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# SOME ASPECTS OF PRICE CONTROL IN WARTIME

PAUL F. HANNAH†

Uncle Sam is about to receive his first baptism by almost total immersion in price control. Passage of H. R. 5479, the Emergency Price Control Act of 1941, was, at the time of going to press, expected within a few weeks.

Uncle Sam has been sprinkled, at different times, and in many of his sovereign states, with price control.<sup>1</sup> He waded up to his knees in the Jordan of price-fixing in World War I. Whether the immersion method now contemplated, which would leave undunked both agricultural prices and wages, will, if finally adopted, be more effective in cleansing away the sins of inflation than measures taken heretofore, the future must decide.<sup>2</sup>

Price-fixing in World War I, and during World War II in England and Canada, serves as prologue to the measure America will soon find shaking her entire economy.

## I. PRICE CONTROL DURING WORLD WAR I

Price control authority during World War I was given to a variety of government agencies. None except the Fuel Administration and the Food Administration had express statutory authority for price-fixing. Maximum prices were regulated by the War Industries Board, the Price-Fixing Committee, the Food and Fuel Administrations, the Emergency Fleet Corporation, the Railway Administration, the War and Navy Departments, the Federal Trade Commission, and the Department of Agriculture.<sup>3</sup>

Of these price-fixing agencies, the War Industries Board and its successor, the Price-Fixing Committee, were perhaps the most important.

### *A. Price Regulation by the War Industries Board and the Price-Fixing Committee*

On July 28, 1917, the Council of National Defense, created by the Na-

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†The writer wishes to express his appreciation for the assistance of Brunson MacChesney, Assistant General Counsel of the Office of Price Administration, and for the assistance of the office of Senator Robert Taft, in making available various memoranda.

<sup>1</sup>See *Hegeman Farms Corp. v. Baldwin*, 6 F. Supp. 297 (S. D. N. Y. 1934), *aff'd*, 293 U. S. 163; *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934); *United States v. Morgan*, 61 Sup. Ct. 999 (1941). For history of price fixing during the Revolutionary War, see (1920) 33 HARV. L. REV. 838-841; McAllister, *Price Control By Law in the United States* (1937) 4 LAW AND CONT. PROB. 273-300; Clark, *Emergency Legislation Prior to December 1917*, U. S. Justice Dept., G. P. O. 1918; Pennsylvania Acts, 1777, p. 59.

<sup>2</sup>For divergent opinions, see A. Wyn Williams, *We Can Learn About Price Fixing from England* (1941) 29 NAT. BUS., 40-42; O. P. A. Release, PM 1421 (Oct. 22, 1941); *Effects of the Defense Program on Prices, Wages and Profits* (Sept. 30, 1941) Brookings Institution.

<sup>3</sup>Garrett, *Government Control over Prices* (1920) G. P. O., 38.

tional Defense Act of August 29, 1916,<sup>4</sup> established the War Industries Board to co-ordinate the war effort and gave it specific directions "to consider price factors."

Previously, the General Munitions Board, created on March 31, 1917, had been authorized by the Secretary of War to determine fair and just prices to be paid by the government, and in emergencies had fixed specific prices. The War Industries Board went further and exercised price controls over a number of basic raw materials, including copper, iron, steel, cement, lumber, zinc, and aluminum. Its price-fixing functions were theoretically all taken over by the Price-Fixing Committee on March 4th, when the President, in reconstituting the Board and redefining its function as the co-ordinator of the war effort, provided that the Board, "in the determination of prices . . . should be governed by the advice of a committee." The Board, made independent of the National Council of Defense on May 28, 1918, continued in fact to exercise controls over prices of many commodities. The Committee, concerning itself primarily with fixing prices of production, did so generally only after conferences with the industries involved. It began as an advisory body concerned solely with protecting the government in its purchases; it ended with protection also of the public, particularly with respect to building materials, wools, and cotton textiles.

Both the War Industries Board and the Price-Fixing Committee accomplished their results, for the most part, by negotiating agreements with industry. Thus, on September 24, 1917, in fixing iron and steel prices the Board announced:

"The President has approved an agreement between the War Industries Board and the steel men, fixing the following prices, which became effective immediately and are subject to revision January 1, 1918."<sup>5</sup>

Behind the agreements, however, were the powers to requisition goods, take

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<sup>4</sup>39 STAT. 649 (1916).

<sup>5</sup>*Hearings before Senate Committee on Agriculture and Forestry, 77th Cong., 1st Sess. (1941) 52, 56.* F. W. Taussig, a member of the Price Fixing Committee of the War Industries Board, has stated:

"The prices fixed were in all cases reached by agreement with the representatives of the several industries. In strictness they were agreed prices rather than fixed prices. The agreements were usually reached in cordial co-operation with the producers concerned, and thus were, in reality, voluntary. There were cases, however, in which they were agreements only in name. The representatives of some industries, though they accepted them, did so virtually under duress. In these cases the Committee to all intents and purposes decreed prices and was enabled to impose them, under the form of agreement, by a more or less veiled threat of commandeering, and also by the certainty that public opinion would condemn those who failed to accede." (Garrett, *Government Control Over Prices* (1920) G. P. O., 239).

over plants, or to place commandeering orders, and these powers as well as the war time spirit, doubtless helped to bring agreement.<sup>6</sup>

Occasionally, however, prices were fixed without calling in the industry or without its agreement. For example, on August 19, 1918, the Fair Price Committee by order<sup>7</sup> fixed maximum prices on woolen rags, the prices to be subject to revision in 10 weeks after investigation by the Federal Trade Commission.

Robert S. Brookings, Chairman of the Price-Fixing Committee, plainly informed producers on July 9, 1918:

"The President has made it perfectly clear to us, that we are not a body that meets simply for the purpose of registering the wishes of the industry. That is not what we are appointed for. We do try to agree with the industry, but failing in that, our instructions are to fix prices, and if we cannot fix it [sic] by agreement, we have to fix it by order, although we do not like to do that."<sup>8</sup>

Little or no statutory or other express authority existed for price control by either the War Industries Board or the Price-Fixing Committee.<sup>9</sup> The former was at first a subordinate part of the Council of National Defense,

<sup>6</sup>As Mr. Baruch advised the President (Putney, Bryant, *Price Control in War Time* (1940) 2 ED. RES. REP., No. 16, 313):

"The prices imposed upon the steel manufacturers and copper producers, if resisted, could have been enforced by seizing the mines and factories under power conferred . . . in certain appropriation acts; and the existence of this power was sufficient to compel obedience to prices without exercising the power."

Mr. Baruch has said in his book (*AMERICAN INDUSTRY IN THE WAR*, 440):

"We used a good many euphemisms during the war for the sake of national morale, and this one of 'price fixing by agreement' is a good deal like calling conscription 'Selective Service' and referring to registrants for the draft as 'mass volunteers'. Let us make no mistake about it: we fixed prices with the aid of potential Federal compulsion and we could not have obtained unanimous compliance otherwise."

<sup>7</sup>The peremptory character of the order is indicated by its text:

"The Price Fixing Committee of the War Industries Board has fixed the following maximum prices upon various grades of rags, effective on all sales made from August 19, and remaining in effect until October 1, 1918, and thereafter, pending the compilation of data which is to be furnished by the Federal Trade Commission. These prices are net f.o.b. shipping points and are to apply to sales made both to the Government and to the public." (Minutes, Price Fixing Committee, August 19, 1918. Senate Committee Print, No. 5, 74th Cong., 2d Sess., 1095).

<sup>8</sup>Minutes of the War Industries Board, Senate Committee Print, No. 4, 74th Cong., 1st Sess., 352.

<sup>9</sup>At various times it has been claimed that the following acts, read together, imply the power exercised: Council of National Defense Act, 39 STAT. 649 (1916), 10 U. S. C. § 1393 (1916); Naval Emergency Fund Act, 39 STAT. 1168; Emergency Shipping Fund Act, 40 STAT. 182; Food Control Act, 40 STAT. 276 (1917), 43 U. S. C. § 431 note (1917); National Defense Act, 39 STAT. 166 (1916), 10 U. S. C. §§ 2, 4, 5 (1916); Espionage Act, 40 STAT. 225 (1917), 22 U. S. C. §§ 243, 244, 245 (1917); Trading-with-the-Enemy Act, 40 STAT. 411 (1917), 34 U. S. C. § 1 (1917), and the Overman Act, 40 STAT. 553 (1918), 50 U. S. C. § 33 note (1918).

created as a peace time planning board by the Act of August 29, 1916,<sup>10</sup> mainly to "supervise and direct investigations and make recommendations" on national defense matters. Possibly within its powers was "the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the nation," although the grammatical construction employed would indicate that it could only investigate and recommend such creations. But the National Council was given no price-fixing authority, and Secretary of War Baker, writing on June 30, 1917, to W. S. Gifford, Director of the Council, protesting the fixing of coal prices by the Committee on Coal Production, said:

"I, therefore, as President of the Council of National Defense, write to say that the Council of National Defense has no legal power, and claims no legal power, either to fix the price of coal, or to fix a maximum price for coal or any other product."

The War Industries Board acquired no new functions, either under the Overman Act of May 20, 1918, or by express delegation from the President, when it was made independent. The Price-Fixing Committee received a grant of power from neither the Congress nor the President. The President himself had been given by Congress no price-fixing authority.<sup>11</sup>

Statutory authority was, however, little missed, and was not even vigorously sought. The reason is clear. As was stated in the *McFarland* case:

"For the most part, as in this case, everybody acquiesced in whatever seemed best to those charged with the immediate responsibility of action. When growers, dealers, and manufacturers accepted the scale of prices dictated by the War Industries Board, it is immaterial whether the Board had or had not any legal power to fix them."<sup>12</sup>

Parties who accepted contracts stipulating fixed prices could later claim no "public taking."<sup>13</sup> Promises the government had no right to require, such as the repayment to the government of excess charges, were held to be binding.<sup>14</sup>

<sup>10</sup>39 STAT. 649 (1916), 50 U. S. C. §§ 1-5 (1928).

<sup>11</sup>United States v. *McFarland*, 15 F. (2d) 823 (C. C. A. 4th 1926).

<sup>12</sup>15 F. (2d) at 838.

<sup>13</sup>*American Smelting and Ref. Co. v. United States*, 259 U. S. 75, 42 Sup. Ct. 420 (1922).

<sup>14</sup>In *United States v. Smith*, 285 Fed. 751 (D. C. Mass. 1922), for example, a demurrer to a suit brought by the Government to recover an excess commission from sale of wool to the Government, upon an agreement contained in the permit not to charge more than this amount, was dismissed, the court saying:

"The defendant was under no compulsion to take a permit [to deal in wool]. He could do so, or not, as he chose. If he had refused, doubtless he would have been discriminated against by the Board. Balancing advantages against disadvantages, it was for him to decide whether he would take a permit or stand on his rights without one. He took one and made the agreement here in suit. It was his voluntary act. *Hamilton v. Dallin*, 21 Wall. 73, 90, 22 L. ed. 528; *Silliman v. United States*, 101 U. S. 465, 25 L. ed. 987. It is said in *Daniels v. Tearney*, 102 U. S. 415, at p. 421 (26 L. ed. 187) that 'where a party has

Thus were the nation's prices regulated twenty years ago: a magnificent demonstration of the patriotism of the people—and of the exercise of power to create additional power, the grant of which Congress had withheld.

