952. The Appeals Board of the War Production Board disposed of over 42,000 cases within two years of its creation. Of these, it granted more than 38,000 appeals, wholly or in part. See O'Brian and Fleischmann,
the contention that the decision from which the appeal is taken "works an exceptional and unreasonable hardship" or that such decision is not in the interest of national defense or in the public interest. However, some appeals are founded on "unreasonable discrimination." Two questions arise: (1) in relation to whom must discrimination be shown; (2) how may it be shown. NPA Regulation No. 5 does not indicate as between whom the alleged discrimination must have occurred. If discrimination is claimed in the quantity of controlled materials allotted for the production of a particular product, it seems reasonable to assume that discrimination must be shown in relation to others producing the same or similar products. This assumption may not be justified if the alleged discrimination arose from the denial of an application for an exception or adjustment from an order or regulation. If I suspect that one or more of my competitors have received preferential treatment, one way in which I could try to confirm my suspicion would be to examine the detailed reports and applications submitted to NPA by such competitors and the action taken thereon by that agency. Do I have access to this material? Under the Defense Production Act,

The President shall be entitled . . . to obtain such information from, require such reports and the keeping of such records by, . . . any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder.212

It is provided, furthermore, that

Information obtained under this section which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information shall not be published or disclosed unless the President determines that the withholding thereof is contrary to the interest of the national defense.213

The Administrative Procedure Act supplements the above requirements with the following:

Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.214

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213 50 Id. § 2155(e).
214 Administrative Procedure Act, 60 Stat. 238, 50 U.S.C. § 1002(c) (1946). It appears doubtful whether a person who alleges discriminatory treatment in relation to another is a person "properly and directly concerned" within the meaning of this section. Are files relating to CMP allotments "matters of official record"?
In authorizing the President or administrative agencies to treat information received and "matters of official record" as confidential, Congress has, in effect, left the determination of who may have access to which records to sound administrative judgment. Believing that most enterprises would prefer to have the information they submit, as well as the quantities of material they have been allotted, treated as confidential, whether or not they specifically request confidential treatment, NPA has taken the position that such information shall not be subject to inspection by competitors or other members of the public. It was anticipated that, were such inspection permitted, the cry of discrimination would be raised as a pretext for "fishing expeditions," the primary aim of which would be the discovery of information relating to the operations of competitors. Requests for information contained in reports and applications submitted to NPA and relating to allotments received can be addressed to the persons who furnished such data and received the allotments. If they are not prepared to impart the information, they presumably would not wish NPA to do so. In judging the wisdom of NPA's position, two elements should be borne in mind. In the first place, the criteria in accordance with which allotments are made to various industries are publicized; an applicant generally can determine by reference to these criteria whether or not he received allotments in the proper amounts. Secondly, any records in the possession of NPA may, of course, be examined by the Appeals Board. An appellant may request the Board to investigate his charge of discrimination. Since, in any event, the Board, and not the appellant, would be the arbiter of whether or not "unreasonable discrimination" had occurred, the fact that the appellant may not himself inspect agency records is not likely to result in a denial of justice.

V. ENFORCEMENT

Wilful violation of any rule, regulation or order issued under the President's priorities and allocation powers constitutes a crime. The President is also specifically authorized to seek injunctions or restraining orders against any person who, in his judgment, "has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of (The Defense Production Act)." The  

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215 Defense Production Act, 64 Stat. 799, 50 U.S.C. App. § 2073 (Supp. 1950). Such crime is punishable, upon conviction, by a fine of not more than $10,000 or imprisonment for not more than one year, or both.

216 Defense Production Act, 64 Stat. 817, 50 U.S.C. App. § 2156(a) (Supp. 1950), as amended, 65 Stat. 139, 50 U.S.C.A. App. § 2156(a) (1951). In contrast to the criminal penalty section, willfulness of violation is not a prerequisite to the granting of an injunction.
The Controlled Materials Plan

United States district courts are given jurisdiction "of violations of this Act or any rule, regulation, order, or subpoena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpoena thereunder." The Attorney General is given "supervision and control" of all litigation arising under the Act. Pursuant to agreement with the Attorney General, NPA compliance officials perform the investigative functions but transfer to the Department of Justice all cases in which prosecution appears warranted. The Defense Production Act imposes no limitations on the time within which action must be commenced. Consequently, the three year period established by the general Federal Statute of Limitations applies. Action for violation of the Act, or of an order or regulation issued thereunder, may be brought after the termination of the Act, or of the order or regulation, provided only that the alleged violation took place prior to such termination.

