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PRICE CONTROL UNDER THE DEFENSE  
PRODUCTION ACT OF 1950

*Reuben Hall\**

THE Defense Production Act of 1950<sup>1</sup> in so far as it deals with price stabilization follows generally the provisions of the Emergency Price Act as amended, which was in effect during World War II. This is true both as to the substantive and procedural aspects. This discussion will be limited to the procedural aspects.

Section 407 of the Defense Production Act of 1950 provides the time and manner in which protests against any regulation or order relating to price controls may be prosecuted. These provisions are virtually the same as those set forth in the Emergency Price Control Act as amended. Essentially it provides that a protest may be filed any time within six months after the effective date of any regulation or order relating to price controls.

Such protest must specifically set forth objections to any provisions of the price orders and affidavits or other written evidence in support of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President.

Within a reasonable time after the filing of the protest, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such protest in whole or in part, he shall

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\*Mr. Hall is Chairman of the Administrative Law Section of the American Bar Association. This article is taken from an address delivered by him to a meeting of that Section in connection with the Southwestern Regional Convention of the American Bar Association held in Dallas, April 16-21, 1951.

<sup>1</sup> Pub. L. No. 774, 81st Cong., 2d Sess. (Sept. 8, 1950).

inform the protestant of the grounds upon which such decision is based and of any economic or other data of which the President has taken official notice.

Any proceedings under this section may be limited by the President to the filing of affidavits or other written evidence and the filing of briefs; provided, however, that upon the request of the protestant any protest filed in accordance with statutory provisions shall, before denial, be considered by a Board of Review consisting of one or more employees of the United States designated by the President. The Board of Review may conduct hearings and may upon the request of the protestants and upon a showing that material facts would be adduced thereby, issue subpoenas to procure the evidence of persons or production of evidence or both. The President shall cause to be presented to the Board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant is to be given an opportunity to present rebuttal evidence in writing and oral argument before the Board, and the Board is to make written recommendations to the President. The protestant is to be informed of the recommendations and, in the event that the President rejects such recommendations, is to be informed of the reasons for the rejection.

If there be any undue delay on the part of the President in disposing of the protest, petition may be filed in the Emergency Court of Appeals for relief; relief being that the Court may order the President to dispose of such protest within a time to be fixed by the Court and if not disposed of within the prescribed time, the protest is to be considered denied.

Section 408 provides court review to the Emergency Court of Appeals. The complaint must specify the objections and pray that the regulation or order protested be enjoined or set aside in whole or in part. The President certifies and files with the Court a transcript of such portion of the proceedings in connection with the

protest as are material under the complaint. The transcript must include a statement setting forth so far as practicable the economic data and other facts of which the President has taken official notice.

No objection and no evidence in support of any objection may be considered by the Court unless such objection has been set forth in the protest or such evidence was contained in the transcript. Upon application by either party for leave to introduce additional evidence which was offered to the President and not admitted or which could not have been offered to the President or included by the President in the proceedings, the Court may determine that such additional evidence should be admitted and may order the same to be received by the President. The President shall promptly receive this additional evidence and such other evidence as he may deem necessary or proper and shall thereupon certify the record and transmit the same to the Court and any modification in the order made as a result thereof. On request of the President such additional evidence may be presented directly to the Court.

No regulation or order may be enjoined or set aside in whole or in part unless the complainant establishes to the satisfaction of the Court that the regulation is not in accordance with law or is arbitrary or capricious. The judgment of the Court in enjoining or setting aside a regulation or order is postponed for thirty days, except in the case where a petition for certiorari to the Supreme Court has been filed, in which case the effective date of the order enjoining or setting aside the regulation is postponed until thirty days from final disposition of the case.

The powers of the President with respect to price stabilization were delegated to the Economic Stabilization Administration by Executive Order 10161.<sup>2</sup> Pursuant to this delegation of authority the Economic Stabilization Administrator issued Price Procedural Regulation I. This regulation outlines the procedure by which applications for adjustment of price regulations, petitions for

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<sup>2</sup> 15 Fed. Reg. 6105 (Sept. 9, 1950).

amendment to price regulations, protests, and requests for interpretations may be submitted.

Applications for adjustment may be made by any person subject to a price regulation under an adjustment provision thereof. Such application shall be filed with the Economic Stabilization Administrator in Washington. It must be filed upon such forms as may be prescribed, but if no form has been designated, must state briefly the name and post office address of the applicant, his business and the manner in which he is subject to the price regulation, designation of the provision for adjustment, the information required by the terms of the applicable adjustment provision, a clear and concise statement of the facts upon which the applicant relies to qualify him for the adjustment, and a statement of the specific adjustment or other relief sought. The application and all accompanying documents must be filed jointly.

In the event of denial in whole or in part, a protest may be filed. Such protest may be based only upon grounds raised in the application for adjustment. Petitions for amendment may be filed at any time by any person subject to or affected by a provision of a price ceiling regulation. He shall propose an amendment of general applicability and be granted or denied solely on the merits of the amendment proposed.