*B. The Food and Fuel Control Act*

Soon after the declaration of war on April 6, 1918, the need to increase and conserve the food and fuel supply for sake of government and public became apparent. Congress enacted the Food and Fuel Control Act<sup>15</sup> on August 10, 1917, for "encouraging the production, conserving the supply, and controlling the distribution of food products and fuel." This Act made unlawful hoarding, waste, monopolization, and profiteering in foods, feeds, fuel, fertilizers, and machinery and equipment required to produce these necessities. It gave the President extensive control, through licensing power, over importation, production, and distribution, and gave *prima facie* correctness to his determinations of what were fair prices and charges. The only prices the President was directly authorized to fix were a reasonable guaranteed price for wheat and prices for coal and coke. Wheat prices, the statute required, had to be based upon a \$2.00 basic price for a certain grade. Coal and coke prices were to be based upon cost of production (including, in the case of producers, operation and maintenance costs, depreciation, and depletion) plus a "just and reasonable profit."<sup>16</sup> It was expressly stated that fixation of coke and coal prices was not to invalidate contracts previously made in good faith.

Control over food was delegated by the President to a Food Administrator, who operated through federal food administrators in each state and county. The backbone of control was the license system, and before the war ended more than 260,000 persons and firms had been brought under license, although the Act exempted from control farm and garden producers and retailers whose gross annual sales fell below \$100,000. Although the Act did not specifically empower, except in the case of wheat, the fixing of either minimum, absolute, or maximum prices on foodstuffs, the requirement in licenses that the licensees should not receive more than a "reasonable margin of profit" coupled with the fixing of this margin by the Food Administration, and the widespread publicity given "fair price" schedules established by price

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availed himself for his benefit of an unconstitutional act, he cannot . . . aver its unconstitutionality as a defense'. The defendant has had the benefit of the agreement, and I think he should be held to the burden of it. United States v. Powers (W. D. Mich., July 5, 1921) 274 Fed. 131."

<sup>15</sup>40 STAT. 279 (1917).

<sup>16</sup>Some doubt may exist whether factors of cost and profit had to be considered in fixing fuel prices when the Federal Trade Commission was not used. Cf. MacDonald Coal Mining Company v. United States, 56 Ct. Cl. 440, 446 (1921) and Highland v. Russell Car and Snow Plow Co. 279 U. S. 253, 259 (1928).

interpreting boards and fair price committees, resulted in fact in effective price control. A majority of the violations were disposed of by state administrators by requirements of restitution or contribution to Red Cross or Liberty Bond drives or by temporary suspension of licenses; out of nearly 10,000 cases handled by the Enforcement Division between August 10, 1917, and December 31, 1918, only 65 resulted in requisition and 72 in criminal proceedings.<sup>17</sup>

The control over coke, coal, and petroleum by the Fuel Administration followed much the same lines as that over food, especially in the case of petroleum. The President had been empowered, however, to fix coal and coke prices, and price-fixing, as might have been expected, was more direct. No criminal penalties had been provided in the original Food and Fuel Control Act in the case of foods, but heavy provisions for fines and imprisonment and for the requisitioning of plants and products with respect to coal and coke gave teeth to price-fixing that could, and did, bite sharply.

In placing price control over coal and coke in the Fuel Administration, the President ignored the suggestion in the statute that price control over fuel "may be exercised by him . . . through the agency of the Federal Trade Commission." He also, in large measure, ignored the provisions of the Act setting up a price-fixing procedure involving investigation and price determination by that body.<sup>18</sup> His action, prompted by the belief that for action administrators were required, was sustained in *MacDonald Coal Mining Co. v. United States*.<sup>18a</sup>

Fuel price-fixing under Section 25 of the Food and Fuel Control Act

<sup>17</sup>Considering the view finally taken by the courts, this perhaps was fortunate. See *post*, pp. 28-9.

<sup>18</sup>The Food and Fuel Control Act (Lever Act) provided in Section 25: "That when directed by the President, the Federal Trade Commission is hereby required to proceed to make full inquiry, giving such notice as it may deem practicable, into the cost of producing under reasonably efficient management at the various places of production the following commodities, to wit, coal and coke.

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"Having completed its inquiry respecting any commodity in any locality, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

"In fixing maximum prices for the producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

"In fixing such prices for dealers the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

"The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission."

<sup>18a</sup>56 Ct. Cl. 440 (1921), *aff'd on other grounds*, 261 U. S. 608, 43 Sup. Ct. 433 (1923).

received, in the main, judicial blessing in the lower federal courts.<sup>19</sup> It was held by the Supreme Court not to violate the "due process" clause of the Fifth Amendment under the particular circumstances involved in *Highland v. Russell Car and Snow Plow Co.*<sup>20</sup> This case doubtless will be employed as a precedent sustaining price-fixing in World War II. The Snow Plow Company defended a claim for a balance owing on coal sold it by the plaintiff during the war. It had already paid plaintiff the price fixed by the Fuel Administration. The Supreme Court, sustaining a judgment for defendant, stressed, among other things, the provision of the Lever Act,<sup>20a</sup> which it held required, in the fixing of a price, allowance of "a just and reasonable sum for profit", and the lack of any evidence that "the amount paid by defendant was not compensatory or that it did not give him a reasonable profit or that the value of the coal was greater than the prices fixed by the President,"<sup>21</sup> and the facts that defendant was engaged in "a public use for which coal and other private property might have been taken by exertion of the power of eminent domain," and that "plaintiff was free to keep his coal." The Court recognized that:

"Under the Constitution, and subject to the safeguard there set for the protection of life, liberty and property, the Congress and the President exert the war power of the Nation, and they have wide discretion as to the means to be employed successfully to carry on,"

and that the price-fixing orders

"here challenged are supported by a strong presumption of validity and they may not be set aside unless clearly shown to be arbitrary and repugnant to the Constitution."<sup>22</sup>

A different decision might have been reached in the *Highland* case had plaintiff proved he had sold his coal at a loss. Four years before, in another

<sup>19</sup>See for example *Pine Hill Coal Co. v. United States*, 55 Ct. Cl. 433 (1920), *aff'd on other grounds*, 259 U. S. 191, 42 Sup. Ct. 482 (1922); *United States v. Pennsylvania Central Coal Co.*, 256 Fed. 703 (D. C. Pa., 1918) (upholding an indictment charging a conspiracy to demand more for coal than the price fixed by the Fuel Administrator); *Ford v. United States*, 281 Fed. 298 (C. C. A. 6th 1922).

<sup>20</sup>279 U. S. 253, 49 Sup. Ct. 279 (1928).

<sup>20a</sup>Section 25, Act of Aug. 10, 1917, 40 STAT. 279 (1917).

<sup>21</sup>The Supreme Court took it for granted that "prices to be charged by dealers were to be made by adding to their cost a just and reasonable sum for profit". The Court of Claims, however, in *MacDonald Coal Mining Co. v. United States*, 56 Ct. Cl., 440, 446 (1921) took the view that "Congress intended to give the President the broadest discretion in fixing the price and did not intend to hamper or tie him down by requiring him to pursue a certain method of procedure or to be guided by certain facts and conditions in fixing the price. If this view of the Act be correct, there is an end of the contention that in fixing the price, the President was bound to take into consideration certain circumstances, namely, the cost of production and a reasonable profit and the plaintiff's claim that an obligation arose out of the duty to consider these circumstances falls."

<sup>22</sup>279 U. S. at 261, 262.

case arising under the Lever Act,<sup>23</sup> the Court had carefully avoided deciding the "grave constitutional question" as to whether "under the existing circumstances, . . . Congress [had] power to fix prices at which persons then owning coal must sell thereafter, if they sold at all, without providing compensation for losses." Certainly the *Highland* case does not sustain price-fixing in all its aspects. The Court did, in *Morrisdale Coal Co. v. United States*,<sup>24</sup> and *Pine Hill Coal Co. v. United States*,<sup>25</sup> definitely resolve any doubt as to whether price-fixing, unaccompanied by a requirement that the owner sell his price-fixed goods and in the absence of proof that the prices fixed were unfair, constitutes, in the case of sales to third parties, a public taking making the government liable for just compensation. Denying the assertion that either the Lever Act or the Fifth Amendment resulted in an express or implied promise on the part of the government to reimburse losses, the Court, speaking through Mr. Justice Holmes, said:

"We see no ground for the claim. The claimant, in consequence of the regulation mentioned, sold some of its coal to other parties at a less price than what otherwise it would have got. That is all. It now seeks to hold the Government answerable for making a rule that it saw fit to obey. Whether the rule was valid or void no such consequence follows. Making the rule was not a taking, and no law making power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation, the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker. The statute provides remedies against the Government in other cases, but the claimant argues that this case does not fall within them, and it did not follow the steps prescribed for them. The petition does not even allege that the price the claimant got was not a fair one, but only that if the Government had not issued the regulation, it would have got more under its contract. Considerably more than that is needed before a promise of indemnity from the Government can be implied."<sup>26</sup>

The attempt made in Section 4 of the Lever Act to make illegal "unreasonable" and excessive charges for food and fuel did not fare as well as the definite price-fixing provisions regarding fuel.

The original Section 4 was held not to support an indictment because no penalty was prescribed therein for its violation.<sup>27</sup> This defect was cured by amendment to the Act on October 22, 1919.<sup>28</sup> This Act also added wearing

<sup>23</sup>*Matthew Addy Co. v. United States*, 264 U. S. 239, 245, 44 Sup. Ct. 300, 302 (1924).

<sup>24</sup>259 U. S. 188, 42 Sup. Ct. 481 (1922).

<sup>25</sup>259 U. S. 191, 42 Sup. Ct. 482 (1922).

<sup>26</sup>*Morrisdale Coal Co. v. United States*, 259 U. S. 188, 190, 42 Sup. Ct. 481 (1922).

<sup>27</sup>*Mossew v. United States*, 266 Fed. 18 (C. C. A. 2d 1920); *United States v. Armstrong*, 265 Fed. 683 (D. Ind. 1920).

<sup>28</sup>41 STAT. 297 (1919).

apparel to the list of necessities, and brought within the realm of price-fixing rents in the District of Columbia, upheld as a war emergency measure in *Block v. Hirsh*,<sup>29</sup> on the ground that the war had "clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law." Then, after a number of courts had held the new Section 4 constitutional,<sup>30</sup> even though enacted after the cessation of hostilities,<sup>31</sup> the Supreme Court, in *United States v. Cohen Grocery Co.*,<sup>32</sup> rejected it on the ground that its language, "it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handing or dealing in or with any necessities," was so vague and indefinite as to amount to an unconstitutional attempt to delegate to courts and juries the legislative power. These words did not, the Court said, fix an ascertainable standard of guilt or adequately inform persons accused of violation of the law of the nature and cause of the accusation against them.<sup>33</sup>

By the time Section 4 was held unconstitutional, however, the war had been won, and the section had accomplished its purpose. The Food Administration, dependent to a considerable extent on the section, had, for example, kept wholesale sugar prices in the United States down to a 17% rise between August, 1917, to November, 1918, while in the same period they had risen 157% in France and 94% in England; and it had achieved corresponding results in the case of bread, canned and dried foods, and other commodities.<sup>34</sup> Thus had "the law's delay", so complained of in the 'thirties, helped a control that participated in victory, and had an unconstitutional enactment helped to preserve and defend the Constitution.

<sup>29</sup>256 U. S. 135, 41 Sup. Ct. 458 (1921).

<sup>30</sup>*United States v. Oglesby Grocery Co.*, 264 Fed. 691 (D. C. Ga. 1920); *Kuenster v. Meredith*, 264 Fed. 243 (D. C. Ill. 1920); *United States v. Mulligan*, 268 Fed. 893 (D. C. N. Y. 1920); *United States v. Rosenblum*, 264 Fed. 578 (D. C. Pa. 1920); *C. A. Weed & Co. v. Lockwood*, 264 Fed. 453 (W. D. N. Y. 1920); *Willard Co. v. Palmer* (not reported); *Weeds, Inc. v. United States* (N. D. N. Y., not reported); *Kennington v. Palmer* (S. D. Miss., not reported); *Tedrow v. Lewis & Sons Dry Goods Co.* (D. C. Colo., not reported).