Criminal action could also be instituted against a person who made "any false, fictitious or fraudulent statements or representations" to NPA, notwithstanding the fact that the statement was not made under oath and that the Government suffered no loss and was not deceived.

NPA compliance investigators, operating out of the Washington office as well as out of numerous field offices, examine the records of business enterprises, large and small, with a view to uncovering possible violations of orders or regulations. Whereas voluminous files have been built up by the compliance staff, the accent, particularly during the first months of CMP, was on education and persuasion. It was recognized that the rules of this new game were not easy to digest and that the business...

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In further contrast to that section, § 2156(a) relates only to violations of the Defense Production Act and not to violations of any regulation or order issued thereunder. However, § 2156(b) bestows jurisdiction upon U.S. District Courts "to enjoin any violation of this Act or any rule, regulation, order, or subpoena thereunder."

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217 50 id. § 2156(b).
218 Ibid.
220 Defense Production Act, 64 Stat. 817, 50 U.S.C. App. § 2156(b) (Supp. 1950). See also United States v. Hark, 320 U.S. 531 (1944); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947). Both of these cases uphold the right to prosecute after revocation of a regulation, for a violation committed while the regulation was in force.
222 Marzani v. United States, 168 F. 2d 133 (D.C. Cir. 1948), aff'd, 335 U.S. 895 (1948).
223 United States v. Presser, 99 F. 2d 819 (2d Cir. 1938).
community should, as a matter of fairness, be given some time in which to familiarize themselves with the intricacies of the plan.

The sole criminal action which has been instituted to date for alleged violation of an NPA regulation resulted in the acquittal of the defendant. So far, no civil actions have been brought by the Government to enjoin violations of NPA regulations. It must be noted, however, that assurances of vigorous enforcement have been given, and that a number of “suspension orders” have been issued against persons who were found to have violated NPA regulations. The suspension order technique, employed extensively during World War II, deserves discussion.

A suspension order has the effect of cutting off a concern from priority assistance and from material allocated by NPA for a specified period. The order is a negative exercise of the priorities and allocation powers. NPA allocates “away from” the person against whom the order is issued. It has been contended vehemently that to deny a person the right to receive materials under control is not, in the first instance, an exercise of the power to allocate, but the unauthorized imposition of an administrative penalty. Such a contention was upheld by a federal district court. Shortly thereafter, however, the United States Supreme Court ruled in L. P. Steuart & Bros., Inc. v. Bowles that the power to allocate materials included the power to issue a suspension order against a retailer and to withhold rationed materials from him, it having been established that he had acquired and distributed such materials in violation of regulations. The Court held:

226 Of the eight proceedings in which decisions had been reached by a hearing commissioner as of April 14, 1952, each resulted in the issuance of a suspension order. The Chief Hearing Commissioner modified one order on appeal, and an appeal is now pending from another.
227 As of October 1, 1944, the War Production Board had issued 635 suspension orders, 193 consent orders and 282 probation orders. Fifty-three of these suspension orders were modified or revoked on appeal to the Chief Compliance Commissioner. To this effect, see O'Brian and Fleischmann, The War Production Board Administrative Policies and Procedures, 13 Geo. Wash. L. Rev. 1, 51 (1944).
228 Criminal prosecutions and suspension proceedings are complementary in nature. Both types of actions may be instituted simultaneously or at different times against a supposed violator.
229 Simon Hardware Co. v. Nelson, 52 F. Supp. 474 (D.C. 1944). The Court of Appeals refused to affirm this decision on the ground that the issue had become moot. The case was remanded with instructions to the District Court to set aside its previous order and dismiss the case as moot. 145 F.2d 386 (D.C. Cir. 1944).
230 322 U.S. 398 (1944), affirming 140 F.2d 703 (D.C. Cir. 1944).
We agree that it is for Congress to prescribe the penalties for the laws which it writes. Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender.

...From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. [P]rudence might well dictate the avoidance or discard of such inefficient and unreliable means of distribution of a scarce and vital commodity. Certainly we could not say that the President lacked the power under the Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war.

...The suspension order rests on findings of serious violations repeatedly made. These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of the violations thus negatives the charges that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation.

This decision has been followed in numerous other cases. Most of these cases arose from disposition of materials in violation of OPA rationing regulations. However, the holdings are believed to be applicable with equal force to situations involving wrongful acquisition or use of scarce materials. It is not a defense that the violation was committed by an employee or agent without the participation or knowledge of the employer.

