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THE DEFENSE PRODUCTION ACT—
A SUMMARY

By JAMES A. DURHAM

Legislation delegating authority to the Executive Department for the purpose of establishing production, credit and stabilization controls has been the subject of heated debate in the Congress during much of the last decade. It is understandable, therefore, that the legislative results of these struggles have been characterized by a variety of compromises, compromises which in large measure have been necessitated both by the delicate substance of the enactments and by the periodic necessity of obtaining the enactment of some type of control legislation by a fixed date.

The most recent of these struggles was typical. The Defense Production Act, as amended, was due to expire June 30, 1952. On May 27th the Senate Banking and Currency Committee reported to the Senate a bill to extend this statute for an additional eight months. On June 16th the equivalent Committee of the House reported to the Committee of the Whole House a similar bill, but one which extended the Defense Production Act for a full year. On June 12th the Senate, after adding a few additional amendments, passed the measure.

It was now the turn of the House of Representatives. Based upon the fact that the Senate bill differed little from that reported by its Banking Committee, similar and expeditious action was anticipated. But the House chose to do otherwise, substantially amending the Committee bill, and not passing the measure until June 26th.

In view of the great dissimilarities in the two bills, it appeared unlikely that the Conference Committee could reach agreement.

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* Associate Chief Counsel, Office of Price Stabilization. Member of the Bars of Kentucky, Indiana, and the U. S. Supreme Court. This article is based upon an address to German lawyers at Washington, D. C., on August 7, 1952, and does not necessarily reflect the official position of the Office of Price Stabilization.

3 98 Cong. Rec., at 7231 (June 12, 1952).
4 98 Cong. Rec., at 8350 (June 26, 1952).
in the limited time necessary to prevent an hiatus in controls. But this normal sort of reckoning failed to reflect the determination of the Senate members of the Conference Committee, particularly indomitable Maybank of South Carolina. While the country watched with anxiety, the Conference Committee met on June 27th, and in the early hours of June 28th a bill was agreed upon.\(^5\) On the same day, even before the bill and Conference Report were available in printed form, both the Senate and then the House passed the compromise bill extending the Act for ten months.\(^6\) On June 30th the President reluctantly signed this bill, and thus the expiration deadline was beaten by a few hours.

Thus recessed the continual tug of war which has usually characterized legislation containing authority to establish ceiling prices and other controls.\(^7\) Once again, the results were a series of compromises which satisfied no one. Whether or not such compromises together with those which were the products of previous battles will permit the effective mobilization and stabilization of our economy remains to be seen, although there is good reason to believe that they will not.

Be that as it may, the probabilities are that control legislation will be the center of much controversy and attention during the next several months. The return of the Republican Party to power may make the debate even warmer. As a consequence it will be of benefit to take stock now of the current provisions of the Defense Production Act, for the significance of any legislative changes which are eventually made can only be understood in terms of the present law.

The Preamble. Section 2 of the Defense Production Act contains a comprehensive declaration of Congressional policy. While over the years the Supreme Court has given little weight to preambles, the instant one is of unusual significance by reason of

\(^5\) 898 Cong. Rec., at 8594 and 8618 (June 28, 1952).
\(^6\) In 1951, the struggle had been even more dramatic. At that time Congressional leaders became aware that the statute could not be extended to prevent a hiatus, so the result was a one month stopgap measure to give Congress further time for the consideration of controversial amendments. This stopgap extension was followed by a law which continued controls until June 30, 1952. This enactment contained the now famous and much debated Capehart and Herlong Amendments. See Sections 402(d) (4) and 402(k) of the Defense Production Act, as amended.
its express relation of the domestic economy to the global responsibilities of the nation. The first three sentences read:

"It is the policy of the United States to oppose acts of aggression and to promote peace by insuring respect for world law and the peaceful settlement of differences among nations. To that end this Government is pledged to support collective action through the United Nations and through regional arrangements for mutual defense in conformity with the Charter of the United Nations. The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out this purpose . . . ."