<sup>31</sup>*United States v. Swedlow*, 264 Fed. 1016 (D. C. Colo. 1920); *United States v. Russell*, 265 Fed. 414 (D. C. La. 1920); *United States v. Armstrong*, 265 Fed. 683 (D. C. Ind. 1920).

<sup>32</sup>255 U. S. 81, 41 Sup. Ct. 298 (1921).

<sup>33</sup>The Court said (255 U. S. at p. 89): ". . . to attempt to enforce the Section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." It further said (255 U. S. at p. 92) that to hold the statute constitutional would be to hold that: ". . . no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very case of the settled significance of the Fifth and Sixth Amendments, and of other plainly applicable provisions of the Constitution."

<sup>34</sup>Paul W. Garrett, *Government Control Over Prices*, G. P. O. (1920) 73, 86, 99, 114, 120.

## II. PRICE CONTROL IN WORLD WAR II IN ENGLAND

In England, the Defense (General) Regulation<sup>35</sup> adopted in September, 1939, by order in Council pursuant to the powers granted by the Emergency Powers (Defense) Act,<sup>36</sup> provided for complete economic mobilization, including complete price control. Section 55 of the Regulation provided that "a competent authority,"<sup>37</sup>

"may by order provide: (a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles of any description, and, in particular, for controlling the prices at which such articles may be sold;

"(b) for regulating the carrying on of any undertaking engaged in essential work, and, in particular, for controlling the charges which may be made by the undertakers in respect of the doing of any work by them; . . ."

The Regulation further empowered "any competent authority" to require the keeping of books and records and their production, to inspect plants and premises, to institute any scheme of control deemed "necessary or expedient," or to require a license as a condition precedent to doing "anything regulated by the order," which license might be made to apply

"either to persons or undertakings generally or to any particular person or undertaking or class of persons or undertakings, and either to the whole or any part of any undertaking, and so as to have effect either generally or in any particular area."

Price controls, originally exercised by the Board of Trade (corresponding to our Secretary of Commerce) soon after the war began, were divided between the Minister of Food, the Minister of Supply, in charge of industrial supplies; the Minister of Health, enforcing the rent "freezing" Rent and Mortgage Restriction Act; and the Board of Trade, operating in the "goods" field.<sup>38</sup> The result of divided authority, coupled with apparent re-

<sup>35</sup>S. R. & O. 1939, No. 927.

<sup>36</sup>The Emergency Powers (Defence) Act provided in part as follows:

"(1) Subject to the provisions of this section, His Majesty may by order in Council make such Regulations (in this Act referred to as Defence Regulations) as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

<sup>37</sup>Regulation 49 designated as "a competent authority" either a "Secretary of State, the Admiralty, the Board of Trade, the Minister of Agriculture and Fisheries, the Minister of Health, the Minister of Transport, the Minister of Supply, the Minister of Home Security, the Minister of Shipping, the Minister of Food, the Postmaster General and the Commissioners of Works". Slightly different provisions for competent authorities were made in the case of Scotland and Northern Ireland.

<sup>38</sup>See Ministers of the Crown (Minister of Food) Order 1939, S. R. & O. 1939, No.

luctance to cover all materials and products, and further, the fact that wages, untouched by the acts, are to a considerable extent closely tied to the cost of living in England, has been in the eyes of some critics<sup>39</sup> unfortunate and chaotic. It is pointed out that in the first four months of World War II, prices in England advanced more than they did in the first fifteen months of World War I.<sup>39</sup>

The cheaper rents, however, have not increased. Rents of working and lower middle-class dwellings (*i.e.*, dwellings bringing an annual rental in London of £100 or less, Scotland £90 or less, and elsewhere £75 or less) were frozen on September 1, 1939, by the Rent and Mortgage Restrictions Act at their then existing levels for the duration of the war and for six months afterward.

The "freezing" process was not adopted, however, in the case of food, goods, and raw materials, control of only the first two of which are here discussed.

Food control has operated through rationing, price and distribution orders<sup>40</sup> of the Minister of Foods, enforced through the licensing and other powers of local food committees. The latter, set up in every local authority area by the Food Control Committee Order of September 1, 1939,<sup>41</sup> are each composed of fifteen members, five representing the food trades and ten (two of whom must be women), the public.

Each food committee was given in September, 1939, the power of enforcing within its area all the existing and future orders of the Minister of Foods<sup>42</sup> and of licensing all food retailers dealing in specified foods.<sup>43</sup> Wide discretion was given the committees as to the terms of the licenses, and violations of those terms were made offenses against the Defense Regulations. Later, on November 3, 1939, the committees were ordered<sup>44</sup> to register all caterers, boarding houses, and other establishments using bacon, ham, and butter, and by a subsequent order, meat and sugars.

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1119 (Sept. 8, 1939); Ministers of the Crown (Minister of Food) (2) Order 1939 (Oct. 13, 1939); Ministry of Supply Act, 1939, 2 & 3 Geo. VI, c. 38; S. R. & O. 1939, Nos. 877, 1298; Rents and Mortgage Restriction Act, 1939, 2 & 3 Geo. VI, c. 71, and A. Wyn Williams, *We Can Learn About Price-Fixing from England* (1941) 29 Nat. Bus., 40-42.

<sup>39</sup>A. Wyn Williams, *loc. cit. supra* note 38.

<sup>40</sup>For examples of price fixing orders, see S. R. & O. 1939, No. 1172 (for butter); S. R. & O. 1939, No. 1104 (for canned salmon); S. R. & O. 1939, No. 1212 (for condensed milk); S. R. & O. 1939, No. 1170 (for eggs); S. R. & O. 1939, Nos. 1127 and 1130 (for fat stock), and S. R. & O. 1939, No. 1040 (for meat).

<sup>41</sup>S. R. & O. 1939, No. 1019.

<sup>42</sup>S. R. & O. 1939, No. 1250.

<sup>43</sup>S. R. & O. 1939, No. 1312. Specified foods were bacon, biscuits, bread, breakfast cereals, butter, cakes, cheese, chocolate and confectioneries, cocoa, coffee, compound lard, cream, fats, eggs, fish, flour, fruit, hams, honey, jams, lard, margarine, meats, milk, potatoes, poultry, game and rabbits, rice, sausages, sugar, syrup, tea and vegetables.

<sup>44</sup>S. R. & O. 1939, No. 1553.

The Minister of Foods, in fixing prices, seems to have almost absolute discretion and to be bound by no procedural requirements other than he chooses to set. Neither he nor his food control committees, so far as it has been possible to discover from the decided cases examined, have been shorn by judicial action of any of their great powers.

Prices of goods have, since November 16, 1939, been regulated under the Price of Goods Act<sup>45</sup> by the Board of Trade. On July 22, 1941, services and second-hand goods were brought under the Board's jurisdiction by enactment of the Goods and Services (Price Control) Act.<sup>46</sup>

The Price of Goods Act made it unlawful to sell, agree to sell, or offer<sup>47</sup> to sell any "price-regulated goods" (*i.e.*, such goods as the Board thought should be regulated)<sup>48</sup> above a "permitted price." The "permitted price" was the price the seller was asking for the goods on August 21, 1939, unless the Board selected one or more other basic dates or permitted an increase in the price. Price increases might be allowed "on the application of any body of persons appearing to the Board of Trade to be representative of traders in goods of any description, or on the application with respect to goods of any description of the central price regulation committee."

Certain factors of cost and expense (but not profit)<sup>49</sup> and such additional factors as the Board felt applicable had to be considered in fixing increases.

Any price-fixing order could be appealed "at the instance of any persons appearing to the Board to be representative of traders in, or buyers of, goods of the description in question" to a referee appointed by the Lord Chancellor from the English bar by giving fourteen days' notice to the Board. The Act gave the referee broad authority, subject to such regulations as the Lord

<sup>45</sup>2 & 3 Geo. VI, c. 118 (1939).

<sup>46</sup>4 & 5 Geo. VI, c. 31 (1940).

<sup>47</sup>By Section 20 of the Act, it was made clear that a mere notification by the seller of the price proposed by him for a sale of the goods, even though not technically an "offer", was within the Act. Section 20 was clarified by the Goods and Services (Price Control) Act to bring within the Act notifications of price given in such circumstances that "the buyer is liable to pay a reasonable price therefor."

<sup>48</sup>Goods sold at auction and goods for export were exempted from the application of the Act, except when ordered to be included by the Board of Trade. The Board moved slowly in bringing goods under the Act. By S. R. & O. 1939, No. 1813 (Dec. 18, 1939) it designated as "price-regulated goods" clothing, household goods, including glassware, pottery, cutlery and household textiles, knitting yarn, sand bags, and certain textiles and leather materials. For most of these goods, the Board fixed specific prices.

<sup>49</sup>Factors specified in the statute included: expense of manufacturing, cost of premises and plant, expenses of maintenance of and improvements on plant; rent; insurance; wages and salaries; administration and establishment expense; liability for taxes, customs and interest; transport charges; advertising; provisions for bad debt; and total volume of business. (Schedule I, Price of Goods Act, 1939). The Board added as factors, liability under valid contracts for purchase at fixed prices for future delivery (S. R. & O. 1940, No. 296); sums representing reasonable remuneration for services rendered in connection with the business (S. R. & O., 1940, No. 978); and levies and rebates granted to raise sums for maintenance of export trade (S. R. & O., 1940, No. 1319).

Chancellor should make, over appeal procedure. The referee could take additional evidence, if he liked. The Act did not prohibit him from deciding solely on the record before the Board or from following his own independent investigation. The referee was required, however, to consult with one assessor from each of the three panels set up under the Act in deciding any appeal. One panel consisted of persons with banking and accounting experience; the second, of persons with technical knowledge of trading; and the third, of persons qualified to represent the interest of buyers of goods.

Local price regulation committees were set up by the Act to watch and recommend prices and to hear complaints.

A complaint<sup>50</sup> had to be filed within seven days of the complained of transaction. The offender, if the case was felt to be worth an investigation, was given a hearing if he wished it.

Violations established to the local committee's satisfaction were reported to the central price-fixing committee, set up to secure uniformity in the actions of the local committees. This central committee, after investigating the case itself, could request the Board of Trade to institute prosecution. Only the Board at the request of the central price-fixing committee, or the Director of Public Prosecution when the local price regulation committee had failed to act or the Board had requested prosecution, could institute actions.

Heavy fines and sentences were provided by the Act. Third offenders were subject to loss of their right to carry on their businesses.

Originally, Section 9 limited the seller's defense (except in the case of a servant or agent who could defend on the ground that he had acted solely on instructions) to proving that the price at which the goods were sold did not exceed the "permitted price." This section, read with Section 18, made it clear that proof of guilty knowledge was not necessary for conviction.<sup>51</sup> A master might be liable although not aware of the sale, or although he had taken all precautions against the Act.<sup>52</sup> This somewhat harsh provision was modified in the Goods and Services (Price Control) Act, to make available the defense that the Act was committed without the accused's consent or connivance and that the accused had exercised all diligence to prevent its commission.<sup>53</sup>

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<sup>50</sup>According to the procedure established on January 10, 1940 by S. R. & O. 1940, No. 25.

<sup>51</sup>*Cf. Pearks, Grenston & Lee, Ltd. v. Ward* (1902) 2 K. B. 1; *Pearks Dairies, Ltd. v. Tottenham Food Control Committee*, (1918) 88 L. J. K. B. 623.

<sup>52</sup>See *Moussell Bros. v. L. & N. W. Ry.* (1917) 2 K. B. 836; *Andrews v. Tucken* (1917) 117 L. T. 726.

<sup>53</sup>Section 16 of the Goods and Services (Price Control) Act reads in part as follows:

"Where a person, not being a body corporate, is charged with an offense under any provision of this Act which expressly provides that the person carrying on a

Sellers under both the Price of Goods Act and the Goods and Services (Price Control) Act are required to sell their goods to those offering the "permitted price," except where unusual quantities are desired, or orderly disposal of goods would be interfered with, or some breach of legal obligation would result. It is illegal for a master or servant either to deny that the goods are in stock if in fact they are, or to mislead a buyer as to whether he has the goods, or to offer the goods upon condition that other goods be bought.

