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PRICE CONTROL AND THE PROFIT SYSTEM

CLIFFORD J. HYNNING*

PROFITS are relevant to price control at this phase of the war economy¹ for the purpose of appraising the extent to which increases in the operating costs of sellers since the statutory base period (which is usually the two-week period starting October 1, 1941)² may or may not be absorbed out of profits. Where the cost patterns of the base

* Member of the Illinois Bar; Senior Analyst, Office of Price Administration. The views expressed herein are personal to the author, and do not necessarily reflect those of the OPA.

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¹ As the war economy grows in time and intensity all standards of normality, including the profit standard, become less and less important and may, conceivably, in specific instances wholly cease to matter, even as a psychological tradition. The "garrison state," as Lasswell phrased it after a visit to Japan, has not overtaken us to its full extent at the time of writing (spring of 1942), but it cannot be entirely ruled out that the whole discussion of profits in the operation of a war economy may eventually become "academic."

² The Emergency Price Control Act authorizes the Price Administrator to disregard the October 1-15 base period wherever actual price quotations are lacking or are unrepresentative in view of "abnormal or seasonal market conditions or other cause," in which case he shall consider the "nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative. . . ." A brief review of the statements of considerations accompanying Maximum Price Regulations Nos. 106 to 142 inclusive indicates that the October 1-15 base period was regarded as controlling in 20 cases, the month of March, 1942, in 7 cases (in addition to the General Maximum Price Regulation, which is applicable to all prices except those specifically enumerated), while other base periods were adopted in 10 cases. The *October 1-15 base period* was controlling in the following regulations: 106 (domestic shorn wool), 107 (used tires and tubes), 109 (aircraft spruce), 110 (household mechanical refrigerators), 111 (household vacuum cleaners), 112 (anthracite coal), 113 (iron ore), 114 (wood pulp), 115 (silk waste), 116 (china and pottery), 117 (used egg cases), 119 (original equipment tires and tubes), 120 (bituminous coal), 123 (raw and processed wool waste), 125 (nonferrous foundry products), 127 (finished piece goods), 134 (rental of construction and road maintenance equipment), 136 (machines and parts), 138 (standard ferromanganese), and 140 (sanitary napkins). The *March, 1942, base period* was controlling in the following regulations: 129 (paper products), 130 (standard newsprint), 131 (camelback), 132

period remain unchanged or have altered in a downward direction, the profits factor is presumably unimportant,³ since the prevailing prices of the base period are apparently normal. Where increases in costs have occurred since the base period, however, an issue is raised as to whether they should be absorbed out of profits or should warrant adjustment by the Price Administrator, a) in the case of producers, fabricators, or distributors, by increases in the prices charged by them, or b) in the case of retailers or other sellers to ultimate consumers, by decreases in the prices paid by them.⁴ The extent to which cost increases should be absorbed out of profits depends, among other relevant factors, upon the comparative status of profits in the industry, which is, in view of the statutory silence,⁵ a question of reasonableness.

In order for profits to perform such an assessing role in the administration of price control it is necessary to resolve several difficult issues—namely, a) the definition of profits in the sense of determining the sources of income and the items of deduction,⁶ b) the standard for determining

(waterproof rubber footwear), 135 (mixed fertilizer, superphosphate, and potash), 141 (shearings), and 142 (retail sales of summer seasonal goods). *Other base periods* were used in the following regulations: 108 (nitrate of soda, sulphate of ammonia, and cyanamid—spring season of 1941), 118 (cotton products—July 21–August 15, 1941), 121 (miscellaneous solid fuels—December 15–31, 1941), 122 (solid fuels delivered from facilities other than producing facilities—dealers—October 1–December 31, 1941), 124 (rolled zinc products—November 29, 1941), 126 (fluorspar—January 2, 1942), 128 (processing piece goods—March 16–April 15, 1942), 133 (farm equipment at retail—January 19, 1942), 137 (motor fuel sold at service stations—April, 1942), and 139 (household and service industry machines—February 15–28, 1942).

³ The presumption may be rebutted, perhaps, by cases where a showing can be made that the profit situation in 1941 was sufficiently "inflationary" to warrant the setting of prices below those prevailing during the so-called base period. The author believes, however, that this possibility is at this time outside the realm of the politically practicable, within which any framework of government regulation must operate.

⁴ According to the announced policy of the OPA no upward adjustments will be made in the retail price ceiling, except as practical incidents to the process of replacing the highly individualistic maxima of the original freeze by uniform maximum prices for given products in particular localities. Where the "squeeze" is found sufficiently great on retailer, distributor, fabricator, and producer alike, the rigid maintenance of the retail price level may require employment of the purchasing and subsidy powers of Section 2(e) of the EPCA. H.R. 5990, 77th Cong. 2d Sess. § 2(e) (Pub. L. No. 421, Jan. 30, 1942). As yet these powers are without practical content for lack of appropriations, a want which is in the process of speedy correction.

⁵ The statutory phraseology of "fair and equitable" is hardly more than the criterion of "reasonableness" which is conventionally required under due process. H.R. 5990, 77th Cong. 2d Sess. § 2(a) (Pub. L. No. 421, Jan. 30, 1942).

⁶ The definition of profits for the purposes of price control centers upon a) the kind of income that is included, b) the kind of deductions that may be offset against such income, c) the treatment of federal income and excess profits taxes, and d) the basis of the reporting entity

"reasonable" profits,⁷ and c) whose profits are concerned. This article is addressed primarily toward the latter inquiry. The following are the main considerations that will be treated in the course of the article.

(i.e., consolidated vs. unconsolidated reports). On all these questions the EPCA is conspicuously silent, nor are the legislative hearings of much help.

The complete lack of accounting definitions in the EPCA—in contrast to the income tax laws—presumably leaves the matter in the realm of the conventional standards of the accounting profession. These standards usually tend toward an understatement of profits, especially since the enactment of the SEC laws and regulations, which are designed to protect the investor against exaggerated statements of earnings. Accountants traditionally and perennially quarrel with the definitions of the income tax laws, notwithstanding that corporate accounting was largely non-existent prior to the federal tax enacted in 1909; but the basic purposes of the tax laws may be closer akin to the objectives of the EPCA. As the pressure upon profits becomes heavier there may well be a steady shift away from conventional accounting to the more rigorous requirements of the tax laws.

