

## Punitive Powers of OPA

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## NOTES AND COMMENT

### PUNITIVE POWERS OF OPA

The world conflict today in which America grapples with her enemies in life and death struggle is ludicrously removed in size and extent from the small local wars that several generations ago ravished parts of the earth. The dynamic impact of modern science has so shrunk our world that events in far-off India have a strange but direct and vital effect on the inhabitants of Libertysville, Kansas. Today's maelstrom is not hindered by borders, by continents or oceans—it is fought on every continent, on every sea—if not with cannon and blood, at least with production and material. And so, no longer is there soldier and civilian, but just fighter. To understand the reason why every new battle, certainly every new invasion, has a vital effect on the lives of all at home, it is necessary to realize this. The difficulties encountered in the prosecution of this struggle have never been duplicated and, to carry it on, new methods have been employed, new fields opened, and, what is in practical effect, a whole new branch of government created.

Out of this overwhelming necessity the people, through their representatives, have delegated broad and sweeping powers to the President who in turn, by executive order and directive, has created agencies both with and without express legislation from Congress, to carry on the civilian phase of the war. Of all the agencies thus created perhaps the one most vitally affecting the lives and habits of Americans is the Office of Price Administration, hereafter referred to as the OPA.

It is the purpose of this article to examine the origin of OPA, to inquire into the statute and directives which have strengthened it, to review the punitive powers which it now exerts and determine their boundaries.

On September 8, 1939 the President of the United States issued a declaration that a state of National Emergency existed. This was followed on June 28, 1940 by an Act of Congress entitled "An Act to Expedite National Defense, and for Other Purposes", Pub. Law No. 671, 76th Cong., 3rd Sess., 54 Stat. 676, providing that "all other naval contracts or orders and all army contracts and orders shall, in the discretion of the President, take priority over all deliveries for private accounts or for export." By Executive Order 8629, C. F. R., 1941 Supp., page 130 on January 7, 1941 in the Executive Office of the President, there was established an Office of Production Management (OPM) to "formulate and execute in the public interest all measures needful and appropriate in order to (1) increase, accelerate and regulate the production and supply of

materials, articles and equipment and the provision of emergency plant facilities and services required for the national defense . . .” On April 11, 1941 by Executive Order 8734, C. F. R., 1943 Supp., page 199, the President declared “. . . there shall be in the Office for Emergency Management of the Executive Office of the President an Office of Price Administration and Civilian Supply, at the head of which shall be an administrator appointed by the President.” On May 31, 1941 by Pub. Law No. 89, 77th Cong., 55 Stat. 236, Congress amended the act of June 28, 1940 and added the following: “(2) deliveries of material to which priority may be assigned . . . shall include in addition to deliveries of material under contracts or orders of the army or navy, delivery of material under (B) contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States; . . . whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private accounts or for export, the President may allocate such material in such manner and to such extent as he may deem necessary or appropriate in the public interest and to promote the national defense.” On August 28, 1941 by Executive Order 8875, C. F. R., 1941 Supp., page 270, under the title “Delegation and Co-ordination of Priority Authority”, the OPM was given additional responsibilities with respect to the procurement, production, transmission or transportation of materials, articles, power, fuel, and other commodities; . . . by the same order the Supply Priorities and Allocations Board was created. OPACS was changed to OPA and the administrator of the OPA was made a member of the Board. The purpose of the Board was declared to be: “(a) To exercise general direction over the war procurement and production program. (b) Determine the policies, plans, procedures and methods of the several federal departments . . . in respect to war procurement production . . .” On January 24, 1942, by Executive Order 9040, 7 F. R. 527, the WPB was directed to undertake the functions and powers theretofore vested in the OPM which was abolished, and “the chairman of the War Production Board may exercise the powers, authority and discretion conferred upon him by this or any other Order through officials or agencies, and in such manner as he may determine and his decisions shall be final.” By Directive No. 1,<sup>1</sup> 7 F. R. 562, Donald M. Nelson, Chairman of the