Buyers from convicted sellers, whether of the goods involved or of similar goods, may, with certain limitations, either rescind the sale or sue to recover the loss from the overcharge, with 5% interest.

The amendatory Goods and Services (Price Control) Act of January 22, 1941, empowered the Board, among other things, to establish maximum prices (instead of merely to increase prices from the pre-war base price); to fix prices for services;<sup>54</sup> to license dealers in, and fix prices for, second-hand goods; to regulate resales by "middlemen"; and to prevent payment of remuneration to salesmen of rationed goods. It was authorized to take into account such factors as it wished in considering price increases, and to take into account different factors in different businesses; but a draft of each order relating to price factors had first to be approved by resolution of each house of Parliament.

Parliament reached back for some of the power it had granted by also requiring each order not relating to price factors to be laid before Parliament, which within forty days could annul the order, "without prejudice, however, to the validity of anything previously done thereupon or the making of a new order."<sup>55</sup>

The added enforcement provisions indicate a growing concern with violations and the need for closing loopholes. Inspectors were provided for. Invoices might be required and buyers were ordered to demand invoices "where price controlled goods are sold in the course of a business and bought in the course of another business." The Board was empowered to specify bookkeeping methods. Sellers of two or more articles or services for a lump sum had to state specifically the amount charged for each. Exchanges of goods for goods were forbidden.

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business shall be guilty of an offense under this Act, it shall be a defense for him to prove that the Act or default in respect to which he is charged was committed by some other person without his consent or connivance, and that he exercised all such diligence to prevent the commission of the act or default as he ought to have exercised, having regard to all the circumstances."

<sup>54</sup>Services were defined by Section 20 to include the hiring of goods and the subjecting of goods to process. This definition, however, does not include salaries or wages, and does not bring them within the Act.

<sup>55</sup>§ 17, Goods and Services (Price Control) Act.

Price control today in England goes far beyond the price regimentation in World War I in the United States. The ministers are price "legislators" subject only to the veto of Parliament. The food control committees have sweeping regulatory power from the arbitrary exercise of which no statutory appeal is provided. Local price committees have also great powers subject to little check. But characteristically, great care is being exercised to sift and resift complaints and charges, giving each accused at least two opportunities to be heard by quasi-judicial or judicial bodies. The fundamental concept of the judicial process, which "proceeds upon inquiry and hears before it condemns," appears to have been observed. Few complaints of arbitrary action have reached this side of the Atlantic, though doubtless inequities have occurred. The loudest complaint is that the control has not been sufficiently rigid and drastic effectively to combat rising prices. Thus does democracy bear lightly shackles of regimentation when her survival requires it.

### III. PRICE-FIXING IN CANADA

In Canada, by Order in Council, the War Time Prices and Trade Board was set up under the War Measures Act<sup>55a</sup> shortly after the war began and was given broad power to fix prices, ration, and requisition. Certain price control authority was and is also exercised by the Oil Controller.

Up to a few weeks ago, a selective system of price control covering few commodities was in operation. The most extensive regulation was in the coal industry, which was largely operating under license. In December, 1940, the Dominion exercised control over wages and tied wages to the cost of living in all the war industries.

On October 18, 1941, Premier MacKenzie King announced that on and after November 17, 1941, no person might sell any goods at a price higher than the maximum charged by him for such goods or services during the four weeks from September 15 to October 11, 1941. No employer in Canadian industry or commerce might, he said, increase his present basic wage rate without permission. The principle of price ceilings was to be applied to agriculture.<sup>56</sup>

By an Order in Council promulgated October 25, 1941,<sup>57</sup> a National War Labor Board was established to regulate wages in all industries. Without permission of the Board, no employer may increase his basic wage scale. The Board may, if it finds the rates in a particular business low as compared to similar businesses in the locality, "prescribe such increased wage

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<sup>55</sup>C. 206, REV. STAT. Canada (1927).

<sup>56</sup>N. Y. Times, October 19, 1941, Vol. XCL, No. 30584, p. 1.

<sup>57</sup>Montreal Gazette, October 27, 1941, Vol. CLXX, No. 257.

rates as it finds fair and reasonable." Payment to wage-earners of cost-of-living bonuses measured by the cost of living index for the Dominion as a whole as prepared by the Dominion Bureau of Statistics is made mandatory. A bonus of 25¢ per week in the case of certain employees and 1% of the basic wage in the case of others is to be paid for each rise of one point in the index. Should the index drop, similar decreases in the bonuses take place. Redeterminations of the bonus must be made quarterly. Collective bargaining agreements not in conformity with the Order must be made to conform before January 1, 1942.

The Maximum Price Regulations, promulgated on November 1, 1941<sup>57a</sup> to "freeze" prices of goods and services in accordance with the Premier's announcement, places sweeping powers in the hands of the War Time Prices and Trade Board. The Board may, under the regulations, "vary any maximum price, . . . prescribe other or additional terms or conditions of sale, . . . exempt any person or any goods or services of any transaction" from the regulations, or withdraw any exemptions. No federal, provincial, or other price fixing authority may fix or approve specific, minimum, or maximum prices or markups with respect to any goods or services without the Board's written concurrence. The Board is to be the sole judge of what shall constitute, or be included in, any price, rate, rental, or charge. Heavy fines and prison sentences may be imposed to punish violations of the regulations, or of "any order or requirement of the Board."

The regulations, of course, forbid sales after November 17th at prices higher than those at which the seller sold the same or similar goods during the basic period cited by Premier King. But quantity or other discounts below the maximum customarily and lawfully given must be continued. Further, prices above the maximum stipulated in contracts made before or after the basic period must be reduced to the maximum.

No one may, without risk of fine and imprisonment, buy or offer to buy goods at prices higher than the maximum; but if he does, notwithstanding his offense, he may recover the excess from his seller.

The regulations cover all "articles, commodities, substances or things," and a long list of services,<sup>57b</sup> but excluded from the maximum price restrictions of the regulations are sales: for export; to the Department of Muni-

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<sup>57a</sup>Order in Council P. C. 8527.

<sup>57b</sup>Services include: those rendered by public utilities; transportation; warehousing; undertaking and embalming; laundering, cleaning, tailoring, and dressmaking; hair-dressing; repairing of all kinds; the supplying of meals and drinks; the exhibition of motion pictures; and plumbing, heating, painting, decorating, and renovating; together with "any activities or undertakings that may hereafter be designated by the Board as services for the purposes of these regulations."

tions and Supply; of personal effects; of deeds, securities, and commercial paper; and of goods at *bona fide* auctions.

Canada, it would appear, has now traveled even further than the mother country down the pathway of rigid price-control.

The War Measures Act, the basis for the price control exercised by the government, was held by the Privy Council in *Manitoba Free Press Co. v. Fort Frances Pulp and Paper Co.*<sup>58</sup> to be within the power of the Dominion under Section 91 of the British North America Act (the Canadian Constitution).

The War Measures Act gives the Dominion Executive almost unlimited powers, including the power to receive from the Dominion Parliament the latter's legislative authority, such as has been delegated in the War Measures Act.<sup>59</sup> Thus there would appear to be little basis for challenging the price control measures the King government has taken.

#### IV. PRICE CONTROL IN THE UNITED STATES SINCE THE BEGINNING OF THE PRESENT EMERGENCY

On May 25, 1940, the President issued an administrative order establishing the Office for Emergency Management, which he had provided for in Executive Order No. 8248 on April 8, 1939, issued pursuant to the provisions of the Reorganization Act of April 3, 1939.<sup>60</sup> This office, under the Administrative Order of May 25, 1940,<sup>61</sup> and a later order issued on January 7, 1941, became the agency through which the President might co-ordinate, supervise and direct the national defense activities of agencies, public or private, and the channel of communications between such agencies and the President.<sup>62</sup> The second administrative order further provided that the work and activities of the Council of National Defense, its Advisory Commission and all subordinate bodies and agents should be co-ordinated in and through

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<sup>58</sup>[1923] A. C. 695.

<sup>59</sup>As was said in *In re Gray* (1918) 57 S. C. R. 150 at 167 and 170:

"The authority . . . is a lawmaking authority, that is to say, an authority (within the scope and subject to the conditions prescribed) to supercede the existing law whether resting on statute or otherwise . . . the true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (expressed or implied) that they shall have the force of law."

On this point, see also *Manitoba Free Press Co. v. Fort Frances Pulp and Paper Co.*, *supra* note 58.

<sup>60</sup>53 STAT. 561 (1939), 5 U. S. C. § 133 (Supp. 1940).

<sup>61</sup>For text, see 1 C. C. H. War Law Serv. ¶ 2601 (1941).

<sup>62</sup>1 C. C. H. War Law Serv. ¶ 2602 (1941).

the Office for Emergency Management under the direction and supervision of the President.

On April 11, 1941, by Executive Order No. 8734,<sup>63</sup> the President created the Office of Price Administration and Civilian Supply [(OPACS), changed to the Office of Price Administration (OPA) by Executive Order No. 8875, promulgated August 28, 1941] as a part of the Office for Emergency Management of the Executive Office of the President to:

"a. take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation . . . speculative accumulation, withholding, and hoarding of materials and commodities;

\* \* \*

"c. determine and publish, after proper investigation, such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem fair and reasonable; and take all lawful and appropriate steps to facilitate their observance;

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"h. recommend to the President the exercise of the authority vested in him by the following named Acts, whenever, in the opinion of the Administrator, such action by the President will enable the Administrator to carry out and secure compliance with the provisions of Section 2 (a) and 2 (c) of this Order . . . ;<sup>64</sup>

"i. perform the functions and exercise the authority vested in the President by the following named Acts,<sup>65</sup> insofar as and only to the

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<sup>63</sup> 1 C. C. H. War Law Serv. §§ 11, 551-67 (1941).

<sup>64</sup>The Acts mentioned are Section 9 of the Selective Training and Service Act of September 16, 1940, Pub. L. No. 783, 76th Cong., 50 U. S. C. § 309 (Supp. 1940) (empowering the President to place an order with any firm and requiring such firm to comply with such orders, just compensation to be paid); Section 120 of the National Defense Act of June 3, 1916, 39 STAT. 214, 50 U. S. C. § 80 (1928). 1 C. C. H. War Law Serv. § 10, 551 (1941) (empowering the President in time of war or when war is imminent to place an order with any firm and requiring the firm to comply with such order for a reasonable price "as determined by the Secretary of War" upon penalty of having his plant taken over and, upon conviction, being punished by imprisonment and fine); Section 1 (15) of Act of February 4, 1887, 24 STAT. 379, 49 U. S. C. § 1 (15) (1939), 1 C. C. H. War Law Serv. § 7203 (1941) (authorizing the Interstate Commerce Commission to establish priorities in car service and transportation, to suspend rules regarding car service and to make other rules whenever in its opinion a shortage of equipment or other emergency requiring immediate action exists in any section of the country); and the Act of October 10, 1940, Pub. L. No. 829, 76th Cong., 54 STAT. — (empowering the President to requisition or take over military or naval equipment or munitions or machinery, tools, materials, or supplies necessary for the manufacture, service, or operation thereof, which have been ordered or manufactured for export purposes, and the export of which has been denied by law).

<sup>65</sup>The Acts specified are: 53 STAT. 1407 (1939), 15 U. S. C. § 713(a)-7 (Supp. 1940) (relating to the exchange, by treaty, of surplus agricultural commodities for stocks of strategic and critical materials produced abroad and the release of strategic and critical materials upon the order of the President); Section 5 of the Reconstruction Finance Corporation Act as amended by Pub. L. No. 664, 76th Cong. (June 25, 1940) 54 STAT.

extent that the authority conferred by such Acts will, in the opinion of the Administrator, enable him to carry out and secure compliance with the provisions of Section 2 (a) and 2 (c) of this Order."