To the extent that a definition can be given at this time, profits for price control purposes probably are equated to the excess of receipts from operations (excluding investment income) over the conventional operating deductions (excluding the special tax deduction for amortization of war facilities under the Second Revenue Act of 1940), before the deduction of federal income and excess profits taxes, as generally determined upon the basis of unconsolidated reports.

⁷ The deliberate omission of the EPCA—and it must have been "deliberate" since Administrator Henderson was extensively questioned on the matter, see Hearings of the House Committee on Banking and Currency on H.R. 5479, 77th Cong. 1st Sess., superseded by H.R. 5990, 77th Cong. 2d Sess., at 394-97, 441-42, 454-55, 463, 594 (1941)—to enact any single test of "reasonableness" in measuring profits leaves the OPA free, in the words of a recent Supreme Court decision, "to make the pragmatic adjustments which may be called for by particular circumstances." *Federal Power Com'n v. Natural Gas Pipeline Co.*, 62 S. Ct. 736, 743 (1942).

Conceptually, the "reasonableness" of profits may be tested by at least four different standards: a) performance in a recent base period, b) relationship of earnings to capital, c) a combination of the base-period-earnings method and the capital method, or d) reference to the fact of payment or non-payment of an excess profits tax, which in turn may be identical with c). The first standard is purely empirical, highly individual, and non-reformist since "business profits as usual" are accepted more or less. Against its empirical advantage of ready proof must be set the difficulties of obsolescence and perhaps complete meaninglessness in cases where basic shifts have occurred in the nature of the output. The capital method has many subspecies depending upon the competing theories and practices for measuring capital, which are conventionally associated with the impossible. The difficulties of valuation, however, derive in major part from the failure or unwillingness of the reviewing judiciary to adopt and consistently apply a definite theory of valuation (e.g., prudent investment vs. reproduction costs); nor may they be so serious in the case of statistical or en masse appraisals where the fortuitous variations of the time and place of corporate organization and reorganization, which may be insuperably difficult in individual cases, more or less cancel one another. For an analysis of a similar problem under the excess profits tax, see Hynning, *The Excess-Profits Tax of 1940—A Critique*, 8 Univ. Chi. L. Rev. 441, 453-60 (1941).

In the first series of "statements of considerations" that must accompany each maximum price regulation under the EPCA (except in the case of the price schedules that had been issued under executive authority and were reissued within ten days after the effective date of the act) the OPA has employed base-period-earnings comparisons (Maximum Price Regula-

1. Historically the profit system has never enabled every producer to make a profit each year. To require price control to assure a profit to every one subject thereto would result in more favorable treatment of producers⁸ than they could ever hope to attain under "normal" circumstances of doing business. The gradual advent of a war economy has radically affected the traditional role of profits in the functioning of our economy, since much of the risk of expansion has been underwritten by the government, and the incentives for production have become overshadowed by the requirements of total war.

2. The issue of "fair return upon fair value," which has greatly plagued governmental regulation of utilities, is wholly inapplicable to price control, since under the terms of the Emergency Price Control Act a producer is never forced to sell his products at a fixed price but may choose to keep them. Furthermore, to permit "confiscatory taking" to become a pertinent issue would result in such protracted delay and controversy that the war would be over, and mayhap lost, before the first determination of "fair value" could be finally completed for a single industry and its individual components.

3. Any extension of governmental control entails adjustments by and injuries to individuals and specific groups, but these incidents must be weighed in their realistic setting of total war, where they must graciously defer to the "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."⁹

4. Maximum price regulations are semi-legislative in character and are therefore not subject to the specificity of standards and findings of fact that characterize adjudicative orders. In particular, a maximum price regulation is not required by the "fair and equitable" standard to afford "reasonable profits" in its application to every producer.

tions Nos. 111, 116, 118, 119, 120, 136, 140), net-worth ratios for single years and a series of years (Regulations Nos. 113, 118), and sales ratios (Regulations Nos. 118, 119). The press release (not statement of considerations) that accompanied the reaffirmation of the cigarette price ceiling (OPA Release No. PM 2746, March 24, 1942) referred only to the high rate of profits on capital that had been typically attained by individual tobacco companies. See *Wall Street Journal*, p. 4, col. 1 (March 28, 1942).

See generally David Ginsburg's address before the War Conference of Controllers on "Standards for the Control of Prices under the Emergency Price Control Act of 1942" (OPA Release No. PM 2924, April 13, 1942).

⁸ The term "producer" as used in this article is not necessarily confined to mining and manufacturing enterprises, but also includes distributors and dealers at wholesale and retail.

⁹ Quoted from Mr. Chief Justice Hughes' opinion in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442 (1934).

5. The coordinated application of a general price regulation, an empirical system of exceptions, and a reserve plan of pooled purchases permits, if it does not require, whatever operating adjustments of the differential needs of marginal producers are necessary to attain the objectives of the act. The "safety valve" function of broad administrative relief ("exceptions") will assure the careful sifting of the complaints of harshness. If a producer is earning reasonable profits he cannot realistically complain that less fortunate competitors may not be doing so. If the less fortunate competitor is actually faring badly under the regulation and his production is needed for civilian requirements, he may be given an exception to the proper extent, and he can consequently not complain against the regulation. Where the regulation remains harsh through the denial of administrative relief, the complaint must show that more than incidental injury is sustained and this despite the demonstrated fact that reasonable efficiency has been attained in the particular instance. Such proof is apt to be very difficult in the concrete.

I. THE PROFITABLENESS OF THE PROFIT SYSTEM

Between the ending of World War I and the beginning of World War II, two decades and a year (1919-39, inclusive), more than 25 per cent of corporate activities (measured in terms of dollar output) was on the average reported by corporations which failed to make a profit. Even in the best year in this comparison, 1919, more than 10 per cent of corporate activities was attributable to firms which were in the red. In prosperous 1929, 19.4 per cent of corporate business was handled by firms with losses. During the thirties the figure rose to 34.2 per cent in 1930, to 51.5 per cent in 1931, and to 60.3 per cent in 1932, and then fell to 42.3 per cent in 1933, and 32.9 per cent in 1934-35. The average for the 15 years from 1925 to the war year of 1939 was 29.4 per cent. These figures are averages for all corporations. Loss ratios are much higher for mining, construction, and service groups. Among the manufacturing industries the loss ratios are relatively high in textiles, apparel, and lumber, in particular.¹⁰

The rate of profit (i.e., profits as percentage of invested capital or net worth) has hovered closely to the 5 per cent figure.¹¹ When profits show a tendency to rise, adjustments are quickly made in capital valuations in order to restore the historical relationship. In various branches of in-

¹⁰ These figures have been computed from *Statistics of Income*, a publication of the Treasury Dept., Bureau of Internal Revenue.