For how long a period may a suspension order run? If the rationale of such an order were that it is a mere correction of past excessive acquisition or use, it would appear that the order should stay in effect only until a compensating adjustment has been achieved. On the "inefficient and wasteful conduit" theory adopted by the Supreme Court in the Steuart case, on the other hand, the only limitation would seem to be the duration of the allocation system. This is not to say, however, that a more limited suspension period may not be imposed as a matter of

231 322 U.S. at 404-406. For discussion of the legality of suspension orders issued by federal emergency agencies, see 32 Geo. L.J. 152 (1944) and 33 Geo. L.J. 45 (1944).

232 Joliet Oil Corp. v. Brown, 143 F.2d 673 (7th Cir. 1944); Talbert v. Sims, 143 F.2d 958 (4th Cir. 1944), citing Brown v. Wilemon, 139 F.2d 730 (5th Cir. 1944), cert. denied, 322 U.S. 748 (1944); Country Garden Markets v. Bowles, 141 F.2d 540 (D.C. Cir. 1944). See also Bowles v. Jacobson, 145 F.2d 975 (5th Cir. 1944).


234 This approach is taken in Gallagher's Steak House v. Bowles, 142 F.2d 530 (2d Cir. 1944).

235 Suspension orders, issued for the duration of rationing, were upheld in Bowles v. Loveman, 147 F.2d 645 (4th Cir. 1945) and in DiMelia v. Bowles, note 233 supra.
The Defense Production Act of 1950, from which the power to allocate is derived, will expire by its own terms, on June 30, 1952, unless it is extended by Congress. Could a suspension order issued today cover a period going beyond June 30, 1952? It was held during the war that orders couched in language such as "until the end of shoe rationing" are valid and may survive the original expiration date of the act under which they were issued, provided, of course, that the act is extended or that other legislation conferring similar allocation powers on the President takes its place.

In the Steuart case, "serious violations repeatedly made" had been established. Must a chain of serious violations be shown in order to make the "inefficient and wasteful conduit" theory operative? Conceivably, a finding of one serious violation may lead to the conclusion that the offender should not be trusted with the distribution or use of materials under allocation. Some controversy has centered around the question of whether it must be established that a violation was willful in order to justify the issuance of a suspension order. It is not disputed that, as a matter of statutory law, a finding of willfulness is not a condition precedent to the issuance of such an order. This is well established. The contention that willfulness must nevertheless be found is based upon the standard "violations" section appearing in all NPA orders and regulations. This section reads as follows:

Any person who willfully violates any provision of this regulation or any other regulation or order of the National Production Authority, or who willfully conceals a material fact or furnishes false information in the course of operation under this regulation, is guilty of a crime and, upon conviction, may be punished by fine or imprisonment, or both. In addition, administrative action may be taken against any such person to suspend his privilege of making or receiving further deliveries of materials or using facilities under priority or allocation control and to deprive him of further priorities assistance. (Emphasis supplied.)

Suspension orders have been issued for as short a period as one week. See Rosenbaum Co. of Pittsburgh v. Bowles, 62 F. Supp. 460 (W. D. Pa. 1945), involving carelessness in misplacing rationing stamps. The logic of discarding for a limited period a conduit which has been found wasteful is subject to question.


Bowles v. Loveman, supra note 235; DiMella v. Bowles, supra note 233.

In Markall v. Bowles, 58 F. Supp. 463 (N. D. Cal. 1944), enforcement of a suspension order issued for the duration of gasoline rationing was enjoined upon the ground that it was too harsh and unreasonable.


CMP Reg. 1, § 26, and analogous sections in other regulations and orders.

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241 CMP Reg. 1, § 26, and analogous sections in other regulations and orders.
The words, "any such person," so the argument runs, relate to "any person who wilfully violates;" an administrative agency should be bound by its own regulations; consequently, administrative action may be taken only against a wilful violator. NPA counsel have taken the position that these "violations" sections are admonitory in nature and that they do not constitute a self-imposed limitation upon NPA's power to take corrective action.

Since suspension orders are issued in the exercise of the power to allocate, and inasmuch as NPA is not bound by the terms of the Administrative Procedure Act, notice and hearing would not appear to be required as a matter of law. In fact, however, every effort has been made to insure adequate notice and a full and fair hearing. Prominent attorneys in various cities have been appointed hearing commissioners and have been given authority to issue suspension orders. These commissioners, who are not connected with the Office of General Counsel, are responsible to the Chief Hearing Commissioner in Washington, who, in turn, is responsible directly to the Administrator of NPA. Rules of practice governing proceedings before hearing commissioners have been promulgated.