Priorities and Allocations. The Declaration of Policy is followed by Title I, dealing with priorities and allocations. Not only does this title contain the basic provisions which are necessary to permit the Government to mobilize, but in addition it contains special provisions applicable to the meat industry and dealing with the importation of fats, oils and dairy products. By reason of the fact that the allocation of meat is so directly related to its pricing, at an early state the Secretary of Agriculture re-delegated his authority over this program to the Economic Stabilization Agency, which in turn re-delegated it to the Office of Price Stabilization.°

The most important of the special meat provisions is the so-called Butler-Hope Amendment, which was added in 1951.°° This effectively prohibited the use of the grandfather clause technique in administering slaughtering quotas, that is, the type of regulation requiring producers to adhere to the pattern of operations during a specified base period. Thus it was provided that no limitations may be placed upon the quantity of livestock processed by an individual slaughterer. This amendment left unaffected the authority to require registration as a condition precedent to engaging in slaughtering operations. OPS therefore, in

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°°°°See section 101 of the Defense Production Act, as amended.
order to maintain closer supervision over this significant aspect of the food economy, required separate registration for each species of livestock. However, the 1952 Amendments provide that a person lawfully authorized to slaughter pork, for example, is automatically entitled to slaughter beef without an additional registration. In addition, the 1952 Amendments permit a slaughterer to shift to kosher production, which usually carries with it the advantage of higher ceilings.

Lest these amendments be construed to weaken the authority to require the grading and grade-marking of meat, which are so vital to the pricing program, the 1952 Amendment reasserts the validity of this program. This provision is of particular importance to the pricing agency, and buttresses its claims that the original Act permitted such a program. District Courts have taken contrary views of the authority contained in the original Act, with the result that the issue will eventually have to be decided by the Supreme Court.

While the special provisions of Title I which pertain to fats, oil and dairy products are important, the general priority and allocation authority delegated to the President is even more significant, for as one writer has observed, it is from this source that he (the President)

“derives the power, which he is presently exercising, to control hundreds of thousands of business enterprises with respect to the type and quantity of products they may produce, the materials they may consume in their production,

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12 Section 101 was amended during the recent session of Congress to include the following sentence:

“Nor shall any restriction or other limitation be established or maintained upon the species, type, or grade of livestock killed by any slaughterer, nor upon the types of slaughtering operations, including religious rituals, employed by any slaughterer; nor shall any requirements or regulations be established or maintained relating to the allocation or distribution of meat or meat products, unless, and for the period for which, the Secretary of Agriculture shall have determined and certified to the President that the over-all supply of meat and meat products is inadequate to meet the civilian or military needs therefore: Provided, That nothing in this Act shall be construed to prohibit the President from requiring the grading and grade marking of meat and meat products.”

13 In United States v. K & F Packing and Food Corp., 102 F. Supp. 26 (W.D. N.Y. 1951), and in United States v. Garrigan, No. 47, E.D. Wis., November 3, 1952 (no opinion), the Government's position was sustained but in U.S. v. Excel Packing Co. Inc. (no opinion), No. 8611, D. Kans., April 17, 1952 a contrary conclusion was reached.
the persons to whom they may sell, the buildings they may construct, etc."14

It is this grant of authority also which led to the formulation by the National Production Authority of the "Controlled Materials Plan." The basic purpose of this plan is to schedule production of essential materials and to so allocate the availability of three basic metals, steel, copper and aluminum, so as to "match up needs with supplies on an over-all basis to obtain balanced production."15

Requisition and Condemnation. Title II deals with the authority of the President to requisition and condemn. Section 201(a) expressly permits him to requisition such "equipment, supplies, or component parts thereof, or materials or facilities necessary for the manufacture, servicing, or operation of such equipment, supplies or component parts" when he determines: (1) that they are necessary for the national defense, (2) that such need is immediate and impending, and (3) that such materials cannot be obtained by other fair and reasonable means. Section 201(b) implements this grant of authority by expressly empowering the President to acquire by "purchase, donation, or other means of transfer", or by condemnation any real property deemed essential to the national defense.