¹¹ See Taitel, *Profits, Productive Activities and New Investment*, TNEC Monograph No. 12 (1941).

dustry the rate of return is of course higher, as in manufacturing (particularly beverages, tobacco, chemicals, and motor vehicles), while in mining and service the rate of return is much lower.¹²

It is obvious from the foregoing that profits are never certain to all, although they may be as invariable as the tide to some fortunate few. In the terms of theoretical economics profits are the reward of risk and efficient management.¹³ A shift of demand from one field to another causes prices and profits to increase and entrepreneurs to incur the costs, and the risks, necessary to increase production to meet the new demand. The very term "risk" demonstrates the uncertainty of the reward, while "efficiency" is obviously relative.

Modern war, in totalitarian terms, moreover, is so revolutionary a change in the social, political, and economic outlook that the normal economy may be shaken to its very foundations. It can adapt itself to the new demands but poorly. Half or more of the economy must change from civilian to military output, and that immediately. The profit motive itself fails to yield its usual response. The uncertainties surrounding any commitment for expanded capacity are so great that profits must reach unheard-of levels to cause expansion, and even then the facts are by no means clear that expansion will occur.¹⁴ The consequent inequality of incomes would seriously impair the war effort and endanger morale. As a result, war production has been almost entirely removed from the free economy, and the government has directed war production through priorities, direct negotiations, financing of plant expansion, guaranteeing costs, and commandeering.

The sector of the economy which is left in a "freer" status is also unable to respond to the profit motive in a normal manner. Only minimum (less than "normal") profits are necessary to maintain production at levels near capacity. Colossal profits, however, are needed to get an expansion of capacity, because of the uncertainties inherent in a war situation. Moreover, increase of capacity in nearly all cases makes demands on materials and labor which may be required by the war effort, so that increase of capacity itself may run contrary to the national interest.¹⁵

¹² For frequency distributions by profit rates of companies in different industries, see SEC, *Statistics of American Listed Corporations*, part 1, at 246-65 (1940).

¹³ See Knight, *Profit*, 12 *Encyc. Soc. Sci.* 480-81 (1934); Knight, *Risk, Uncertainty, and Profit* (1921).

¹⁴ The response to the special tax amortization for defense facilities has been disappointingly small.

¹⁵ The WPB has just announced a policy of calling a halt to all plant expansion that cannot be shortly completed in order to use scarce resources for current output.

To assure profits to all under a price regulation is obviously to abolish risk and disregard the factor of efficiency, to both of which profits are designed to accrue. No such corruption of the profit system can be made in its name and under its blessings. Certainty of profits may eventuate in some form, but that would not be a profit economy as typically conceived.

II. "FAIR RETURN UPON FAIR VALUE?"

Ever since the end of the nineteenth century governmental control of corporations, and of public utilities in particular, has been embarrassed by the perennial question, "Has a fair return on fair value been assured?"¹⁶ If it has, the control may be valid. If not, it is condemned as "confiscatory," which is taken to be forbidden by the constitutional provisions respecting "due process" and "just compensation." The answer to the "fair return" question depends upon the rate of the return and the value upon which the return is calculated. The disposition of the first part of the question has been relatively simple.¹⁷

The second problem was immediately made difficult, if not insoluble, by the classic judicial exposition on the subject in *Smyth v. Ames*,¹⁸ where Mr. Justice Harlan directed that the determination of the "fair value of the property being used by it [i.e., the utility] for the convenience of the public" must give "such weight as may be just and right in each case" to the following:

. . . the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses. . . . We do not say that there may not be other matters to be regarded in estimating the value of the property.¹⁹

A wide area for judgment of the various and conflicting elements of value—past vs. present vs. future—was thus thrown open to judicial re-

¹⁶ The doctrine started with Mr. Chief Justice Waite's dictum in *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886): "Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), and *Smyth v. Ames*, 169 U.S. 466 (1898), applied the doctrine and thus firmly established the guaranty of reasonable regulation, and no more, of public utilities.

¹⁷ "The following rates have been held nonconfiscatory: 6 per cent, 6½ per cent, 7 per cent, 7½ per cent, 8 per cent, 10 per cent [citing cases]. The following rates have been held confiscatory: 4.3 per cent, 4.53 per cent, less than 5 per cent, 5½ per cent, 6 per cent, less than 7.44 per cent [citing cases]." Library of Congress, *The Constitution of the United States of America* (annotated) 797 (1938).

¹⁸ 169 U.S. 466 (1898).

¹⁹ *Ibid.*, at 546-47.

view, and has more or less remained so until this day, or at least until the Supreme Court rendered its opinion on March 16, 1942, in the case of *Federal Power Com'n v. Natural Gas Pipeline Co.*²⁰ The rule, it was there pointed out, "creates but offers no solution to the dilemma that value depends upon the rates fixed and the rates upon value."²¹ The effects have been "paralyzing."²² "The havoc raised by insistence on reproduction cost is now a matter of historical record."²³ The concurring justices therefore thought that, since "the opinion of the Court erases much which has been written in rate cases during the last half century," the instant case afforded "an appropriate occasion to lay the ghost of *Smyth v. Ames* . . . which has haunted utilities regulation since 1898."²⁴ The opinion of the Court, however, went no further than to state that if the commission's order produced no arbitrary result in the particular circumstances of the case, the Court's inquiry was at an end.²⁵

These difficulties aside, however, valuation is still a tremendous undertaking in detail, even when confined to the utilities, where the costs of time and work are not too serious since the proceedings are limited in number and fair adjustment can ordinarily be made long after the initial event.²⁶ Fortunately there is a way out, for the objectives and techniques of price control are essentially different from those of the regulation of public utilities, and these differences are sufficiently great to destroy the analogy.