More than a year before the creation of OPACS, the President created a Price Stabilization Division, charged with directing efforts and price stabilization in the raw material field, as a subordinate body of the Council of National Defense. An Office of Price Administration had been set up in this Division. On February 17, 1941, it issued its first price schedule, setting maximum prices for second-hand machine tools.<sup>66</sup> This Office issued five price schedules<sup>67</sup> before its functions were taken over by OPACS. These schedules were adopted by Mr. Henderson, the Administrator of OPACS.<sup>68</sup> Thirty-four price schedules had been issued by the Office of Price Administration and the Price Stabilization Division up to October 4, 1941.

Each schedule states the reasons for its adoption, and then purports to forbid persons either to buy or to sell the articles covered at more than the maximum prices set.<sup>69</sup>

All schedules examined have carried an "enforcement" paragraph to the effect that OPACS will endeavor to inform Congress and the public of any violation and to assure that the powers of the government are fully exerted

—, 15 U. S. C. § 605 (Supp. 1940) (relating to loans by the Reconstruction Finance Corporation); and Section 4 of the act approved June 7, 1939, 53 STAT. 811, 50 U. S. C. § 98c (Supp. 1940) (relating to the purchase, storing, and use of strategic materials which can be used only upon the order of the President in time of war or when he finds that a national emergency exists).

<sup>66</sup>Release No. PM 76, 1 C. C. H. War Law Serv. p. 11651 (1941).

<sup>67</sup>Price Schedule No. 2, relating to aluminum scrap and secondary aluminum ingot issued March 24, 1941, Release No. PM 186, 1 C. C. H. War Law Serv. ¶ 11655 (1941); Price Schedule No. 3, relating to zinc scrap material and secondary zinc slab issued March 31, 1941, Release No. PM 219, 1 C. C. H. War Law Serv. ¶ 11661 (1941); Price Schedule No. 4, relating to iron and steel scrap, issued May 3, 1941, Release No. PM 226, 1 C. C. H. War Law Serv. ¶ 11665 (1941); and Price Schedule No. 5, relating to bituminous coal, issued April 2, 1941 (revoked May 1, 1941), Releases Nos. PM 228 and PM 351, 1 C. C. H. War Law Serv. ¶¶ 11675 and 11677 (1941).

<sup>68</sup>See memorandum of General Counsel of Office of Price Administration dated May 8, 1941, and printed in *Hearing before Committee on Agriculture and Forestry, 77th Cong. 1st Sess. (May 29, 1941) 12.*

<sup>69</sup>Price Schedule No. 2, for example, begins as follows: "Now, therefore, in order to facilitate cooperation with the Government in maintaining price stability and in preventing excessive and speculative price increases injurious to the defense program and to the public interest and welfare, it is directed that,

"1302.1 maximum prices on sales of aluminum scrap by the maker of the scrap. On and after March 25, 1941, except as provided in paragraph 5 below, regardless of the terms of any commitment theretofore entered into, no maker of aluminum scrap shall sell, offer to sell, deliver or transfer at a price, aluminum scrap made by him at prices higher than the prices set forth in Column I of Appendix A, attached to this schedule, and no person shall buy, or offer to buy, aluminum scrap from the maker of such aluminum scrap at higher prices. Lower prices than those set forth in Column I of Appendix A may, however, be charged, demanded, paid or offered." 1 C. C. H. War Law Serv. ¶ 11655 (1941), 6 F. R. 4076.

to protect the interest of the public and of persons conforming to the schedule. Citizens are asked to report violators.<sup>70</sup>

The authority of the Office of Price Administration to issue such price schedules has been vigorously challenged<sup>71</sup> and as vigorously defended.<sup>72</sup>

The attack upon the price schedules is grounded primarily upon the argument that the chief executive, even in an emergency, has no price-fixing authority unless it is delegated to him by the Congress.

The defense is not of "price-fixing." It is strictly limited to sustaining "the announcement" or "the issuance" of price schedules. It is asserted that this authority is derived from Congressional acceptance of the exercise of similar authority in World War I, from the re-enactment of the commandeering provision of the Army Appropriation Act of June 3, 1916,<sup>73</sup> by Section 9 of the Selective Service and Training Act of 1940, from the implied constitutional powers of the chief executive during a period of emergency, and from his obligation "to take care that the laws be faithfully executed."<sup>74</sup>

It is submitted that the Office of Price Administration has the power to issue its price schedules, but for somewhat different reasons than those assigned.

The claim that World War I price-fixing during less than two years is "a factor indicating the existence of authority" finds little support in authority.<sup>75</sup> *United States v. Midwest Oil Company*,<sup>76</sup> cited to support the proposition, was concerned with a usage extending over more than eighty years.

As the Court points out in the *Midwest Oil Company* case,<sup>77</sup> an element necessary to turn a usage into a power is a claim of the power. Both the president and the War Industries Board urged Congress to give the president the full price-fixing authority<sup>78</sup>—in itself the negation of a claim to the power.

<sup>70</sup>See, for example, 1 C. C. H. War Law Serv. ¶ 11656 (1941), at p. 11658.

<sup>71</sup>See, for example, memorandum opinion of Senator Robert Taft to the effect that the Administrator of the Office of Price Administration is without authority to fix prices. *Hearing before Committee on Agriculture and Forestry, 77th Cong., 1st Sess. (May 29, 1941) 45.*

<sup>72</sup>Memorandum of General Counsel of Office of Price Administration dated May 8, 1941, *loc. cit. supra*, note 68.

<sup>73</sup>39 STAT. 213, 214 (1916), 50 U. S. C. § 80 (1928).

<sup>74</sup>Memorandum of General Counsel of Office of Price Administration reprinted in *Hearings before Committee on Agriculture and Forestry, 77th Cong., 1st Sess. (May 29, 1941) 11-23.*

<sup>75</sup>Memorandum of General Counsel, *Hearing before Committee on Agriculture and Forestry, 77th Cong., 1st Sess. (May 29, 1941) 13.*

<sup>76</sup>236 U. S. 459, 35 Sup. Ct. 309 (1915).

<sup>77</sup>236 U. S. at 469.

<sup>78</sup>*Minutes of the War Industries Board, Senate Committee Print No. 4, 74th Cong., 1st Sess. (Dec. 5, 1917) 149-150; Address before Congress, December 4, 1917, Official Bulletin (December 4, 1917) 3.*

Furthermore, the practice in the Wilson administration was quite different from that being followed today. As previously pointed out, price-fixing was conducted by agreement, with few exceptions, even though the agreement was obtained by the threat to exercise a power which the government had a right to exercise. In World War II, the practice is the issuance of price schedules. The one practice would seem to be too dissimilar to serve as a precedent for the other.

The argument that Congress acquiesced in the exercise of the president's authority in 1917 and 1918, and that as a consequence, the authority has come into being, is likewise unconvincing. No acceptance or acquiescence by the Congress of what President Wilson did in 1917 and 1918 is shown. It is true that the Nye Committee, the War Policies Commission (the latter composed of both congressmen, senators, and cabinet officers, with a cabinet officer as chairman), and a special Senate Committee on the Investigations of the Munitions Industry considered World War I price-fixing without denouncing the course followed by a president no longer alive. Silent recognition of a *fait accompli* two decades old hardly should be taken as a grant of power, or even of approval of its exercise, even if these committees could speak for the Congress. It is a novel theory of constitutional law that would make it possible for one of the branches of government by failing to protest the exercise over a short period of a power by another branch to bestow that power upon that other branch.

Because the commandeering statute<sup>79</sup> is said to have been re-enacted, with slight change, in Section 9 of the Selective Training and Service Act, 1940,<sup>80</sup> and further because this commandeering statute was invoked during 1917 and 1918 as an ultimate sanction supporting the maximum prices announced as applicable on all sales, it is argued that Congress has, in effect, adopted the 1917-1918 practice. During World War I, however, the commandeering provisions were never relied upon, or considered, as authorizing the announcement of maximum prices. The doctrine that by re-enactment of a statute Congress means to give it the interpretation placed upon it by the executive branch has no application, because the executive branch never interpreted the statute as authorizing either the fixing of prices or the announcement of price schedules. Furthermore, re-enactment does not adopt the executive's construction unless the prior statute was itself ambiguous.<sup>81</sup> The commandeering statute furnishes no support to the present exercise of power.

<sup>79</sup>Act of June 3, 1916, § 120, 39 STAT. 213, 214 (1916), 50 U. S. C. § 80 (1928).

<sup>80</sup>Act of September 16, 1940, 54 STAT. —, 50 U. S. C. App. § 309 (Supp. 1940). It appears from the U. S. Code that Section 120 was never repealed. See also *Opinion of the Attorney General* to the President of the Senate, August 27, 1940, 1 C. C. H. War Law Serv. ¶ 2222 (1941) p. 2212. If so, was it reenacted?

<sup>81</sup>*Chicago and A. R. Co. v. United States*, 49 Ct. Cl. 463 (1914).

The remaining argument is that the president has the implied power to issue ceiling price schedules.

The argument over whether the executive has any powers, apart from those specifically given him in Article II of the Constitution, is older than the Constitution itself. Alexander Hamilton took the view that there were such powers, subject to the exceptions and qualifications expressed in the Constitution.<sup>82</sup>

Upon the doctrine of implied powers was rested the holding of the Supreme Court that Neagle, when he killed Judge Terry, was acting pursuant to law, and hence had the right to a writ of *habeas corpus*.<sup>83</sup> The executive branch has been permitted to endorse a bill of exchange without express prior statutory authority,<sup>84</sup> and to demand, receive, and sue upon a bond not prescribed by statute.<sup>85</sup> The Secretary of Interior was, without statutory authority, held empowered to make rules and regulations to protect timber on public land.<sup>86</sup> In *United States v. San Jacinto Tin Company*,<sup>87</sup> the Attorney General was held empowered under the Constitution to bring suit to set aside a patent issued by fraud. The same power was invoked in *In re Debs*<sup>88</sup> to sustain the bringing of an injunction suit under the anti-trust laws, without express authority from Congress, to end the Pullman strike.<sup>89</sup>

<sup>82</sup>4 THE WORKS OF ALEXANDER HAMILTON (Lodge Edition) 438.

<sup>83</sup>*In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890). In this case, the Court asked, rhetorically, whether the phrase in the Constitution requiring the Chief Executive to "take care that the laws be faithfully executed" was "limited to the enforcement of Acts of Congress or of treaties of the United States according to their *expressed term*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations and all the protection implied by the nature of the Government under the Constitution?" The Court did not expressly answer the question in the affirmative. It did so, however, by implication.

<sup>84</sup>*Dugan v. United States*, 3 Wheat. 170, 4 L. ed. 362 (1818).

<sup>85</sup>*United States v. Tingey*, 5 Pet. 115, 8 L. ed. 67 (1831). The Court said (5 Pet. at p. 122): "If the United States are competent to become parties to such a bond without legislative requisitions, it is equally true that the right to direct or require such a bond belongs to the Executive. It is a part of its Constitutional power; nor does the circumstance that the authority of the legislature may also direct the taking of a particular bond negative the existence of such a power. The President is enjoined 'to take care that the laws be faithfully executed'. In the performance of this trust he not only may, but is bound to avail himself of every appropriate means not forbidden by law. When a law is passed authorizing the the appointment of an officer, or appropriating money to be disbursed under the direction of the President, are not the duties of the Executive such as to impose upon him the appointment of agents to perform the trusts reposed in him? . . . This bond was taken under the direction of the President to secure the performance of the trust committed to the officer; in the language of the Constitution to 'take care that the laws be faithfully executed'. If the means be appropriate to the end, does not the injunction to use such means flow from the Constitution, and is it not, therefore, imperative? Could Congress increase the obligation or give greater validity to the Act by reiterating the mandate?"