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<sup>1</sup> EXECUTIVE ORDER No. 9125, 7 F. R. 2719, “. . . Chairman of the WPB with the advice and assistance of the members of the board shall perform the additional functions and duties and exercise the additional powers, authority, and discretion conferred upon the president of the United States by Title 111 of the Second War Powers Act 1942. The chairman of the WPB may perform the functions and the duties, and exercise the powers, authority, and discretion conferred upon him by this or any other order through such officials or agency including the OPA . . . and in such manner as he may determine . . . The chairman of the WPB is authorized to delegate to the OPA or price

WPB, declared that "The OPA is authorized and directed to perform the functions and exercise the power, authority and discretion conferred upon the President by Section 2a of the Act of June 28, 1940 as amended by the Act of May 31, 1941 with respect to the exercise of rationing control over (1) the sale, transfer, or other disposition of products by any person who sells at retail to any person and (2) the sale, transfer, or other disposition of products by any person to an ultimate consumer. . . . The authority of the OPA under this directive shall include the power to regulate or prohibit the sale, transfer, or other disposition of products to any retailer who has acted in violation of any rationing regulation or order prescribed by the OPA hereunder, and shall include the power to regulate or prohibit the sale, transfer, or other disposition of products to any wholesaler or other supplier of any retailer, directly or indirectly, if such wholesaler or other supplier has acted in violation of any rationing regulation or order prescribed by the OPA hereunder. The OPA is likewise authorized to require such reports and the keeping of such records and to make such investigations, as it may deem necessary or appropriate for the administration of the rationing powers conferred herein; *and it may take such measures as it may deem necessary or appropriate for the enforcement of any rationing regulation or order prescribed by it pursuant to this directive.* (Italics by author.) (c) The OPA may exercise the power, authority and discretion conferred upon it by this directive through such officials including part-time and uncompensated special agents and in such manner as it may determine. (d) The chairman of the WPB will on the request of the OPA advise the OPA as to the portion of existing products available for rationing by the OPA under this directive. (e) The chairman of the WPB may, from time to time, delegate to the OPA such additional powers with respect to the exercise of rationing control or amend the delegation herein in such manner and to such extent as he may determine to be necessary and appropriate. . . ." Approved, F. D. R., January 24, 1942. Supplementary Directive No. 1f: "In the exercise of rationing authority delegated to the OPA with respect to tires, passenger cars, gasoline, or other products used in transportation, such office shall to the full extent administratively practical, implement any policies or programs with respect to transportation which the Office of Defense Transportation may formulate." The ultimate source of the OPA rationing power, it will be noticed, stems from the Act of May 31, 1941 as amended by the Second War Powers Act and is delegated

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administrator such of his functions . . . with respect to priorities or rationing as he may deem to be necessary or appropriate for the effective prosecution of the war. . . . The price administrator is hereby authorized to exercise all functions, duties, powers, authority or discretion with respect to such priorities or rationing in the same manner and to the same degree and extent as if such functions had been conferred or transferred to OPA directly by executive order."

by means of WPB Directive No. 1. Under Title 111, "Priorities Powers" of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 50 U. S. C. A., §§ 631-645a as amending the Act of June 28, 1940, Section 2(a) (8) provides "the President may exercise any power, authority, or discretion conferred upon him by this subsection a, through such departments, agency, or officer of the government as he may direct and in conformity with any rules or regulations which he may prescribe." From this clause springs the President's power to delegate his duties conferred by the act of Congress to an administrative agency,—in this case the OPA. Note, too, the broad powers of the OPA to enforce this authority under the directive which states in unequivocal terms that the OPA may take such measures as it may deem necessary for the enforcement of any regulation or order. So, for example, OPA probably has the authority to designate a maximum speed for motorists and to condition the granting of ration coupons on the observance of such speed. Motorists failing to comply with this regulation may be deprived of their rationing books and denied additional ones. No limitation is imposed on the manner of allocation under the Second War Powers Act except that it promote the national defense, and any method which OPA may adopt to secure the most efficient use of existing supplies of shortage materials is a proper exercise of the power of allocation. So the conditioning of gasoline rations upon sale to the Government of tires in excess of five could be upheld on the theory that the acquisition and distribution of such tires are part of the allocation program authorized by the Act. The purpose of both gasoline rationing and the sale of tires to the Government is the proper allocation of transportation facilities. The unpopular but necessary curtailment of pleasure driving is also incidental to the power to allocate. Since there is a shortage of gasoline and transportation facilities, the OPA must direct that both of these be used sparingly and in the manner best suited to the national interests. As a result it may hold that only those using such shortage materials may do so to further the war effort. (It will be remembered that in respect to transportation facilities the OPA was directed to implement any policies which it may draw up with those the ODT might formulate.)