A public utility is a highly privileged entity, with a franchise from the state entitling it to many extraordinary legal rights of a semi-monopolistic character, in return for which it is subject to special duties and disabilities. Among such duties is that of supplying any demand for its services according to the rates and terms fixed by public regulation. One of the disabilities of a utility is that it cannot discontinue its charter services with-

²⁰ 62 S. Ct. 736 (1942), noted in 9 Univ. Chi. L. Rev. 728 (1942).

²¹ *Ibid.*, at 751, in the concurring opinion of Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy.

²² *Ibid.*, at 750.

²³ *Ibid.*, at 752.

²⁴ *Ibid.*, at 750.

²⁵ *Ibid.*, at 743. The concurring justices say that this is a return "in part at least to the constitutional principles which prevailed for the first hundred years of our history." They cite *Munn v. Illinois*, 94 U.S. 113 (1877), and *Peik v. Chicago & Northwestern R. Co.*, 94 U.S. 164 (1877), as having "emphatically declared price fixing [of which rate-making is one species] to be a constitutional prerogative of the legislative branch, not subject to judicial review or revision." *Ibid.*, at 749. See Hale, Does the Ghost of *Smyth v. Ames* Still Walk?, 55 Harv. L. Rev. 1116 (1942).

²⁶ For statistics, see Final Report of the Attorney General's Committee on Administrative Procedure, Appendix G, at 327-74 (1941).

out the explicit permission of the state. If the rates and terms of sale of a utility's services, as fixed by regulatory commission, are too low to assure a "fair return," it is said to have no escape from the "taking" that it consequently may suffer, save to make a constitutional objection.

There is nothing corresponding to these rights and duties of a producer under the Emergency Price Control Act of 1942. Section 4(d) expressly stipulates that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."²⁷ If the seller objects to the maximum price regulation he has the choice (though it may be Hobson's) whether to sell or not. Since the seller retains the commodity he obviously cannot complain that he has suffered a "taking." Without the possibility of a "taking" there can be no question of "fair return" in the particular case. The mere prospects of making substantial profits from sales free of the regulation are too intangible to warrant constitutional protection.

A concrete illustration of this argument can be given from *E. I. du Pont de Nemours & Co. v. Hughes*,²⁸ a case under the Lever Act of World War I, where the delivery of coal pursuant to an order of the Fuel Administrator was held to be made subject to the published prices as fixed by the Administrator. The court said:

Whether the price of \$2.45 a ton conformed to that provision for just compensation is not important in view of the fact that the Government had not requisitioned the coal and had done nothing more than order Hughes to sell it to the du Pont Co. impliedly at the price fixed for steam coal. This order was not mandatory upon Hughes for the Lever Act did two distinct things; it provided, first, that the Government might requisition supplies, and second, regulate contracts between parties for supplies. The first is a direct taking of private property for a public use; the other is not a taking at all. The act did not require Hughes to sell his coal to the du Pont Co. on the Fuel Administrator's order . . . but it did provide that he could sell his coal only as the Fuel Administrator should order and only at the price he should fix. Here was a dilemma in which Hughes found himself had he thought the price unfair. But to meet such a situation and to avoid the constitutional objection of unjust compensation the Lever Act gave Hughes a way out. He could have ignored the order and refused to make delivery to the du Pont Co. He was free to keep his coal. . . . When requisitioned, he could, under Section 10 of the act, have accepted seventy-five per cent of the price determined and sued the United States for the balance of his claim. . . . Hughes did not avail himself of this remedy afforded by the act but, having entered into the contractual relation with the du Pont Co. indicated by the order and made deliveries under it, he must be regarded as having acquiesced in the order and agreed to all the terms of the resulting contract of sale including that of price which, on the uncontradicted proof of

²⁷ H.R. 5990, 77th Cong. 2d Sess. § 4(d) (Pub. L. No. 421, Jan. 30, 1942).

²⁸ 50 F. (2d) 821 (C.C.A. 3d 1931).

sale and use of the coal for steam purposes only, was the price fixed for coal of that quality.²⁹

This argument, however, is not applicable to any transaction where some semblance of seller's choice is wanting, as in the case of the requisitioning power.³⁰ Having no choice about the sale, the seller may appropriately raise the question of a "taking" if the facts so prove. Nor does the instant argument gainsay the point that the "fair and equitable" requirement of the Emergency Price Control Act may invalidate a given regulation if there are enough sellers in a situation similar to that of the protestant and no administrative relief by way of exception or other adjustment is forthcoming.

III. CONSEQUENCES OF NEW LEGISLATION INEVITABLE ADJUSTMENTS

In a complex world it is inevitable that the extension of governmental activities and controls results, on the one hand, in numerous adjustments by and hardships on some individuals and groups and, on the other, in benefits to others. "A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this a tariff could not be changed, or a nonintercourse act, or an embargo be enacted, or a war declared?"³¹

Especially during times of war, when to hesitate may be to fail, is it necessary to recognize that the state cannot afford to weigh nicely all the contending interests that may be affected and so to act as to accord to all

²⁹ *Ibid.*, at 824-25. Other cases following the same argument include *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253 (1929), in the course of which Mr. Justice Butler said, "The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiations and price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his coal had been requisitioned, the Act and orders will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth." *Ibid.*, at 262. See also *Morrisdale Coal Co. v. United States*, 259 U.S. 188, 190 (1922); cf. *United States v. Adler's Creamery*, 107 F. (2d) 987, 990 (C.C.A. 2d 1939), rev'd on other grounds 110 F. (2d) 482 (C.C.A. 2d 1940), cert. den. 311 U.S. 657 (1940) (milk marketing agreement order).

³⁰ Likewise, the imposition of substantial penalties by the Second War Powers Act for violation of WPB orders undermines the theory that a producer is equally "free" to disregard a priority or allocation order.

³¹ *Second Legal Tender Cases (Knox v. Lee)*, 12 Wall. (U.S.) 457, 551 (1870).

complete equity in an historical sense, i.e., protect the status quo from adverse change without compensation. These are the times when the survival of the nation itself depends upon drastic intervention by the state into the so-called "normal" or "private" spheres of conduct. The consequences of intervention may be unfortunate in specific instances, but they must be weighed against the consequences of the failure of the state to intervene in a period of crisis.