Although both sections hedge this requisitioning and condemnation power with certain qualifications, including that of just compensation, nonetheless this grant of power is so broad that some lawyers speculated the Attorney General would use it to uphold the President's seizure of the steel industry. However, not only did the Executive Order directing seizure by the Secretary of Commerce fail to mention Title II or the Defense Production Act generally,16 but in addition Assistant Attorney General Baldridge failed to employ this argument before Judge Pine in the District Court. Although the Solicitor General's brief in Youngstown Sheet and Tube Co. v. Sawyer,17 did rely

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14 Kaskell, Production Under the Controlled Materials Plan, 37 Corn. L. Q. 573, 574 (1952).
15 Id. at 584.
16 Executive Order 10340, 17 F.R. 3139 (April 10, 1952). Requisitioning presents difficult legal problems with respect to "just compensation" even if the commodity is covered by a ceiling price. Consult Braucher, Requisition at a Ceiling Price, 64 Harv. L. Rev. 1103 (1951).
upon the Defense Production Act *generally* as among the statutory powers supporting the President's action, and particularly Title V relating to the settlement of labor disputes, it remained for Justice Frankfurter to inquire at oral argument whether Title II of the Defense Production Act was relied upon.

*Expansion of Productive Capacity.* Title III of the Act deals with the expansion of productive capacity and supply. This title provides that the procurement agencies, in order to expedite production and deliveries under Government contracts, may under certain circumstances guarantee the financing of the performance of contracts vital to the national defense.

In addition, Title III, as amended in 1951, authorizes a subsidy program for "metals, minerals, and other raw materials, including liquid fuels . . ." and "for the encouragement of exploration, development, and mining of critical and strategic minerals and metals . . ." In order to prevent the development of a consumer food-subsidy program such as existed on a few commodities during World War II, agricultural commodities may be included in current defense subsidies only where they are purchased for industrial uses or stockpiling. By the 1951 Amendments Congress made specific provisions for the use of subsidy payments to increase production among domestic high cost marginal producers, and to compensate for temporary increases in transportation costs.

*Wage Controls.* Title IV covers both price and wage stabilization. At the outset, the President was authorized to employ voluntary agreements to secure both wage and price stability. If this did not work, the President was directed to set mandatory price ceilings on a selective basis. However, at the same time he was required to stabilize wages and salaries in the industry producing the commodity placed under a price ceiling. Therefore, when Ceiling Price Regulation 1 governing the sale of new auto-

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17 343 U.S. 579 (1952).


19 15 F.R. 9061 (1950).
mobiles by manufacturers was issued on December 18, 1950,\textsuperscript{19} this regulation was immediately followed by Wage Stabilization Regulation 1.\textsuperscript{20}

However, when ceilings were established for a substantial part of all retail sales, or established generally, the President was required to bring all wages and salaries under control except where specifically exempted. Therefore, on January 26, 1951, when the General Ceiling Price Regulation was issued, there was issued simultaneously therewith General Wage Stabilization Regulation 1.\textsuperscript{21} In addition, the statute requires the issuance of regulations prohibiting wage increases which would "require an increase in the price ceiling or impose hardships or inequities on sellers operating under the price ceiling." Particularly in connection with the steel industry's wage-price dispute, there was considerable debate as to whether this provision had been given full effect by the Wage Stabilization Board.

In general, the basic standards for wage regulations are the same as those for price regulations, which are discussed below. In addition, the Act prohibits the stabilization of wages at less than that paid during the pre-Korean month of May-June 1950, and prohibits action which is inconsistent with the Fair Labor Standards Act, the Taft-Hartley Act, and other relevant Federal and State statutes. Exempted from wage and salary control were fees and salaries of physicians and attorneys. In 1951 barbers and beauticians received a similar exemption, and in 1952 the salaries of engineers, architects and certified public accountants were exempted.\textsuperscript{22}

A far more important exemption is the one provided for small business enterprises, which under a 1952 amendment is defined as "any enterprise in which a total of eight or less persons are employed in all its establishments . . . ." However, particular industries, occupations, or areas may be lifted from the exemption in the discretion of the Wage Stabilization Board. In the case of agricultural labor, the 1952 Amendments exempt completely with-

\textsuperscript{19} 15 F.R. 9326 (1950). This order was issued on December 22, 1950, under authority delegated to the Economic Stabilization Administrator.