<sup>86</sup>*Wells v. Nickels*, 104 U. S. 444, 26 L. ed. 825 (1881).

<sup>87</sup>125 U. S. 273, 8 Sup. Ct. 850 (1888).

<sup>88</sup>158 U. S. 564, 586, 15 Sup. Ct. 900 (1895).

<sup>89</sup>See also *United States v. Knox*, 128 U. S. 230, 9 Sup. Ct. 63 (1888); *Heckman v.*

As has been frequently pointed out, President Lincoln, without statutory authority and while Congress was not in session, turned the militia into a volunteer army, added 23,000 men to the regular army and 18,000 men to the navy, pledged the credit of the United States for a quarter of a billion dollars, paid out two million dollars of unappropriated funds, suspended the writ of *habeas corpus*, closed the post office "to treasonable correspondence," caused numerous persons to be arrested, and blockaded the southern ports.<sup>90</sup>

The president's power to establish martial law outside the zone of military action was, however, held to be non-existent in *Ex Parte Milligan*.<sup>91</sup> But his power to blockade the southern ports without a declaration of war having been made by Congress was upheld in the *Prize Cases*<sup>92</sup> and his discretion held to be a wide one: "whether the conditions justified the President's actions was a question to be decided by him and no judicial court has jurisdiction to review his determination."

On the other hand, no less authority than former President and Chief Justice Taft has held that the president has no implied or emergency powers.<sup>93</sup> Even those disagreeing with Mr. Taft agree that the president gains no "war power" from his power as commander-in-chief except the power of commanding the armies and fleets which Congress has caused to be raised.

The prevailing view seems to be, however, that the president takes from the delegation to him by the Constitution of the executive power and from the constitutional injunction "to take care that the laws be faithfully executed" some authority that extends beyond the powers expressly given him. This authority permits him to adopt means "appropriate to the end" to carry out broad policies laid down by Congress or within the scope of powers expressly given him. And he is, to a considerable extent, the judge of the appropriateness of the means used. This is not to say that he can assume the powers of the legislature or the judicial functions; but within the broad limits of the executive power, he may act without express constitutional mandate.

Does this penumbra of power extend to the issuance of ceiling price schedules?

The nation is today making its most gigantic war effort in history, an

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United States, 224 U. S. 413, 32 Sup. Ct. 424 (1912); 6 Op. Att'y Gen. 28; 4 Op. Att'y Gen. 248; 6 Op. Att'y Gen. 220, 446.

<sup>90</sup>CORWIN, *THE PRESIDENT: OFFICE AND POWERS*, (1940) 157; and see proclamations of April 15, and May 3, 1861, 6 RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS*, (1908) 13-16; message of July 4, 1861, *id.* at 20-31; special message of May 26, 1862, *id.* at 77-79; message of February 14, 1862, *id.* at 102-104; and *id.* at 23-25, 31, 7-27.

<sup>91</sup>14 Wall. 2, 18 L. ed. 281 (1866).

<sup>92</sup>2 Black 635, 17 L. ed. 459 (1863).

<sup>93</sup>See TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* (1925) 125-127.

effort that already is absorbing 15% of the national income,<sup>94</sup> calling for the expenditure of 56 billion dollars and completely dislocating our peacetime economic system.<sup>95</sup> The War and Navy Departments have become the largest purchasers of goods and services in the nation, both directly and indirectly, as a result of express directions, appropriations, and authorizations from the Congress. Various departments of the government are competing with one another for goods and services as the result of increase in the cost of defense to the government and in the dislocation of markets. It would seem only appropriate that some agency of the executive branch, charged with the execution of the will of Congress, should have the power to advise the various purchasing divisions, as well as those dealing with those divisions, what are reasonable prices for necessary goods. And inasmuch as the price of necessary articles is bound up inextricably with prices of general commodities, it would seem but appropriate that the power to proclaim the executive views as to what are reasonable prices would extend to all commodities and, if necessary, to services.

It is not necessary, however, to go this far to sustain the announcement of maximum prices by the Office of Price Administration. As has been previously pointed out, the executive order creating the Office for Emergency Management provided for the co-ordination, through that Office, of the work and activities of the Council of National Defense. That Council, with its subordinate agencies, has the duty<sup>96</sup> to investigate with respect to practically all matters relating to national defense, to give information to producers and manufacturers as to the requirements relating to supplies needed for defense, and to create (or to make recommendations with respect to the creation of) relations which will render possible in time of need the immediate concentration and utilization of the national resources.

The statutory authority given to the Council and to its subordinate bodies would seem ample to warrant the investigation of, and report of the findings on, prices. While OPA was not organized by the Council as a subordinate body, it is linked to it, in many respects is subordinate to it, and would seem entitled to exercise the powers conveyed.

The National Defense Council statute does not, of course, go so far as to direct, or authorize, the price information to be put in the form of price schedules bearing the indicia of commands to both buyers and sellers. Nor does it appear that such orders are authorized by the express terms of the executive order creating the Office of Price Administration. But if authority to issue the information exists, the form in which it was issued would

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<sup>94</sup>Release of Office of Price Administration, Oct. 22, 1941, PM 1421.

<sup>95</sup>See *Washington Post*, Oct. 26, 1941, p. 1.

<sup>96</sup>Under the Act of August 29, 1916, 39 STAT. 649, 50 U. S. C. §§ 1-5 (1928).

hardly legalize either the information or the organization that collected it. The form of order may be a "trap for the unwary" profiteer and an unfair attempt to give the appearance of power where none is known to exist, but it hardly makes the dissemination of maximum price information beyond the pale of the law.

Senator Taft has objected that enforcement of the price schedules by commandeering is "purely and simply Government blackmail."<sup>97</sup> But as a general rule, as Mr. Justice Holmes stated in *Vegelehrn v. Guntner*,<sup>98</sup> "What you may do in a certain event you may threaten to do, that is give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences." Provided the conditions of the commandeering statutes were met, it would appear clear that the president might legally exercise any of the powers therein contained, irrespective of his motive. And were he to commandeer the plant of a price-schedule "violateur," the latter would be entitled to just compensation. To threaten requisition of a plant as a means of enforcing price orders does not constitute duress.<sup>99</sup>

If the executive has the power to enforce its price announcements, it gets its authority not from the announcements nor from the investigations in back of them but from the congressional grant to commandeer. The government may not be turning square corners with the citizen, but it is not "black-mailing" him.

Senator Taft would seem to be sound in his view that the Office of Price Administration has neither constitutionally nor by statute the power to fix prices, that is to say, to make price orders, the violation of which is unlawful and which measure the rights of citizens in their dealings with each other. The fixing of prices, traditionally, is a legislative function.<sup>100</sup> Whenever the price-fixing power, to the extent it has existed, has been exercised, it has been exercised by the Congress or the state legislatures.<sup>101</sup> The legislative

<sup>97</sup>Hearing before the Committee on Agriculture and Forestry, 77th Cong., 1st Sess. (May 29, 1941) 47.

<sup>98</sup>167 Mass. 92, 44 N. E. 1077 (1896).

<sup>99</sup>Cf. *American Smelting Co. v. United States*, 259 U. S. 75, 42 Sup. Ct. 420 (1922); *United States v. Tingey*, 5 Pet. 115, 8 L. ed. 66 (1831).

<sup>100</sup>*St. Louis Terminal Ass'n v. United States*, 266 U. S. 17, 45 Sup. Ct. 5 (1924); *Pacific Gas and E. Co. v. San Francisco*, 265 U. S. 403, 44 Sup. Ct. 537 (1923); *Prentiss v. Atlantic Coastline Ry.*, 211 U. S. 210, 29 Sup. Ct. 67 (1908); *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729 (1912).

<sup>101</sup>Even before the adoption of the Constitution, such price-fixing powers as were used were always exercised by the legislative branch either directly or by delegation of authority. *State Regulation of Prices* (1920) 33 HARV. L. REV. 838-841; McAllister, *Price Control by Law in the United States: A Survey* (1937) 4 LAW & CONTEMP. PROB. 273-300. For example of cases involving legislative price fixing, see *Chicago, B. & Q. Ry. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94 (1877); *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1877); *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757 (1877); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612 (1914). See also as examples

power of the United States was conferred by the Constitution exclusively upon the Congress. This power embraces all the functions of the state and all the functions of government not expressly or impliedly delegated to other branches or expressly withheld from the legislative branch.<sup>102</sup> The legislative function, subject to constitutional restriction, extends to the making of all new rules for the regulation of future conduct,<sup>103</sup> and it would seem that the establishment of rules decreeing prices to be charged is plainly within that function. The fact that the price-fixing power was, at the time of adoption of the Constitution, exercised by the legislative branch would be enough to stamp it as legislative in character.<sup>104</sup> Further, even had this power not originally resided in the legislature, the long continued and uninterrupted exercise of this power by the Congress with the acquiescence of the other branches, would lodge it there.<sup>105</sup>

The fact of the emergency would not cause a shift of the authority. As Corwin has pointed out,<sup>106</sup> "the power of dealing with national emergencies is an inherent power in the National Government as a whole, not in a part thereof, and it is subject in its exercise to the methods and procedures which are laid down in the Constitution."

No congressional authority having yet been given the executive branch to fix prices in this emergency, OPA has hardly the legal power to do more than to announce its price schedules, to urge compliance therewith, and when violations occur, to bring pressure to bear through other departments executing express congressional mandates.<sup>107</sup> But its "announcement" and

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of early exercise of price fixing power by Congress, 3 STAT. 587, § 7 (1820) (regulating wharfage rates and rates for sweeping chimneys in the District of Columbia); 9 STAT. 224, § 2 (1848) (regulating charges for carriages in the District of Columbia). It has long been recognized that the legislative branch alone can delegate price fixing authority to a municipal corporation. A municipal corporation has no power to fix prices unless the legislature delegates that power to it. *Greene v. Fitchburg*, 219 Mass. 121, 106 N. E. 573.

<sup>102</sup>*Cooper v. Telfair*, 4 Dall. 14, 1 L. ed. 721, 723 (1799); *Fletcher v. Peck*, 6 Cranch 87, 3 L. ed. 162 (1810); *Bridgeport Public Library v. Burroughs*, 85 Conn. 309, 82 Atl. 582 (1912); *Woodruff v. New York Ry.*, 59 Conn. 63, 20 Atl. 17 (1890); *Mayor v. State*, 15 Md. 479 (1890).

<sup>103</sup>*People v. Roth*, 249 Ill. 532, 94 N. E. 953 (1911); *Schaake v. Dottey*, 85 Kan. 598, 118 Pac. 80 (1911).

<sup>104</sup>*Leavenworth County v. Miller*, 7 Kan. 479 (1871); *Booth v. Commonwealth*, 130 Ky. 88, 113 S. W. 61 (1908).

<sup>105</sup>*United States v. Mid West Oil Co.*, 236 U. S. 459, 35 Sup. Ct. 309 (1915).

<sup>106</sup>CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (1940) 133.

<sup>107</sup>OPA has, in two cases, sought to persuade a bankruptcy court to exercise its equitable jurisdiction to protect the public interest to the extent of refusing to confirm sales above ceiling prices, in the *Matter of the Bender Body Co.* (N. D. Ohio) No. 55795, and to instruct referees or trustees not to sell above ceiling prices, *In re Oliver C. Riggs*, Bankruptcy No. 21,858 (E. D. Pa.). In the former case, the government has filed a petition to intervene and by stipulation between counsel, part of the proceeds of the sales, some of which were made above price ceilings established by OPA, have been impounded pending a decision by the court on the merits and on the question of the

"issuance" of price schedules would seem to be justified both as a discharge of part of the constitutional obligation of the president to take care that the defense program Congress has laid down be executed, and as an exercise of the statutory powers of the National Defense Council and its subordinate bodies.