The petition for amendment shall be filed with the Economic Stabilization Administrator in Washington. Five copies of the petition and all accompanying documents and briefs shall be filed. Denial of the petition for amendment is not subject to protest or to judicial review.

#### PROTESTS

Any person subject to any provision of a regulation or order relating to price controls may file a protest with the Economic Stabilization Administrator in Washington. Six copies of the protest and all accompanying documents are required to be filed. The protest must contain the following: the name and post office

address of the protestant; nature of its business and the manner in which the protestant is subject to the provision of the regulation or order being protested; the name and post office of any person filing the protest on behalf of the protestant; a complete identification of the provisions protested, such as the number of the regulation, the date of issuance and the section or sections to which objection is made; a clear and concise statement of all objections raised by the protestant against the provision protested; a clear and concise statement of all facts alleged in support of each objection; a statement of the relief requested; a statement signed and sworn to that the protest and documents filed therewith are prepared in good faith and the facts alleged are true to the best of the protestant's knowledge, information and belief.

A protestant must specify which of the facts are known to be true and which are upon information and belief. A protestant who wishes his protest considered by a Board of Review must specify so, the request indicating if he wishes oral argument, preference as to argument before a Board of Review in Washington or argument before a sub-committee consisting of one member at a location named by him. The request for consideration by a Board of Review must be made either in the protest or in an amendment filed therewith within fifteen days after the date the protest is filed.

Affidavits and any other written evidence setting forth in full all the evidence, presentation of which is subject to the control of the protestant and upon which the protestant relies in support of the facts in the protest, and a statement by the protestant in affidavit form setting forth in detail the nature and sources of any further evidence not subject to the control of the protestant upon which he believes he can rely in support of facts alleged in the protest shall be filed. Such statement shall be accompanied by an application for assistance by way of subpoenas, interrogatories or otherwise, in obtaining the documentary evidence or evidence of persons subject to the protestant's control. If the evidence of persons is required, the application shall specify the name and ad-

dress of each person and the facts to be proved by him. Where the application calls for the production of documents, it must specify them with special particularity to enable them to be identified.

In most cases evidence in protest proceedings will be received in written form. The protestant may request the receipt of oral testimony and in such request must show why the filing of affidavits or other written evidence will not permit fair and expeditious disposition of the protest.

A protestant may file with his protest accompanying evidential material and a brief in support of his objections. The brief must be filed as a separate document. The factual basis upon which a protest is determined is to be found in the record of the proceedings.

This record consists of the following: protest and supporting evidential material; material incorporated in the record of the proceedings by the Administrator; oral testimony taken in the course of the proceedings; all orders and opinions issued in the course of the proceedings; statement of considerations accompanying the regulation or order; if the protest is to an order denying application for adjustment, the application, material filed in support thereof, and the order and opinion denying the application. The record may also include statements of economic data and other facts of which the Administrator has taken official notice, including facts found by him as a result of reports filed and studies and investigations made pursuant to Section 705 of the Act.

There shall also be included in the record such evidence in the form of affidavits or otherwise as the Administrator deems appropriate in its bearing on the protest. When such evidence has been so incorporated in the record, copies must be served upon the protestant, and the protestant is entitled to a reasonable opportunity to present rebuttal evidence.

Where the Administrator grants the protest in whole or in part, a copy of the order is required to be sent to the protestant. When

the protest has been considered by a Board of Review, the protestant is advised of the recommendations of the Board by the Administrator.

In the event that the protest is denied in whole or in part, a copy of the Administrator's opinion is sent to the protestant. In such opinion a protestant shall be informed of any economic data or other facts of which the Administrator has taken official notice and the grounds upon which such decision is based and, if the protest has been considered by a Board of Review, the recommendation of such Board, and, if any recommendation has been rejected, the reason for the rejection.

#### INTERPRETATIONS

Any person desiring an official interpretation of a regulation or order may request the same in writing from the Administrator. Such request shall set forth the full factual situation out of which the interpretative question arises and the names and addresses of the persons involved.

Action taken in reliance upon and in conformity with any interpretation of a provisional regulation or any order is good only in such cases where the interpretation has been officially issued in writing and so long only as the interpretation remains in effect.

Generally, the regulations pertaining to procedure are the same as those which prevailed under the Emergency Price Act and the Office of Price Administration (O.P.A.). Under that Act the validity of any price regulation or order could not be considered by any court other than the Emergency Court of Appeals and on petition for certiorari by the Supreme Court. This right to limited judicial review of price regulations and orders to the Emergency Court of Appeals was sustained by the Supreme Court as to civil actions in *Lockerty v. Philips*<sup>3</sup> and as to criminal cases in *Yakus v. United States*.<sup>4</sup>

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<sup>3</sup> 319 U. S. 182 (1943).

<sup>4</sup> 321 U. S. 414 (1944).