This balancing of conflicting interests is no new problem, nor is it peculiar to the control of prices. The weighing of competing social values is so typical of modern statecraft that "Legislation could scarcely go on at all if its indirect results, its final incidence, must be so nicely adjusted."³² The enactment of a prohibition law may substantially destroy the liquor industry,³³ but is that reason enough to stay the state's will that intoxication shall be reduced? The preservation of the apple orchards of a state may require the practical destruction of cedar trees, but such choice of social values, when the choice must be made, is clearly within the real, and not merely the nominal, power of the state.³⁴ The zoning laws may destroy an industry in the interests of urban welfare.³⁵ The institution of the controls of total war interferes with and may even destroy contract rights, as, for example, the requisition of the entire product of a steel plant renders impossible the performance of contracts with others who may suffer hardship thereby.³⁶ Monetary legislation changing the gold content of the dollar may rend asunder specific contracts providing for payment in gold specie.³⁷

The restraining application of price control cannot be appraised as an abstraction. The complaint of producers and stockholders that profits may be adversely affected must be weighed against the interests of the consumer in checking the rising tide of living costs. The producer who suffers a loss in profit must not forget the potential loss in money income of the draftee under the selective service system (not to mention the danger to life and limb) or the loss in property values consequent upon a wholesale evacuation of danger areas. Like most modern issues, the ques-

³² Learned Hand, J., in *Hegeman Farms Corp. v. Baldwin*, 6 F. Supp. 297, 298 (N.Y. 1934), aff'd 293 U.S. 163 (1934).

³³ *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919); *Ruppert v. Caffey*, 251 U.S. 264, 301 (1920).

³⁴ *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

³⁵ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

³⁶ *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502 (1923).

³⁷ *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935).

tion is no longer (if it ever was) one of "either-or" but of "more-or-less," and the "more-or-less" must be appraised in the light of total war.³⁸

"Once it be agreed," Judge Learned Hand incisively noted in his decision sustaining a New York milk marketing regulation which set minimum purchase prices, "that the state may interpose for either end in the 'free play of supply and demand,' the incidents follow."

It is not critical that some will find themselves unable to withstand the pressure and will collapse. . . . Just as it is exposed to the rubs of competition in what it buys on an uncontrolled market, and must make such fetch to adjust as it can, so it must accommodate its dealing to a price fixed, as we now know, in the plenitude of municipal power. That power once granted, its transmitted disturbances the Fourteenth Amendment does not neutralize.³⁹

The delicate balancing of competing interests that price-fixing entails has been effectively restated in the concurring opinion of Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy in the recent case of *Federal Power Com'n v. Natural Gas Pipeline Co.*⁴⁰ as follows:

The requirements of "just and reasonable" embrace among other factors two phases of the public interest: (1) the investor interest; (2) the consumer interest. The investor interest is adequately served if the utility is allowed the opportunity to earn the cost of the service. . . . One caveat, however, should be entered. The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably a return to the company of the cost of the service might not be "just and reasonable" to the public. . . . The investor and consumer interests may so collide as to warrant the ratemaking body in concluding that a return on historical cost or prudent investment, though fair to the investors, would be grossly unfair to the consumers. The possibility of that collision reinforces the view that the problem of ratemaking is for the administrative experts, not the courts, and that the ex post facto function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review.

IV. "LEGISLATIVE" CHARACTER OF ADMINISTRATIVE REGULATIONS AND PRICE REGULATIONS IN PARTICULAR

The general doctrine of the inevitable incidents of new legislation is fully applicable to government regulations, which are essentially "legislative" in character. It may not, however, be applicable in the same degree to administrative adjudication in which the specific rights of contending parties must be carefully weighed and accordingly determined.

The distinction between the two types of administrative action is, in its baldest terms, the difference between actions of *general* applicability

³⁸ This article assumes that there is no longer question of the power of the Federal Government to control prices.

³⁹ *Hegeman Farms Corp. v. Baldwin*, 6 F. Supp. 297, 298-99 (N.Y. 1934).

⁴⁰ 62 S. Ct. 736, 753 (1942).

(called rules or regulations) and actions of *particular* applicability (called orders). If the parties subject to the administrative action are named, or are identified by their relation to a specific piece of property or transaction or institution, the order is typically one of specific application. If they are not named, but the order applies to a designated class of persons or situations, the order is typically a general rule or regulation.⁴¹

The distinction is not wholly one of form, as so many legal "distinctions" may become, but is believed to have substantial factual basis and to be attended with practical consequences of significant scope. Briefly, the legislative character of regulations operates to dispense with the requirement of notice and hearing that conventionally must be observed at some phase of the process of making orders; nor need specific evidence or findings ordinarily be adduced to justify the regulation. The quasi-judicial character of orders, on the other hand, is considered to require that the issuance of enforcement of an order must be preceded by notice and hearing and must be supported by substantial evidence specifically applicable to the given instances.⁴²

In recent years, however, there have been both legislative and judicial tendencies toward a blurring of the distinction between regulations and orders, toward the assimilation of rule-making and adjudicatory proceedings, and toward the introduction of specific procedural safeguards into the process of administrative rule-making. In many cases the practical effect of regulations and orders is much the same, as Fuchs has recently noted:

... there is no hard and fast necessary distinction between rule-making by administrative agencies and other types of functions which those agencies perform. At least in many instances, there is knowledge of the proceedings by substantially all interested parties in rule-making as in other types of proceedings. It is sometimes possible, indeed, for an administrative agency to name all the interested parties as respondents and to conduct the proceedings as though they were adjudicative in character. It may be just as necessary, moreover, for affected private interests to protect themselves in relation to proposed regulations as it is in proceedings of an adjudicative character, since their rights will be disposed of by the regulations as finally as they could be if a license were revoked or denied or a cease-and-desist order were issued in respect to a named party.⁴³

⁴¹ Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 264-65 (1938). See also Freund, *Administrative Powers over Persons and Property* cc. 4, 8, 11 (1938); Hart, *An Introduction to Administrative Law* cc. 8, 11 (1940); Blachly and Oatman, *Federal Regulatory Action and Control* c. 4 (1940).

⁴² See also Timberg, *Administrative Findings of Fact*, 27 Wash. U. L. Q. 62, 77 (1941). The author therein appears to favor a blending of the two types of administrative action.

⁴³ Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making*, 27 Wash. U. L. Q. 1, 9 (1941).