#### V. SOME CONSTITUTIONAL ASPECTS OF PRICE-CONTROL

The final form of the price-control measure had not been determined at the time this article went to press. A discussion of the constitutionality of price-fixing, therefore, must perforce be general in nature.

##### A. Congress Has Power to Fix Prices in Aid of National Defense

Notwithstanding the fact that World War I did not definitely settle the question,<sup>108</sup> little doubt would now seem to exist that, assuming appropriate methods are employed, the Congress has, even before the actual commencement of hostilities, the power to fix maximum prices. This power may be derived from the "war power" and probably from the commerce power. It can be plausibly argued that it exists under the power of Congress to coin money and regulate the value thereof.<sup>109</sup>

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right of the government to intervene. The sales have been confirmed subject to the stipulation. In the latter case, the court refused, on the ground of short notice, to instruct the receiver, but a sale below the ceiling prices rendered the question moot. The court did, however, allow the government formally to intervene. The Comptroller General has held, however, that the Federal Prison Industries, in selling scrap material, may not reject bids in excess of ceiling prices established by OPA, Comp. Gen. Dec. B-20689, Oct. 13, 1941, 10 U. S. LAW WEEK 2261. Nor can the governmental agency refuse to solicit cash bids, even though by limiting the bids to bids to exchange new material for that offered for sale, it might avoid receiving bids above the ceilings. The decision was rested on the conclusion that "there appears nothing in the statutes relating to Federal Prison Industries, Inc., which reasonably could be construed as authorizing the rejection of the highest cash bids under the circumstances presented." The Comptroller-General followed the reasoning employed by him in Decision B-15941, 20 Comp. Gen. 703, 9 U. S. LAW WEEK 2686, holding that the Navy Department could not relieve a successful bidder of its obligation to purchase scrap materials because the bid price was in excess of the ceiling price established after acceptance of the bid, but before performance. In that decision, it was pointed out that the United States as a contractor is not liable for its acts as a sovereign, and that a sovereign is not affected by statutory provisions or administrative orders unless expressly named therein or included by implication.

<sup>108</sup>As stated hereinbefore, the Supreme Court expressly reserved the Constitutional question in *Addy Co. v. United States*, 264 U. S. 239, 44 Sup. Ct. 300 (1924). Notwithstanding this, the validity of price fixing seems to have been assumed in *United States v. MacIntosh*, 283 U. S. 605, 622, 51 Sup. Ct. 570 (1931), wherein the court said: "To the end that war may not result in defeat, freedom of speech may, by Act of Congress, be curtailed or denied . . . prices of foods and other necessities of life fixed or regulated; railways taken over and operated by the Government; and other drastic powers, wholly inadmissible in times of peace, exercised to meet the emergencies of war."

<sup>109</sup>Ginsberg, *Legal Aspects of Price Control in the Defense Program*, (1941) 27 A. B. A. J. 530, 531.

1. *The War Power of the Congress.*—Congress is empowered by the Constitution “to declare war,” “to raise and support armies,” “to provide and maintain a navy,” and “to make rules for the Government and regulation of the land and naval forces.” It is empowered to tax “to provide for the common defense,” and “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.”<sup>110</sup>

The foregoing powers, as were pointed out many years ago by John Quincy Adams,<sup>111</sup> are plenary:

“Sir, in the authority given to Congress by the Constitution of the United States to declare war, all the powers incidental to war are, by necessity, implication, conferred upon the government of the United States. Now the powers incidental to war are derived not from the internal municipal sources, but the law and usages of nations. . . . There are, then, in the authority of Congress and in the Executive, two classes of powers altogether different in their nature and often incompatible with each other—war power and peace power. The peace power is limited by regulations and restricted by provisions in the Constitution itself. The war power is only limited by the usages of nations. The power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty and of life.”

The war power was given Congress because the framers of the Constitution realized that “the very existence of the Nation might be at stake, and that every resource of the people must be at command.”<sup>112</sup> In that case the Supreme Court said:

“Of course, the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.”

That power “permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the Nation.”<sup>113</sup>

It is for the Congress to decide what steps are required to wage a successful war or to defend the nation successfully, and its discretion is not to be interfered with.<sup>114</sup> In fact, as Charles Evans Hughes pointed out in 1917,<sup>115</sup>

<sup>110</sup>U. S. CONST. ART I, § 8.

<sup>111</sup>REGISTER OF DEBATES, XII, 4037-4038.

<sup>112</sup>Charles Evans Hughes, speaking before the American Bar Association on *The Fighting Powers of the United States under the Constitution*, Report of the 40th Annual Meeting of the American Bar Association, 232-248. See also THE FEDERALIST, Nos. XLI, XXVI, and XXIII; *United States v. MacIntosh*, 283 U. S. 605, 51 Sup. Ct. 570 (1931); *Miller v. United States*, 11 Wall. 268, 20 L. ed. 135 (1871).

<sup>113</sup>*Home Bldg. and L. Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1934).

<sup>114</sup>*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579 (1819). In that case the Court

all "reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful war."

The "war" or "national defense" power of the Congress was held to extend to operation of the railroads<sup>116</sup> and of the telegraph and telephone systems,<sup>117</sup> to draft man power,<sup>118</sup> to place compulsory orders for materials,<sup>119</sup> to put into effect prohibition after the Armistice had been signed,<sup>120</sup> and to acquire the Gettysburg Battlefield.<sup>121</sup> None of these acts would seem more far-reaching than price-fixing, if the latter could be shown to have reasonable relation to national defense.

The importance to national defense today of the price structure is too plain to require any considerable argument. As previously stated, about 15% of the national resources has been devoted to defense production. The total defense program to date calls for expenditures of approximately fifty-six billions of dollars.<sup>122</sup> By June 30, 1942, approximately seventeen billion will have been spent, and in the fiscal year, 1943, 26 billion more out of a national income not exceeding 105 billion dollars will be devoted to defense.<sup>123</sup> Even before defense spending began to hit its stride, prices began their upward spiral. From the outbreak of war to August, 1941, the wholesale price index in this country increased 20.4%. The cost of living index has shown a 9.6% rise above the August, 1939, level.<sup>124</sup> By the end of

said (4 Wheat. at 421, 4 L. ed. at p. 605): "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended, but we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. That the end be legitimate, that it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." In *Stewart v. Kahn*, 11 Wall. at 506, 20 L. ed. at 179, the Court said:

"The measures to be taken in carrying on war and to suppress insurrection, are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

*Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253, 49 Sup. Ct. 314 (1928); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 163, 40 Sup. Ct. 106 (1919); *Stewart v. Kahn*, 11 Wall. 493, 20 L. ed. 176 (1871).

<sup>115</sup>Report of the 40th annual meeting of the American Bar Association, (1917) p. 247.

<sup>116</sup>*Northern Pac. R. R. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1919).

<sup>117</sup>*Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507 (1919).

<sup>118</sup>*Selective Draft Cases*, 245 U. S. 366, 38 Sup. Ct. 159 (1917).

<sup>119</sup>*Moore & Tierney, Inc. v. Rockford Knitting Co.*, 265 Fed. 177 (C. C. A. 2d 1920).

<sup>120</sup>*Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 Sup. Ct. 106 (1919).

<sup>121</sup>*United States v. Gettysburg Electric Co.*, 160 U. S. 668, 16 Sup. Ct. 427 (1896).

<sup>122</sup>See Office of Production Management release PM 1442 (Oct. 25, 1941).

<sup>123</sup>See Office of Production Management release PM 1442 (Oct. 25, 1941).

<sup>124</sup>See Office of Production Management release PM 1421 (Oct. 22, 1941).

June, 1941, the Bureau of Labor Statistics daily index of the spot prices of 28 basic commodities advanced to 150% of its level in August, 1939, a rise of about 24% in less than six months. More than half of the increase in the general level of wholesale prices has come within the past four months, during which the defense program has begun to "take hold."

Price increases and high cost of living not only undermine morale;<sup>125</sup> they also greatly and unnecessarily increase the cost to the government of preparations for national defense.<sup>126</sup>

The necessity of price control as a war measure has been recognized by chambers of commerce, Senate committees, the War Policies Commission, and in the industrial mobilization plans prepared by the War Department and in the experience of foreign countries.<sup>127</sup>

The reasonable relation of price-fixing to a successful defense would seem easily demonstrable.

The fact that a declared state of war does not now exist does not diminish the right of Congress to control prices. Neither reason nor precedent supports a view that in a period of history when the Battle of France was lost on the assembly lines three years before it began the Congress is powerless to act until the enemy is at our gates. In a much simpler day Congress could, as a war measure, place an embargo on commerce in time of peace.<sup>128</sup> It has been permitted, under the war power, to construct a dam in peace time to strengthen defense,<sup>129</sup> to build highways for national defense,<sup>130</sup> and to exercise the power of eminent domain to establish a battleground as a means

<sup>125</sup>See statement of Bernard Baruch, *War Policies Commission Hearing*, held pursuant to Public Res. No. 98, 51st Cong., 2d Sess., 812-813, and address of President Wilson to the mine operators and manufacturers of the United States, July 12, 1917, and 13 WASHINGTON'S WRITINGS, 382-383.

<sup>126</sup>It is estimated that the cost to the government of the World War was increased by 15 billions of dollars because of price inflation. See BARUCH, *AMERICAN INDUSTRY IN THE WAR* (1941) 447-453.

<sup>127</sup>See 20 EQUITY (1918) 61-62; Report of the Special Committee on Control of Prices during the War, appointed by the U. S. Chamber of Commerce; *War Policies Commission Hearing*, 812-813; Taussig, *Price-Fixing as Seen by a Price-Fixer* (1919) 33 Q. J. OF ECON., 205, 240; *Report of The House Committee on Military Affairs on H. R. 119*, 74th Cong., 1st Sess. (1935) 9; Industrial Mobilization Plan, revision of 1939, SEN. DOC. NO. 139, 76th Cong., 2d Sess. (1939); *Senate Munitions Committee Report on H. R. 5529*, 74th Cong., 1st Sess. (1935) 26; SEN. REP. NO. 944, Part 2, 74th Cong., 1st Sess. (1935) 128; House Committee on Military Affairs, H. R. REP. NO. 808, 75th Cong., 1st Sess. (1935) and H. R. REP. NO. 1870, 75th Cong., 3rd Sess. (1939); Senate Committee on Military Affairs, SEN. REP. NO. 480, 75th Cong., 1st Sess. (1937).

<sup>128</sup>Cited in BLAKE, *EXAMINATION OF THE CONSTITUTIONALITY OF THE EMBARGO LAWS*, 56.

<sup>129</sup>*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326-328, 56 Sup. Ct. 466 (1936).

<sup>130</sup>*Nashville, C. & St. Louis Ry. Co. v. Walters*, 294 U. S. 405, 417, 55 Sup. Ct. 486 (1938).

of building up morale.<sup>131</sup> And its authority in the present time to draft men has been upheld.<sup>132</sup>

From the foregoing, it would appear clear that the power to regulate prices in the present emergency may lawfully be exercised by the Congress under its war powers.