With respect to the criminal aspects, a minority of the Court, consisting of Justices Roberts, Rutledge and Murphy, dissented and held in effect that Congress could not confer jurisdiction upon state or federal courts in enforcement proceedings, particularly of a criminal nature, and at the same time deny the enforcing court jurisdiction or power to consider the validity of the regulations for which enforcement is sought; that to prohibit the enforcing court from considering all questions of validity might require it to enforce regulations which are or may be invalid for constitutional reasons.

It was their view that whenever the judicial power is called into play, it is responsible directly to the fundamental law, and no authority can intervene to force or authorize the judicial body to disregard it. The proceedings for protest are short-cut proceedings trimmed almost to the bone of due process. The prohibition against consideration of the validity of price regulations in enforcement proceedings, civil or criminal, gives such regulations a higher sanctity than is given a statute.

Mr. Justice Roberts in the *Yakus* case condemned the whole procedure relating to protests. As he there stated, the Administrator may load the record with all sorts of material, articles, opinions, compilations and what-not, pure hearsay—subject to no cross-examination—to persuade the court that his order could “in his judgment” promote “one of the purposes of the Act.” The Administrator need make no findings of fact. And it was held in *Montgomery Ward & Co. v. Bowles*<sup>5</sup> that the action required only a summary statement of the basic facts which justified the regulation. It is hard to conceive of any situation where the protestant labors under such handicaps. A procedure better designed to prevent the making of an issue between the parties can hardly be conceived. In the opinion of Mr. Justice Roberts such court review was a farce.

There is a presumption that the regulation or order is valid.

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<sup>5</sup> 138 F. 2d 669 (Em. App. 1943).

This follows the general rule of good administrative law practice that the court presumes that the official charged with the administration of an act has performed his duty in a lawful manner.<sup>6</sup> It is the burden of the protestant to establish that the order is invalid.<sup>7</sup>

In preparing a protest I urge that you set forth fully and in detail all grounds upon which the protest is founded. Objections to price orders or regulations not presented in the protest to the Administrator are not open on appeal to the Emergency Court of Appeals.<sup>8</sup>

Where the ground of the protest is that the maximum price established by the price order or regulation is non-compensatory, results in a loss to the protestant, and is therefore unfair and inequitable and not in accordance with law, the protest should so state, and supporting evidence should be presented to establish that the loss is not peculiar to the protestant alone, but is generally applicable to a substantial portion of the industry. Loss to the protestant alone is insufficient to establish invalidity of a price order. It must be shown to be general to the industry or a substantial portion thereof.<sup>9</sup>

While judicial review of validity of price orders and regulations is limited under the Act to the Emergency Court of Appeals, questions respecting the application or interpretation of price orders and regulations are open for consideration by the courts generally.<sup>10</sup> However, the interpretation of a maximum price order made by the Administrator, unless plainly erroneous or inconsistent with the Act, is entitled to great weight and may be controlling.<sup>11</sup>

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<sup>6</sup> Gillespie-Rogers-Pyatt Co. v. Bowles, 144 F. 2d 361 (Em. App. 1944).

<sup>7</sup> Heinz v. Bowles, 149 F. 2d 277 (Em. App. 1945); Montgomery Ward & Co. v. Bowles, 147 F. 2d 858 (Em. App. 1945).

<sup>8</sup> Gold-Form Inc. v. Bowles, 152 F. 2d 107 (Em. App. 1945).

<sup>9</sup> Fournace v. Bowles, 148 F. 2d 97 (Em. App. 1945), *cert. denied*, 325 U. S. 884 (1945); United States Gypsum Co. v. Brown, 137 F. 2d 803 (Em. App. 1943).

<sup>10</sup> Alan Levin Foundation v. Bowles, 152 F. 2d 467 (Em. App. 1945); Lubin v. Streg, 56 F. Supp. 146 (E. D. N. Y. 1944).

<sup>11</sup> Bowles v. Seminole Rock & Sand Co., 325 U. S. 410 (1945).

The Emergency Price Act was sustained as an exercise of the War Powers. Whether it would be sustained in peace-time may be open to question. We are told by our government officials that the tensions of the cold war may continue for a period of ten to twenty years and that because of such conditions we may look forward to increased regulation of our economic life.

The American Bar Association spent a number of years in attempting to enact into law statutes which would provide fair hearings with judicial review of administrative matters. The Administrative Procedure Act,<sup>12</sup> finally enacted in 1946, was the culmination of these efforts. My own views with respect to the sufficiency of procedures dealing with protests against price orders and regulations are more forcefully expressed by Mr. Justice Roberts and Mr. Justice Rutledge in their dissenting opinions in the *Yakus* case.

The Defense Production Act so far as it pertains to price stabilization expires June 30, 1951. There will probably be efforts made to extend this date. I suggest that in connection with any such extension consideration be given to the desirability of including within the Act provisions that will require hearings respecting protests to be held in accordance with Sections 7 and 8 of the Administrative Procedure Act. In my judgment by so doing persons affected by price orders would have a fair opportunity for a fair hearing more nearly conforming to the ordinary usual concepts of due process.

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<sup>12</sup> 60 STAT. 237, 5 U. S. C. 1946 ed. § 1001 *et seq.*

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