Recent statutes have surrounded administrative rule-making with such procedural safeguards as notice and hearing, as, for example, in the Fair Labor Standards Act and the Food, Drug, and Cosmetics Act. Moreover, courts in a few notable opinions have taken the view in cases involving the fixing of wages or prices that due process of law requires the administrative rule-making to observe certain minimum procedural standards—the rudiments of “fair play” of the *Morgan* cases.⁴⁴

On this particular phase, however, the Emergency Price Control Act is most explicit—hearings are left optional with the Price Administrator, who may, of course, choose to hold them for the purpose of informing the regulatory agency, not necessarily for the building up of a record in support of the regulation. The Price Administrator is not required to present the case for a proposed regulation at the hearing, nor is he in any way limited in the consideration of a regulation to the evidence presented at the hearing.

In a number of federal statutes the term “order” has been used to describe administrative action of *general* applicability. The particular term is therefore not so important as the scope of the term used. Under the Agricultural Adjustment Act, for example, the Secretary of Agriculture is authorized to enter into marketing agreements with processors, producers, and others engaged in handling certain agricultural commodities, and, after notice and hearing, to issue “orders,” the function of which is to regulate the conduct of these handlers. Again, under the Fair Labor Standards Act, an industry committee recommends to the Administrator of the Wage and Hour Division the highest feasible minimum wage rates for the industry, and reasonable classifications within the industry. The administrator upon a hearing approves the recommendations by “order” or disapproves them. Though these administrative actions are called “orders,” they are not directed to particular individuals, but set standards of general applicability. The procedure is not truly judicial or adversary in nature. Thus in terms of the preceding discussion these “orders” are actually rules or regulations, and the hearings leading to their promulgation are legislative in character.⁴⁵

The Emergency Price Control Act itself somewhat blurs the distinction between regulations and orders by defining them in synonymous terms: “As used in the foregoing provisions of this subsection, the term ‘regulation or order’ means regulation or order of *general applicability and effect*.”⁴⁶

⁴⁴ *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1937).

⁴⁵ Blachly and Oatman, *op. cit. supra* note 41, at 62-63.

⁴⁶ H.R. 5990, 77th Cong. 2d Sess. § 2(a) (Pub. L. No. 421, Jan. 30, 1942) (*italics added*).

What remains, however, is "regulation" in its technical sense of an administrative action of general applicability, irrespective of the terminology involved. The confusion in terminology is, therefore, believed to remain merely a confusion in phraseology and not in concept, and consequently without significance in the present instance. Being of "general applicability," the so-called "orders" fall squarely into the class of administrative actions recognized by administrative law as "regulations."

This argument means that the price regulations and general adjustments under the universal ceiling are governed by the standards that are evolved by the courts in other control areas for appraising regulations of general applicability; it means that price regulations are not required to meet the more specific standards pertaining to orders of individual application. Apart from the peculiarities of specific statutory phraseology, it is pertinent to examine the experience in fixing rates or prices under the agricultural marketing agreements, the experience of the various state milk control boards, the federal control of stockyards, some of the Interstate Commerce Commission proceedings, etc., all of which typically involve wage or price regulation of general applicability. On the other hand, little or no relevance should be assigned to the standards and procedures used and required where administrative action is typically by means of orders of individual application (e.g., rate making for individual firms).

The historic rule has been that general regulations do not need to be preceded by findings, or to be based on specific evidence, as stated by Mr. Justice Cardozo in his dissent in *Panama Refining Co. v. Ryan*:⁴⁷ "If findings are necessary as a preamble to general regulations, the requirement must be looked for elsewhere than in the Constitution of the nation." The majority opinion of Mr. Chief Justice Hughes in that case, however, argued that the exercise by the President of delegated legislative power is subject to specified standards, and that if the delegation is to be upheld, the President must show "compliance" therewith by means of proper findings in order to make his action valid.⁴⁸

This decision has caused much difficulty to commentators, who were reluctant to believe that the Court was undertaking to require findings as a condition to all regulations. Hart has contended that the Court meant to limit the requirement of findings to cases of *contingent legislation*—that

⁴⁷ 293 U.S. 388, 448 (1935).

⁴⁸ *Ibid.*, at 432-33. The precedents cited by the Chief Justice were but two cases—*Wichita R. & Light Co. v. Public Utilities Com'n*, 260 U.S. 48 (1922), involving a construction of a Kansas statute which was promptly repudiated by the Supreme Court of Kansas in *Consolidated Flour Mills Co. v. Kansas Gas & Electric Co.*, 119 Kan. 47, 237 Pac. 1037 (1925), and *Mahler v. Eby*, 264 U.S. 32 (1924), involving a deportation order. Both precedents obviously presented administrative action of individual application, not general regulations.

is, legislation which specified that controls are to go into effect only when an administrative authority finds the existence of conditions defined in the statute.⁴⁹

Assuming that the decision is properly thus limited, the rule of the *Panama* case—to the extent that it remains applicable—would still appear to apply to price control regulations, for the Emergency Price Control Act seems to fall in the category of contingent legislation. The Price Administrator is authorized to issue price regulations only when in his judgment prices “have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act” as stated in Section 1(a). Moreover, the act itself requires findings of a sort by the following provision in Section 2(a): “Every regulation or order issued under the foregoing provision of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order.”

The important point, however, is what kind of a “statement of considerations” is required by the act or by general principles of administrative law, and what kind of evidence, if any, is needed to support the statement. Hart’s conclusion that findings in support of regulations, as required in the *Panama* case, need not be conclusions of fact based upon specific evidence⁵⁰ is confirmed by relevant court decisions.

A decision directly in point is the *Assigned Car Cases*,⁵¹ which involved a so-called “order,” actually a regulation, of the Interstate Commerce Commission, establishing a universal rule for the use of railroad cars assigned to coal mines. The rule was attacked on the ground that the general finding of discrimination on which it was based was without support, because the evidence introduced related to only a few carriers, and was not shown to be typical. The Court, however, said that this argument confused the legislative functions of the commission with its quasi-judicial functions: “In establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable.”⁵²

It is no more requisite to the validity of a general regulation—in the absence of a controlling statutory provision—that it be supported by

⁴⁹ Hart, *op. cit.* supra note 41, at 252. In the same year the Supreme Court upheld an administrative regulation (under an Oregon statute) prescribing the form, capacity and dimensions of berry containers, despite the lack of findings of fact. Mr. Justice Brandeis stated: “But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern.” *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

⁵⁰ Hart, *op. cit.* supra note 41, at 166.