The overture to a suspension proceeding consists of the issuance of a "charging letter." If the respondent wishes to answer the charges, he must answer within ten days. Each charge is deemed denied unless it is admitted. If the respondent fails to answer, NPA counsel may proceed to prove its case. Hearings are of a quasi-judicial nature. Counsel for respondent may examine and cross-examine witnesses but need not adhere to formal rules of evidence. He may request the issuance of subpoenas, requiring the attendance of witnesses for purposes of testimony or for the production of relevant documents. After testimony

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242 Matter of M & B Metal Products Co., Brief of Respondents on Motion to Quash. The motion was overruled by the Hearing Commissioner. (Suspension Order 7, February 25, 1952). An appeal from the order was dismissed by the Deputy Chief Hearing Commissioner on April 14, 1952, with an opinion affirming that the standard "violations" provision is admonitory only, and that willfulness need not be shown.

243 Except as to the requirements of § 3 of that Act; Defense Production Act, 64 STAT. 819, 50 U.S. C. APP. § 2159 (Supp. 1950).


245 Ibid.


247 Id. §§ 2(a)-(c).

248 Id. § 2(e).

249 Id. § 2(f).

250 Ibid.

251 Id. § 2(n). The President may compel the testimony of a witness and the production
has been concluded, proposed findings, conclusions and supporting briefs may be submitted, and oral argument thereon may be allowed.\textsuperscript{262} Suspension orders can be based not only on violations of NPA orders, regulations, or directives, but also on material misrepresentations.\textsuperscript{253} Both the respondent and the Government may appeal to the Chief Hearing Commissioner from the provision of a suspension order.\textsuperscript{254} The decision of that officer is not subject to further administrative review. In accordance with well established principles of judicial review of administrative determinations, the respondent may, of course, seek an injunction against the enforcement of the order. The Chief Hearing Commissioner is authorized, upon a showing of irreparable harm, to grant temporary suspension orders\textsuperscript{255} and stays pending appeals;\textsuperscript{256} he may issue consent orders\textsuperscript{257} and revoke or modify suspension orders previously issued.\textsuperscript{265}

Of the eight suspension orders issued by NPA to date, seven were based on use of critical materials in excess of authorized levels, and one on acceptance of steel in violation of inventory limitations and on failure to maintain prescribed records. In the latter case, all allotments, allocations and priority assistance were withdrawn for a period of 90 days, and respondents were prohibited from acquiring materials under NPA control during the same period. No restriction was imposed upon the use or disposition of materials in inventory at the time the order was issued.\textsuperscript{259} Three of the orders withdrew all allotments, allocations and priority assistance for periods of 27 days, 90 days and six months, respectively, and prohibited the acquisition, use or disposition of any materials subject to NPA control for the same periods.\textsuperscript{260} One order withdrew allotments, of documentary evidence, even if such testimony or other evidence may tend to incriminate the person presenting the same. However, "no natural person shall be prosecuted or subjected to any penalty of forfeiture in any court, for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination." Such immunity does not vest any right to priorities assistance or to the allocation of materials. See Defense Production Act, 64 Stat. 816, 50 U.S.C. App. § 2155(b) (Supp. 1950).

\textsuperscript{252} Impl. 1 to NPA—GAO 16-06, § 2(g).
\textsuperscript{253} Id. § 2(k).
\textsuperscript{254} Id. §§ 3(a), (b).
\textsuperscript{255} Id. § 5(a).
\textsuperscript{256} Id. § 4.
\textsuperscript{257} Id. § 5(b).
\textsuperscript{258} Id. § 5(c).
\textsuperscript{260} S. O. 1, issued Oct. 15, 1951, against Delaware Ave. Holding Corp. & Jas. C. Breyfogle, involving the unauthorized use of 22 tons of steel beams in construction (90-day suspension); S. O. 4, issued Nov. 30, 1951, against Alside, Inc. for use of over three million pounds of
allocations and priority assistance for 45 days and provided that allotments of steel made thereafter be reduced in the amount of 50 tons per month until a reduction of 548 tons had been effected.\textsuperscript{261} Another order withdrew allotments, allocations and priority assistance for three months and stipulated that during those months the respondent's use of aluminum in the manufacture of collapsible tubes be reduced to 20 percent of the use otherwise permitted.\textsuperscript{262} The remaining two orders provided for a reduction in use during one calendar quarter in a quantity equal to the excess found to have been consumed theretofore.\textsuperscript{263}

It is believed that the suspension order procedure outlined above is in line with fundamental principles of due process in that it separates the judicial and the prosecuting functions and provides for adequate notice and a full hearing before an impartial tribunal, with the right to compel the attendance of witnesses, and to cross-examine them. The terms of the suspension orders issued to date certainly do not evince a proclivity, on the part of hearing commissioners as a group, toward administrative despotism.