Until January 30, 1942 the OPA was the offspring of an executive order. On that date Congress gave the agency its official sanction by the Emergency Price Control Act of 1942, Pub. Laws 421, 77th Congress. On March 27, 1942 Congress enacted the Second War Powers Act which amended the act of May 31, 1941.

On September 12, 1942 by Supplementary Directive No. 1-M, 7 F. R., 7234, the authority delegated to the OPA by Directive No. 1 was extended to include the exercise of control over the sale, transfer, delivery or disposition of meat. In reference to this, Judge Johnson, in *Brown v. Bernstein*,<sup>2</sup> said: "To carry out the meaning and intent

<sup>2</sup> *Brown v. Bernstein*, 49 F. Supp. 497 (1943). *Accord*, *United States v. Wright*, 48 F. Supp. 687 (1943).

of Congress in adopting a statute and to understand what that intent was, it is proper for the court to ascertain the mischief supposed to prevail at that time and which it was sought to remedy. In the broad viewpoint which must necessarily be taken in the interpretation of emergency and wartime legislation for the protection of our nation the act of June 28, 1940 is not limited to army or navy contracts . . . the pertinent congressional legislation has served not to narrow or limit this chain of executive orders but to broaden and enhance the powers therein given. It is to be noted with emphasis that the matter of a national emergency has, and always was, left to the judgment of the President . . . The various acts of Congress authorizing the President to take action in the event of a national emergency show that Congress throughout the years made little or no distinction between a state of national emergency and a state of War . . . Executive orders issued and legislation enacted during a national emergency and in time of war must be expressed in broad terms and generalities. In the interpretation of such legislation the court must not hunt for limitations nor scrutinize the wording with confining intent but should seek for the purpose and spirit of the enactment. The executive orders, legislative enactments and directives . . . are intended to be, and are, a protection to this nation under the powers of the Constitution and there has resulted therefrom a duly established right in the administrator of the OPA to (ration meat)."

Sections 204c and d of the Emergency Price Control Act authorize the creation of an Emergency Court of Appeals which shall have jurisdiction to consider the validity of any order or regulation issued under the authority of the Act. The courts have upheld this provision as denying in toto, jurisdiction of any and all courts over such subjects save the Emergency Court of Appeals and the Supreme Court. "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion provided it not be extended beyond the boundaries fixed by the Constitution. And the jurisdiction having been conferred, may at the will of Congress, be taken away in whole or in part . . ." <sup>3</sup>

The standard set by the Emergency Price Control Act was upheld in *Helena Rubinstein, Inc. v. Charline's Cut Rate, Inc.*, where the court said: "The price administrator must (1) give due consideration to the prices prevailing for commodities between October 1 and October 15, 1941. (2) He must continually adjust his regulations on the basis of all facts which are relevant and which he may determine to be of general applicability to the commodity involved,

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<sup>3</sup> *Lockerty v. Phillips*, U. S. Sup. Ct., May 19, 1943, 87 L. ed. 958, Adv. Ops. (1943).

and (3) he must accompany every regulation or order with a statement of the consideration involving its issuance. A legislative delegation of power to an administrative agency is constitutional when the legislation itself sets up the necessary standards which are required by adjudications of the United States Supreme Court for the guidance of the agency created to administer the law."<sup>4</sup>