\textsuperscript{20} See 16 F.R. 816 (1951); note the vigorous criticism of the belated imposition of wage and price controls in Ginsburg, Price Stabilization, 1950-52: Retrospect and Prospect, 100 PENN. L. REV. 514 (1952).

\textsuperscript{21} See Section 402(e) of the Defense Production Act.
out reference to size of farming operation or without allowing the reimposition of wage controls.

Settlement of Labor Disputes. By Section 403 in Title IV of the Act the President was directed to administer wage controls "through a new independent agency created for that purpose ..." And by virtue of Title V of the Act, dealing with the settlement of labor disputes, the President is authorized to "designate such persons or agencies as he may deem appropriate to carry out the provisions of this title." The express purpose of Title V was to provide for "effective procedures for the settlement of labor disputes affecting national defense." In this connection primary reliance was to be placed upon collective bargaining, mediation and conciliation, and "... due regard shall be given to terms and conditions of employment established by prevailing collective bargaining practice ..." Again action inconsistent with the Fair Labor Standards Act or the Taft-Hartley Act was prohibited.

As directed by President Truman, the Wage Stabilization Board acted under both Titles IV and V in connection with the steel dispute which led to the Supreme Court's opinion in the Youngstown case. In other words, the Board was acting simultaneously as an arbitrator of a labor dispute and as the agency to prevent wage increases. Only history will show whether it was wise to permit one agency to perform two quite related yet nevertheless different functions at the same time.

At least the Congress has indicated its disapproval of this procedure in no uncertain terms. In the 1952 amendments to the Defense Production Act it not only requested the immediate use of the Taft-Hartley Act, but in addition stripped the Board of the disputes authority delegated by the President and made all members of the Wage Stabilization Board subject to Senate confirmation.

Price controls. As heretofore indicated, price controls like wage controls are governed by Title IV of the Act. As in the case of wage regulations, the Administration was first directed to try voluntary controls. If this failed, and by January 1951 it had been determined that voluntary controls were ineffective,
the President was to try price and wage controls on either a selective or general basis. The selective method required that findings of necessity be affirmatively made, and in effect encouraged the use of general controls.

When general controls were employed, such findings became unnecessary under the Act. In fact, general price and wage controls were made mandatory whenever ceilings had been established on a substantial part of retail sales. In the issuance of regulations, the pricing Agency was directed to consult with industry and to carry out this mandate the OPS has formed over 600 "industry Advisory Committees." Each regulation issued is to be accompanied by a "minimum economic brief," or Statement of Considerations.

The basic substantive standard for both price and wage controls is that they be "generally fair and equitable" and effectuate the purposes of the Act. The OPS has attempted to supplement this legislative standard with administrative standards modeled largely on the World War II stabilization experience.

In addition, special standards have been introduced in the price control field. For example, there are special statutory standards for the protection of manufacturers, distributors and farm producers. The best known of these is the so-called Capehart Amendment, under which OPS must permit individual manufacturer and processor ceilings to reflect cost increases through July 26, 1951. This is applicable even though ceilings remain "generally fair and equitable" with respect to an industry. In addition there is a special standard for distributors, the so-called Herlong Amendment, under which sellers are guaranteed their customary markups. However, this is not applicable on

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26 The leading case reflecting the OPA experience is Gillespie-Rogers-Pyatt Co. v. Bowles, 144 F. 2d 361 (E.C.A. 1944). See also Cavers and Associates, Problems in Price Control: Pricing Standards, General Publication No. 6 of Historical Reports on War Administration (1947); Nathanson and Leventhal, Problems in Price Control: Legal Phases, General Publication No. 11 of Historical Reports on War Administration (1947).