⁵¹ 274 U.S. 564 (1927).

⁵² *Ibid.*, at 583.

specific evidence than that it operate in every instance to leave the affected parties invariably in the same positions as they occupied prior to the regulation. The contention of allegedly unfair effects of general regulations has been made in cases involving both minimum and maximum price regulations. In each case the courts have given the same answer: not every producer is entitled to earn "reasonable" profits.⁵³

The outstanding case involving a minimum price regulation is *Hegeman Farms Corp. v. Baldwin*,⁵⁴ where the contention was made that the prices fixed by the New York Milk Control Board were so low as to deprive the protesting company of a fair return upon the fair value of its property. The argument, it is apparent, was couched in the phraseology and relied upon the rationale of utility rate making. The Court denied the claim for relief, stating:

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. . . . True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the Board. To make the selling level higher might be unfair to the consumers; to make the purchasing level lower might bring ruin to producers. 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 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. The Fourteenth Amendment does not protect a business against the hazards of competition. . . . True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race.⁵⁵

The test of efficiency has also been applied to maximum rate cases under the Stockyards Act, notably in the case of *Tagg Bros. & Moorhead v. United States*,⁵⁶ where one of the operators contended that the order of the Secretary of Agriculture was based on the notion that the industry

⁵³ See *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 447 (1928): "It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business."

⁵⁴ 293 U.S. 163 (1934).

⁵⁵ *Ibid.*, at 170-71.

⁵⁶ 280 U.S. 420 (1930).

was suffering from an oversupply of market agencies and that some should accordingly be eliminated. The lower court denied that the Secretary of Agriculture was required to "fix rates so high that all agencies in the business would make money, whether they did substantial business or not." The court pointed out that this would result in the multiplication of agencies faster than livestock could be brought to market, necessitating an endless chain of rate increases.⁵⁷ In affirming this decision, the Supreme Court agreed that the evidence supported the Secretary's finding that "monopolistic power was exercised by the plaintiffs without the usually attendant economy of minimizing expenditures for business getting; that the operating costs of the several agencies for the performance of similar services varied widely; that some of the expenses were wasteful and unnecessary."⁵⁸

To recapitulate: Outside the narrow field of public utilities with duties to serve all that demand—and perhaps even that exception may shortly fall—price control is not required to assure profits to all that are subject to its dictates. But price control, at least at this phase of war controls, cannot disregard the profit factor entirely. The line is drawn at the level of "reasonable efficiency." That is to say, price control should not set prices so low that the "reasonably efficient" producers cannot make "reasonable profits" thereunder.

V. GENERAL PRICE REGULATION, EXCEPTIONS, AND POOLED PURCHASES

The requirement that the "reasonably efficient" producers shall be able to earn "reasonable profits" under the administration of price control is, of course, satisfied by a showing under a specific maximum price regulation a) who the "reasonably efficient" producers are, and b) that the marginal case among them is able to earn "reasonable profits." In many cases, however, such factual proof may be difficult to obtain, within the limitations of time and manpower, and when obtained it may give rise to specific controversies that would paralyze effective action in controlling inflation.

It is part of the thesis of this article that a much simpler approach is

⁵⁷ *Tagg Bros. & Moorhead v. United States*, 29 F. (2d) 750 (D.C. Neb. 1928).

⁵⁸ *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 440 (1930). In *American Commission Co. v. United States*, 11 F. Supp. 965, 968 (Colo. 1935), the court said, "The Constitution does not assure the plaintiffs return on the aggregate value of their property and services devoted to the public use under all circumstances. Failure of the smaller firms, due to competition, to obtain a fair share of the business, does not require rates sufficient to assure them of a living."

available under which the factual burden of establishing "reasonable efficiency" may to a substantial degree be placed on the protestant in individual cases instead of being placed on the Price Administrator in upholding general price regulations. The approach is not only administratively simpler, but, once having been generally sustained as a fair operating scheme, it is practically invulnerable to specific attack. Moreover, the effective level of prices under control is apt to be substantially lower than if the former procedure is followed.

The approach assumes the direct linkage of Section 2(a) of the act, which provides for general maximum price regulations, with Sections 2(c) and (e) which provide, respectively, for exceptions and pooled purchases. Section 2(c) of the act authorizes the Price Administrator to make "such classification and differentiation, and to provide for such adjustments and reasonable exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act." This subsection is less applicable to price control at the retail level, the adjustments of which must largely be made in terms of the subsidy powers. Section 2(e) authorizes the administrator to buy and sell commodities, or to make subsidy payments to domestic producers of commodities, "upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof."⁵⁹

Analyzed as an integral part of the Emergency Price Control Act of 1942, Sections 2(a), (c), and (e) afford ample authority for the Price Administrator to make the "pragmatic adjustments which may be called for by particular circumstances"⁶⁰—that is, to vary the maximum prices under a general regulation with the empirical needs of the different marginal producers. The primary technique of variance, at the outset at least, is the power in specific instances of limited scope to raise the price maxima by way of exceptions, since negotiations under the purchasing power depend upon the establishment of a large operating fund, which is not yet in full being.

Where a producer is earning reasonable profits under the operation of a

⁵⁹ The power to buy and sell goods granted by Section 2(e) is the basis for the plan of pooled purchases. Setting a uniform price high enough to call forth the production of sufficient marginal firms in a given industry to supply the needs of the nation may result in a price level which is too high in the judgment of the Price Administrator, yet exceptions for marginal producers may be inappropriate, particularly at the retail level. Under Section 2(e) the administrator may buy substantially all the product of an industry at varying prices, and resell the product at uniform average prices.

⁶⁰ Mr. Chief Justice Stone, in *Federal Power Com'n v. Natural Gas Pipeline Co.*, 62 S. Ct. 736, 743 (1942).

general maximum price regulation, he obviously cannot complain on his own behalf, since he has sustained no actionable damage; nor can he realistically complain that less fortunate competitors of his may be suffering losses.⁶¹ If the less fortunate producers are actually faring badly under the general price regulation, and their production is needed for civilian requirements (not to mention the military demand), they should be given an appropriate exception under the general regulation. Sustaining no further damage under the general regulation as applied to them by way of an exception, such producers cannot complain against it.