2. *The Power to Fix Prices under the Commerce Clause.*—While it is less clear, recent decisions of the Supreme Court would seem to give the Congress the power to fix prices under its commerce power.<sup>133</sup> The fixing of prices upon articles or services in interstate commerce is not new. Congress has fixed a wage scale<sup>134</sup> and railroad rates,<sup>135</sup> and regulated fees and charges for livestock exchanges.<sup>136</sup> It has prevented price discrimination.<sup>137</sup> It has even gone further, constitutionally, to bar completely from interstate commerce, goods produced in violation of the Fair Labor Standards Act,<sup>138</sup> and to regulate the labor relations of producers for interstate commerce.<sup>139</sup> Doubtless to sustain price control under the commerce clause it would be necessary to show that price-fixing was reasonably necessary in order to prevent undue burden upon interstate or foreign commerce or the disruption of the orderly exchange of commodities in interstate commerce.<sup>140</sup> Whether such a showing could be made in any particular case would depend upon the circumstances. How far Congress could go to fix retail prices, rents, or wages outside of the transportation field would depend, presumably, upon the proof developed as to the burden produced by these items on interstate commerce and as to their effect upon its orderly flow.<sup>141</sup> Those hoping for greater government control will, doubtless, prefer to see general price legislation sustained on the basis of the commerce power.

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<sup>131</sup>United States v. Gettysburg Electric Co., 160 U. S. 668, 16 Sup. Ct. 427 (1896).

<sup>132</sup>Stone v. Christensen, 36 F. Supp. 739 (D. Ore. 1940); United States v. Rappaport, 36 F. Supp. 915 (S. D. N. Y. 1940); Herling v. United States, — F. (2d) —, (C. C. A. 2d June 21, 1941). Cf. Moore & Tierney, Inc. v. Rockford Knitting Co., 265 Fed. 177, 180 (C. C. A. 2d 1920).

<sup>133</sup>United States v. Rock Royal Co-operative Co., 307 U. S. 533, 59 Sup. Ct. 993 (1939); Sunshine Anthracite Coal v. Atkins, 310 U. S. 381, 60 Sup. Ct. 907 (1940); United States v. Darby Lumber Co., 312 U. S. 100, 61 Sup. Ct. 451 (1941).

<sup>134</sup>Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298 (1917).

<sup>135</sup>Louisville & National R. R. v. Interstate Commerce Commission, 190 U. S. 273, 23 Sup. Ct. 687 (1903).

<sup>136</sup>Tagg Bros. & Moorehead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930); Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922).

<sup>137</sup>George Van Camp & Sons v. American Can Co., 278 U. S. 245, 49 Sup. Ct. 112 (1928).

<sup>138</sup>United States v. Darby Lumber Co., 312 U. S. 100, 61 Sup. Ct. 451 (1941).

<sup>139</sup>National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1937).

<sup>140</sup>Nebbia v. New York, 291 U. S. 502, 537, 54 Sup. Ct. 505 (1934).

<sup>141</sup>United States v. Rock Royal Co-operative Co., 307 U. S. 533, 59 Sup. Ct. 993 (1939), and cases therein cited, 307 U. S. at 568-570.

Those with contrary views will prefer a test on the war power alone. The latter, certainly, is the broader and more dependable. A court need not, unless it wishes, look beyond it for the necessary constitutional authority.

### B. Price-Fixing and the Fifth Amendment

The power to fix prices, if in fact appropriate to either national defense or to prevent burdens on interstate commerce, and assuming its exercise in a reasonable way, would seem not to violate either the "due process" or "the just compensation" clauses of the Fifth Amendment.

Both the war and the commerce powers of the Congress have been held to be as broad, in their appropriate fields, as the police power of the states raised to their highest degree.<sup>142</sup> A state, it was held in *Nebbia v. New York*,<sup>143</sup> may "regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells," and "if the laws passed seem to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*."

The congressional freedom is no less great than is that of a state legislature, especially when the "extraordinary circumstance of war," or threat of war, may bring, as Charles Evans Hughes pointed out in his address in 1917 before the American Bar Association,<sup>144</sup> "particular businesses and enterprises fairly into the category of those which are affected with the public interest and which demand immediate and thoroughgoing public regulation." At such a time, he said:

"The production and distribution of foodstuffs, articles of prime necessity, those which have direct relation to military efficiency, those which are absolutely required for the support of the people during the stress of conflict, are plainly of this sort. Reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress. . . . That [war] power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the Constitution or by any one of the amendments."

In the exercise of the commerce power, the same test of "appropriateness

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<sup>142</sup>United States v. Rock Royal Co-operative, *supra* note 141; Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106 (1919); Second District v. N. Y. C. R. R., 230 N. Y. 149, 129 N. E. 455; United States v. Gordin, 287 Fed. 565 (S. D. Ohio 1922); United States v. Casey, 247 Fed. 362 (S. D. Ohio 1918).

<sup>143</sup>291 U. S. 502, 54 Sup. Ct. 505 (1934).

<sup>144</sup>Report of the 40th Annual Meeting of the American Bar Association (1917) 247.

to the end" measures "due process." In *Virginia Railway Co. v. Federation No. 40*,<sup>145</sup> the Supreme Court said:

"Even though Congress, in the choice of means to affect a permissible regulation of commerce, must conform to due process . . . it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause."

The economic facts previously discussed indicate strongly that extensive price-fixing is "appropriate to the permissible end" of national defense. While for lack of sufficient knowledge of economic facts this writer is not now prepared to say that general price-fixing is essential to the free flow of commerce, it might well be proved to be. Certainly today it cannot be said that there is anything inherent in the fixing of maximum prices which violates the due process clause.<sup>146</sup>

It has, of course, been argued that before the prices of a business can be regulated it has to meet the test, which Mr. Justice Holmes called "little more than a fiction,"<sup>147</sup> that the business be affected with a public interest. This test was, however, discarded in *Nebbia v. New York*.<sup>148</sup> The fact that a buyer was not, as the defendant in *Highland v. Russell Car and Snow Plow Co.*,<sup>149</sup> engaged in a public use "for which coal and other private property might have been taken by exertion of the power of eminent domain" should not prevent the government from prescribing the maximum prices to be paid.

And satisfaction of the now outmoded test of "due process" laid down in *Murray's Lessee v. Hoboken Land and Improvement Co.*,<sup>150</sup> i.e., that of examining the "settled usages and modes of proceeding existing in the common and statute law of England" which are not unsuited to the New World, would be found in the almost continuous price-fixing activities of the pre-Revolutionary War English governments and of colonial and new state legislatures, previously discussed.<sup>151</sup>

No emergency has yet been held to suspend the requirement that private property shall not be taken for public use without just compensation.<sup>152</sup> But, as was held in *Morrisdale Coal Co. v. United States*<sup>153</sup> and *Pine Hill Coal Co.*

<sup>145</sup>300 U. S. 515, 558, 57 Sup. Ct. 592 (1937).

<sup>146</sup>*Olsen v. Nebraska*, 312 U. S. —, 61 Sup. Ct. 862 (1941); *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934).

<sup>147</sup>*Tyson & Brother v. Banton*, 273 U. S. 418, 446, 47 Sup. Ct. 426 (1927).

<sup>148</sup>291 U. S. at 531-539.

<sup>149</sup>279 U. S. 253, 49 Sup. Ct. 314 (1928).

<sup>150</sup>18 How. 272, 276-7, 15 L. ed. 372 (1856).

<sup>151</sup>See also authorities cited by Brandeis, J., in *New State Ice Co. v. Leibmann*, 285 U. S. 262, 305-308, 52 Sup. Ct. 371 (1932).

<sup>152</sup>*United States v. Russell*, 13 Wall. 623, 627, 628, 20 L. ed. 474 (1871).

<sup>153</sup>259 U. S. 188, 42 Sup. Ct. 481 (1922).

*v. United States*,<sup>154</sup> the fixing of prices is "not a taking, and no law-making power promises by implication to make good losses that may be incurred by obedience to its commands." Even the entry into a contract with the government at a fixed price, if voluntary, prevents a later claim of "a taking."<sup>155</sup> Doubtless, were property requisitioned by the federal government itself, the seller would be entitled to have determined *de novo* the reasonableness of the price set, since the measure of just compensation is a judicial and not a legislative problem.<sup>156</sup> Such a requirement may limit to some extent the operation of a price-fixing statute; it would not appear to effect its validity.

Were the Congress to require, as the English Price of Goods Act has, that sellers may not refuse to sell their goods at the prices fixed, just compensation probably could be demanded from the government where the prices fixed were held to be less than reasonable.<sup>157</sup> But no such requirement is contained in any measure so far proposed here. In England, of course, the government may take property for war purposes without making just compensation.<sup>158</sup>

In the absence of a forced sale, however, the fixing of prices below those at which some sellers might profitably sell would not seem to constitute a "public taking." The fact that a regulation, otherwise valid, results in the lessening of value of a property,<sup>159</sup> or prohibits the sale of a product,<sup>160</sup> or causes some other particular hardship<sup>161</sup> does not constitute either "a taking" or a violation of due process. No one has a constitutional right in a profit from a sale set on an industry-wide or region-wide basis.<sup>162</sup>

<sup>154</sup>259 U. S. 191, 42 Sup. Ct. 482 (1922).

<sup>155</sup>American Smelting etc. Co. v. United States, 259 U. S. 75, 42 Sup. Ct. 420 (1922).

<sup>156</sup>Monongahela Navigation Co. v. United States, 148 U. S. 312, 327, 13 Sup. Ct. 622 (1893).

<sup>157</sup>Highland v. Russell Car and Snow Plow Co., 279 U. S. 253, 49 Sup. Ct. 314 (1928); Dupont de Nemours & Co. v. Hughes, 50 F. (2d) 821 (C. C. A. 3d 1931).

<sup>158</sup>*In re A Petition of Right* [1915] 3 K. B. 649.

<sup>159</sup>Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106 (1919); Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141 (1920).

<sup>160</sup>Purity Extract Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44 (1912).

<sup>161</sup>Pierce Oil Co. v. Hope, 248 U. S. 498, 500, 39 Sup. Ct. 172 (1919) (upholding ordinance requiring gasoline tanks to be stored outside city limits); United States v. Hudson, 299 U. S. 498, 57 Sup. Ct. 309 (1937).

<sup>162</sup>United States v. Morgan, 312 U. S. —, 61 Sup. Ct. 999 (1941); Tagg Bros. & Moorehead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930); Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 55 Sup. Ct. 7 (1934).

In the *Hegeman Farms* case, the Court said (293 U. S. at 169-170): "The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit. . . . The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police

The distinction between the case of an ordinary business and that of a public utility, which must be allowed to earn a fair return,<sup>163</sup> is, of course, that the public utility must continue to provide the services the rates for which are fixed, which is not true in the case of the ordinary seller. And even a public utility's right to earn dividends is not absolute if an unfair rate is the alternative.<sup>164</sup>

The foregoing is not to say that the Fifth Amendment could not be violated by price-fixing. Were the prices set so low as to give no or only a very few sellers adequate returns, they probably would be arbitrary, unreasonable, and violative of due process. Unreasonable classifications of goods, profit margins, or other actions either unnecessary or unduly disturbing to normal business practices might be held beyond the constitutional pale. Such actions, however, would not invalidate the acts of Congress or impair the price-fixing power.

General price-fixing legislation, therefore, probably will survive the tests of constitutionality. Some may doubt whether the Constitution will survive price-fixing. Others may be more concerned with the problem of weaving such a war time measure inextricably into the fabric of governmental control. But the vast majority, concentrating primarily upon the attainment of the goals set for them, will adhere to the price schedules whether fixed by congressional mandate or not, or whether advised by their counsel that they must or not. They will do this because fundamentally and eternally to Americans good sound sense is "law," no matter what the law reviews now, or the judges after the event, may say regarding its constitutionality.

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power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged." See also *United States v. Adler's Creamery*, 107 F. (2d) 987 (C. C. A. 2d 1939); *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 61 Sup. Ct. 524 (1941).

<sup>163</sup>*Smythe v. Ames*, 169 U. S. 466, 526, 18 Sup. Ct. 418 (1898).

<sup>164</sup>*Reagan v. Farmers Loan and Trust Co.*, 154 U. S. 362, 412, 14 Sup. Ct. 1047 (1894); *Covington and Lexington T. R. Co. v. Sandford*, 164 U. S. 578, 596-97, 17 Sup. Ct. 198 (1896).