VI. DECONTROL

Much speculation among control-weary businessmen currently revolves around the probable duration of CMP. The plan is, in essence, self-liquidating, since its ultimate objective is to foster conditions under which stringent production controls will become superfluous. NPA had estimated initially that, barring all-out war and other developments not now foreseen, CMP could be placed in mothballs during the latter half of 1953.\textsuperscript{264} The increased availability of certain carbon steel shapes, notably of sheet and strip,\textsuperscript{265} and a significant improvement in the aluminum in excess of authorized amounts (six months suspension); this order was modified on appeal. S. O. 5, issued Dec. 4, 1951, against Pacific Tire & Rubber Co., involving unauthorized consumption of approximately 650,000 pounds of new rubber and of over 450,000 pounds of new rubber in the manufacture of replacement passenger tires (27-day suspension).

\textsuperscript{261} S. O. 7, issued Feb. 25, 1952, against M & B Metal Products Co., involving unauthorized use of 675 tons of iron and steel products. An appeal from this order is now pending.

\textsuperscript{262} S. O. 8, issued Mar. 26, 1952, against Victor Industries Corp., for consuming 25,000 pounds of aluminum in excess of authorized use.

\textsuperscript{263} S. O. 2, issued Oct. 19, 1951, against Nat. Brewing Co. & J. C. Hoffberger for unauthorized use of 1,675,000 tin cans; S. O. 3, issued Dec. 4, 1951, against Armstrong Rubber Co., involving excess consumption of 920,000 pounds of new rubber.

\textsuperscript{264} Assuming maintenance of present levels of defense expenditures and the continued existence of statutory authority through extension of the Defense Production Act or the enactment of similar legislation.

\textsuperscript{265} The decrease in the demand for certain types of steel is believed to be attributable, in large measure, to curtailments in production necessitated by shortages of copper, aluminum and of certain other products and materials.
situation,\textsuperscript{266} have spurred demands for early "decontrol." It appears likely that a gradual relaxation of controls will precede decontrol, and that decontrol, itself, may be accomplished in a piecemeal fashion.

Among the interim steps which conceivably might be taken are the following: (1) levels of allotments, particularly to manufacturers of civilian products, could be raised substantially; (2) the self-authorization limits under Direction 1 to CMP Regulation No. 1 could also be raised; (3) Direction 4 to CMP Regulation No. 1, which now authorizes the ex-allotment purchase of imported steel under specified conditions, could be expanded to permit ex-allotment acquisition of used and secondary controlled materials, of "merchant trade products,"\textsuperscript{267} of "conversion steel," of "merchant trade products,"\textsuperscript{268} of imported copper and aluminum, and of imported A products; (4) the definition of "controlled material" could be amended to exclude imported, used or secondary materials; (5) the placing of unrated orders for certain controlled materials could be permitted after the expiration of lead times, to the extent to which producers may be able to accept such orders; (6) restrictions on the percentage of allotments which may be ordered for delivery during any one month could be relaxed;\textsuperscript{268} (7) inventory controls could be relaxed; (8) the burden of paper work could be diminished through simplification of application and reporting procedures.

It is probable that one or another of the steps listed above will be taken in the near future. Decontrol of individual controlled material shapes has also been discussed. Such action was taken in the case of non-nickel bearing stainless steel.\textsuperscript{269} However, decontrol of individual shapes raises serious administrative problems. For instance, in order to give manufacturers maximum purchasing flexibility, allotments are being made in terms of such broad classifications as carbon steel and copper wire mill products, rather than in terms of bar, sheet, plate and so forth. Were carbon steel sheet to be decontrolled overnight, persons who would have used the bulk of their allotments for sheet would be free to use those same allotments for heavy plate and other shapes in tight supply, thus aggravating existing scarcities. It is the consensus of opinion among defense officials that sudden decontrol of individual shapes would create serious disruptions. Recent statements by the heads of DPA and NPA suggest the possibility of decontrolling most carbon steel and alloy steel

\textsuperscript{266} Domestic production of aluminum is increasing substantially in consequence of the completion of new facilities.

\textsuperscript{267} Such as nails, barbed wire, roofing, etc.

\textsuperscript{268} These restrictions are imposed by Dir. 3 to CMP Reg. 1.

\textsuperscript{269} Dir. 9 to CMP Reg. 1.
shapes as of the first quarter of 1953. Such a decision should be made several months in advance of the quarter in which it is to take effect, in order that necessary adjustments can be made.

As of May of 1952, the date of complete abandonment of CMP cannot be predicted with any degree of accuracy. It seems likely that a modified CMP will be retained throughout 1953, but that certain materials now under control will be decontrolled before that time.