28 Section 402(k), Defense Production Act.
an individual basis, but rather for "groups of sellers" and for "groups of commodities."\(^\text{29}\)

The principal pricing standard for agricultural products is the "parity" provision (Section 402(d) (3)) under which both farm products and commodities processed therefrom must reflect parity prices as determined and published for individual agricultural commodities.\(^\text{30}\) Such determinations are made by the Secretary of Agriculture pursuant to the Agricultural Act of 1949. In the case of milk, the Secretary of Agriculture possesses a large measure of the authority to set ceilings. This arises because the OPS may not supersede the Agricultural Marketing Agreement Act of 1937, under which minimum prices for milk are set in a large number of metropolitan areas. Nor may the pricing Agency set ceilings which conflict with either the minimum or maximum prices set by any state. In addition, the Secretary of Agriculture may revise ceilings upward to reflect increased feed costs, both in areas where Federal minimum prices are applicable and where they are not.

As amended in 1952, the Act requires the pricing Agency to institute profit margin controls at processor and distributor levels whenever ceilings are set at the farm level.\(^\text{31}\) The purpose of this provision is to prevent processors and distributors from receiving a windfall out of a drop in farm prices. At the present only beef and soybeans are under control at the farm level, and therefore they would be the only commodities falling under this provision.

Title IV also directs the pricing Agency to make adequate provision for hardship situations. Adjustments are to be made to correct hardships and inequities, and this has been done by a general regulation applicable to all manufacturing industries. Special attention is directed to industries under economic compulsion to enter into future contracts, and where crop disasters occur both fresh and processed agricultural commodities are to receive special relief.

In the pricing area Congress also has provided for certain exemptions and established certain prohibitions. The most im-

\(^{29}\) In Safeway Stores v. Woods, Docket No. 590 in the Emergency Court of Appeals, this construction of the Herlong Amendment is being challenged.  
\(^{30}\) California Lima Bean Growers Ass'n v. Bowles, 150 F. 2d 984 (E.C.A. 1945).  
\(^{31}\) Section 402(n), Defense Production Act.
important exemption is that for fruits and vegetables, either in fresh or processed form. Nor may the pricing agency establish ceilings (1) on rents for real property, (2) on bowling alley fees, (3) on fees for professional services, for architects, engineers, and accountants, for barbers and beauticians, and for the writing of insurance. Newspapers, books and magazines, motion pictures, television and radio stations, and outdoor advertising are similarly exempted. In addition, some exemptions exist because of Congressional policy against regulating areas otherwise governed by Federal or local authority. This includes margin requirements on commodity exchanges, rates charged by common carriers and public utilities, marine terminals, non-transportation facilities operated by railroads, and sales made by states and municipalities.

The prohibitions to which reference was made are directed against (1) the requiring of reports on commodities selling below ceiling; (2) the setting of ceilings below state minimum price laws; (3) the use of pricing techniques inconsistent with state antitrust laws; (4) the maintenance of ceilings which do not permit merchants to pass on gross receipts taxes levied by local authority; (5) the use of “grade labelling” and standardization of commodities, with special reference to the food field; (6) the interference by price control of established business, distribution and accounting practices; and (7) the use of the “highest price line” limitation to require apparel retailers to continue sales of low-priced merchandise.

Violations of regulations are subject to a variety of sanctions. These include the temporary or permanent injunction, the private and public treble damage suit, and fine and imprisonment. Although implementation has just begun, the statute contains a tax disallowance procedure which may some day be of consider-

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32 Section 402(d) (3), Defense Production Act.
33 Section 402(e), Defense Production Act.
34 Section 402(h), Defense Production Act. See also Auerbach, Quality Standards, Informative Grade Labeling and Grade Labeling as Guides to Consumer Buying, 14 LAW AND CONTEMPORARY PROBLEMS 362 (1949).
36 See Korach Brothers v. Clark, 162 F. 2d 1020 (E.C.A. 1947); Carsel, The Highest Price Line Limitation in Problems in Price Control; Changing Production Patterns, General Publication No. 9 of Historical Reports in War Administration (1947) 107-127.
able significance. The foregoing sanctions are available to the Government in the district courts (except that the disallowance authority provides an administrative sanction).