Where the general regulation remains harsh in its application to a producer through the denial of administrative relief, the protestant must show a) that more than incidental injury is sustained under the operation of the general maximum price regulation, and b) that this is despite the demonstrable fact that "reasonable efficiency" has been attained in the particular instance.

If these twin facts appear to be capable of proof in a given instance, the Price Administrator should either modify the general price regulation upwards or forthwith issue an appropriate exception. The general regulation should be modified upwards only upon evidence that there may be many producers with substantial aggregate output that can likewise establish the foregoing twin facts. If there is room for doubt that many producers will be able to sustain the requisite proof of "reasonable efficiency," the issuance of an exception should be the preferable course of action.

The exception technique—in the nature of a "safety valve"—is thus used to channelize the complaints for careful sifting of the relevant facts, many of which may not be fully available at the time of issuing the general regulation.⁶² Such stress on the provisional nature of the general price regulations and reliance on the exception procedure greatly simplifies the problem of the type of factual evidence that is required under the general regulation. Whenever a protestant or a group of protestants appear to make out a case against the general regulation as applied to them, the

⁶¹ "No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others." *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 446 (1928).

⁶² As the exceptions grow in number and relative scope, a reconsideration of the general regulation may become necessary. Presumably there is a point, which of course may vary from regulation to regulation, at which the volume of sale subject to exceptions is sufficiently great to make the general regulation meaningless. As of the end of March, 1942, exceptions had been granted under twenty different price regulations to a total of at least eighty-six firms.

issuance of an appropriate exception disposes of the factual basis of the complaint.⁶³

In theory, as already pointed out, the general regulation may be required to set maximum prices at such levels as will enable the "reasonably efficient" producers to earn "reasonable profits" thereunder. In practice much less refined data and analysis may be required, if the foregoing exception procedure is stressed. General statistical or "typical" evidence—including industry aggregates of profits—may be initially sufficient, provided some allowances have been made for the dominating position of the large multi-product firms and for firms rapidly undergoing extensive conversion to military production.⁶⁴ Reliance is placed on the sifting function of the exception procedure to uncover meritorious cases that were hidden from view in the original analysis of aggregate earnings.

The courts have already passed with favor on the use of generalized, non-specific evidence to support regulations of general applicability and perspective,⁶⁵ although they may frown upon the use of similar evidence in cases involving particular adjudications where greater degrees of precision in the nature of the underlying proof may be required. The distinction between general and specific administrative action, which was drawn in the course of this discussion, is particularly important to an agency like the Interstate Commerce Commission, which acts in both capacities. Ever sensitive to the nuances of requirements under different types of inquiries, the Interstate Commerce Commission has long relied on what has become known as "typical evidence," which is largely statistical in character, to support its general regulations of sweeping impact on the railroad rates of the nation. Little or no specific evidence may be offered about a particular carrier, or commodity, or region. A unanimous Court sustained regulation so supported in the *New England Divisions Case*,⁶⁶ speaking through Mr. Justice Brandeis:

⁶³ Under the EPCA the administrator is authorized at any time to modify or rescind a regulation, order, or price schedule, notwithstanding the pendency of a complaint with the Emergency Court of Appeals. H.R. 5990, 77th Cong. 2d. Sess. § 204(a) (Pub. L. No. 421, Jan. 30, 1942).

⁶⁴ Note that the use of unconsolidated accounts, which are the main requirements under OPA's projected financial reporting plan, will substantially reduce the analytical problem that is presented by the multi-product or converted firms, since separate operating subsidiaries are ordinarily established along the main industrial lines. The value of insulating risk, among other advantages, will probably induce most large industrial companies which are undergoing conversion to war production to establish separate subsidiaries for the management of the new production.

⁶⁵ See *Aetna Ins. Co. v. Hyde*, 275 U.S. 440 (1928).

⁶⁶ 261 U.S. 184 (1923).

The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. . . . For many years before the enactment of the Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice. . . . It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases.⁶⁷

The use of "typical evidence" in general rate proceedings by the Interstate Commerce Commission has been coupled with an understanding that action based upon such proceedings is largely provisional in character. It is an express recognition of the continuity of administrative control that sprang, in the words of the Interstate Commerce Commission, from the actual necessities of procedure and administration. The regulation in the *New England Divisions Case* prescribed an immediate increase in the rate divisions for the New England railroads; but the Court recognized that a comprehensive revision was contemplated to put the rate divisions on a more logical and systematic basis, since it remained open for individual carriers to challenge the application of the regulation to the particular facts of their situation.⁶⁸ Thus prompt relief was given, while the necessary safeguards for the rights of others were provided by later, more detailed proceedings. The general proceedings are but the starting-point for subsequent readjustment; they meet the need for rapid action, but they leave open a remedy in the subsequent process of control for injustices which later appear. Thus the fact-finding which precedes the general regulation need not be so comprehensive and precise as it would if the general regulation were considered to be final and immutable.⁶⁹

The wartime control of prices, whether selective or by the general freeze, obviously can no more guarantee profits to every producer than it

⁶⁷ *Ibid.*, at 197-98.

⁶⁸ *Ibid.*, at 200.

⁶⁹ See 2 Sharfman, *The Interstate Commerce Commission* 376-80 (1931). "Both the typical nature of the evidence on which the Commission relied and the provisional character of the order which it issued were a reflection of realistic performance rather than arbitrary exercise of power." *Ibid.*, at 380. See also Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 *Harv. L. Rev.* 364, 389-90 (1942).

can afford the administrative handicap of itself proving that each regulation shall assure profits to each of the reasonably efficient. If either were done, in the words of the experienced Interstate Commerce Commission acting within a much narrower orbit, "the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."⁷⁰

It should suffice that a price regulation permits the industry subject thereto, statistically speaking, and without proof as to specific components of the industry, the opportunity to earn reasonable profits under the circumstances. To paraphrase the late Mr. Justice Brandeis⁷¹ the reasons are:

The number of firms which might be affected by a regulation of the Administrator of Price Control, if the power granted were to be exercised fully, might far exceed two million; the number of prices involved, many billions. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each commodity of each producer, would be tantamount to denying the possibility of controlling inflation

⁷⁰ New England Divisions, 66 I.C.C. 196, 203 (1922).

⁷¹ Notes 66 and 67 *supra*.