"The administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this act" (Emergency Price Control Act, Pub. Law 421, 77th Cong., 2d Sess., Title 11, Administration and Enforcement). What is "necessary or proper", of necessity, includes a large field of rules, regulations and prohibitions to be drawn upon by the administrator in his discretion. However, the courts have seemed willing to uphold any enforcement regulation reasonably directed toward the attainment of the purposes of the act. Under Section 202, the power of the Administrator includes the right to make studies and investigations, to require any person engaged in the business of dealing with any commodity or rents, or offering for rent, any housing accommodations, to furnish information under oath, to keep records and documents, and to subpoena witnesses. The right to injunctive relief is granted in Section 205. In 9 *Law and Contemporary Problems*, 55-58 Duke U. 1942, David Ginsberg, former general counsel of the OPA, commented on the procedure of injunctive relief thusly, "whenever the Administrator believes that a licensee has violated any of the provisions of his license, or of any regulation or order to which he is subject, a warning notice must be sent by registered mail. If there is reason to believe that the licensee after receipt of warning notice, has again been guilty of a violation, the administrator may petition for a court order suspending the license for a period not more than twelve months. The issue open in proceedings for license suspension is, by the terms of the act, limited to the question whether the licensee has in fact violated any provisions of the license, or of a regulation or order after the receipt of the warning notice. . . . The fact that suspension proceedings will often be brought in the state courts means that those charged with the administration and enforcement of the act must take account of forty-eight different systems of trial and appellate practise."

It will be of little advantage to our readers to discuss in detail the powers given to the OPA under the Emergency Price Control Act. Suffice to say that in every regulation promulgated by the OPA there are sanctions directly authorized by the statute. The exercise of these powers is hardly questionable in view of the fact that the courts have almost consistently upheld the constitutionality of the Act itself. As remarked previously we have contented ourselves with

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<sup>4</sup> *Helena Rubenstein v. Charline's Cut Rate, Inc.*, 132 N. J. E. 254, 28 A. (2d) 113 (1943).

reviewing the exercise of the more debatable powers of the OPA., *i.e.*, those enforced without express statutory authorization.

In our opinion one danger lurks in the practise of the grinding out of numberless rules and regulations. These affect so many of our people that each day sees the citizen innocently violating one or more of them. Of course it is highly impracticable to punish each and every violator, so OPA, assuming a common sense attitude, has not attempted to do so. But here lies the danger. "Though the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority . . . so as to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of the Constitution."<sup>5</sup>

In conclusion, it may be said that the OPA, born of necessity, through executive order and directive, and later sanctioned by statute, must be viewed in the light of the times in which it was enacted. It is wartime legislation. As such, we must consider it from the viewpoint of the objective to be attained—namely, economic stabilization during a period of great emergency. Upon the successful harnessing of economic forces at home depend our victories abroad.

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#### ESTOPPEL IN LIFE INSURANCE IN NEW YORK (N. Y. INS. LAW § 58)

The doctrine of equitable estoppel has been used to preclude insurers from defending on the grounds of breach of condition, and as a defense to insurers' actions to rescind for breach of condition. The doctrine operates when "one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert. Then he will not be permitted in a court of justice to avail himself of that advantage."<sup>1</sup>

Two factors control estoppel. The first is the common law parol evidence rule making inadmissible oral testimony to alter the terms of a written contract.<sup>2</sup> The second factor is New York Insurance Law § 58<sup>3</sup> providing that insurance policies must contain the

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<sup>5</sup> *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1886).

<sup>1</sup> *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 233, 236 (U. S. 1871).

<sup>2</sup> See comment of Johnson, Ch. J., regarding *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392 (1858) as printed in VANCE, *INSURANCE* (2d ed.) 497-501 for a vigorous defense of the parol evidence rule.

<sup>3</sup> What cases commonly refer to as N. Y. Ins. L. § 58 is now superseded by N. Y. Ins. L. §§ 142, 149 and 150. The original § 58 is found in c. 690 of