However, to secure an injunction against the Government, or to establish the invalidity of a regulation, a seller must file a "protest" with the pricing Agency under Section 407 of the Act. If the protest is denied, a complaint may be filed under Section 408 with the Special Emergency Court of Appeals which has "exclusive jurisdiction" to determine the validity of regulations or orders. District courts may consider only interpretive and constitutional questions, as opposed to validity questions. However, upon leave of a district court in an enforcement proceeding, a defendant may file a complaint directly with the Emergency Court of Appeals. The Supreme Court may of course review decisions of the latter on certiorari.

Credit Controls. Title VI, entitled Control of Consumer and Real Estate Credit, was once considered as a cornerstone of an anti-inflation policy. This title was the authority for Regulation W, which governed down payments and installment periods on consumer durable goods, and for Regulation X, which governed the financing of housing. During the last ten years such "indirect" controls have been repeatedly urged as a preferable alternative to "direct" price and wage controls.

In 1950, when the Defense Production Act was enacted, both the Administration and its Opposition joined in authorizing such controls. However, the history of the administration of Regulations W and X by the Federal Reserve Board has led to repeated demands for their modification or elimination. In 1951 Congress modified Regulation W and lightened the restrictions applicable to residential repairs and improvements. As the authority for such controls was expiring, the Federal Reserve Board itself, on May 7 and June 11, 1952, substantially modified both regulations.

But this shift in Board policy came too late to satisfy groups anxious to prevent the Government from again making such controls stricter. Thus the 1952 Act repeals the authority over con-

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38 17 F.R. 4256 (May 9, 1952); 17 F.R. 5301 (June 11, 1952).
sumer credit and severely limits the authority to impose effective controls over real estate financing. 39

**General Provisions.** Title VII is given over to various provisions implementing the basic substantive provisions of the Act. This includes definition of certain terms, delegations, enforcement, voluntary agreements, industry advisory committees, administration, and a declaration of policy favoring small business enterprises.

The enforcement provisions of Title VII are the most important. Section 704 authorizes the promulgation of whatever rules and regulations as are necessary to effectuate the purposes of the Act, to prevent circumvention or evasion, or to facilitate enforcement of the Act and regulations issued thereunder. Section 705 provides for the obtaining of information where necessary to enforce the Act or secure data relevant to the formulation of regulations. Persons from whom such information is obtained may make a request for confidential treatment, but upon a determination that its withholding is contrary to the interest of the national defense the Agency may deny such protection. The normal case where confidentiality would be refused is where the information subpoenaed is vital to the prosecution of a violation, or where the data is necessary to demonstrate the validity of a regulation. Section 706 authorizes the appropriate agency, through the Attorney General, to seek temporary or permanent injunctions to prevent violations of the Act.

**Conclusion:** As may be seen from the above description, the various control measures are quite interrelated. In the over-all, they, of course, add up to vast and sweeping power over the American economy. This fact is naturally unpalatable to many of us, yet the fact remains that in an economy as complex and as interrelated as ours, it is impossible during periods of stress to control one facet of our economy to the exclusion of others. As a consequence any set of workable controls can only result from a delegation of power which is sufficiently comprehensive to permit a balanced regulation of the economy.

It is submitted that the current danger facing the American economy is not that of too much governmental control, but rather

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is the fact that certain areas have been carved out and exempted from control. Thus for example the elimination of governmental power to control installment buying has already rendered impotent the authority to deal directly with the vast increase in consumer credit, which increase, no doubt, is contributing to the current uprising in prices. Similarly, because of the price exemption for fruits and vegetables new obstacles to controlling the entire food budget have been created. These piecemeal attempts to cut down the powers of government by creating islands of decontrol may, if the forces of inflation continue to gain momentum, prove to be the very factors which will eventually result in even more comprehensive and rigid supervision over our financial structure.
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