

Standards for Price Stabilization

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When a lawyer and an economist are asked to speak successively on the subject of price stabilization standards, it is perhaps implicit in the invitation that the lawyer should talk about legal limitations on the Price Director's powers and leave it to the economist to discuss how, within those limitations, the broad policy goals may best be achieved. If such were the division, I should yield back the bulk of my time to our economist. As I will try to show, the crucial decisions being made and to be made lie, for the most part, comfortably within the area committed by law to administrative discretion. In other words, the Director's main worries will not be over when he *can* do and successfully withstand judicial review but rather over what he *should* do as a matter of wise policy.

It is, however, an occupational disease of price control lawyers to talk as though they were economists, and the jurisdictional line where their special competence steps has always been rather shadowy.

I will at least start out like a lawyer with a bit of definition of terms. In talk about standards for price stabilization, the word "standards" is used in two very different senses, and the two are often confused. First, "standards" may refer to the guides to administrative action found in the governing statute. I suppose that as a teacher of administrative law I ought to make passing reference to the constitutional necessity that these standards be precise enough to save the statute from being invalidated as an improper delegation of legislative power. There is no likelihood, however, that the Defense Production Act will meet the fate of the NIRA. That question seems foreclosed by the *Yakus* case, in which the Emergency Price Control Act of 1942 was sustained against an attack on this ground.

It is not, therefore, the constitutional adequacy of the standards which will concern us but rather the limitations which these standards impose upon the Price Director's action. (For convenience I will speak of the Director as though he were the direct recipient of the power delegated by Congress. The Defense Production Act in fact confers all power upon the President with authority to delegate it as he chooses. The President created the Economic Stabilization Agency and delegated all his powers under Title IV, the part of the law dealing with price and wage stabilization, to

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the Stabilization Administrator. The latter redelegate the price powers to the Price Director.)

The second way in which the word "standards" is used is with reference to the administrative standards of the Director's own making. As I will demonstrate later, the statutory standards are in such general terms that the Director is bound for both practical and legal reasons to develop more specific rules for his own guidance and that of his staff. The formulation of these administrative standards is the Director's most exacting task.

For the purposes of the present discussion of statutory pricing standards, I am going to limit myself, somewhat arbitrarily perhaps, to those which relate to the conditions under which controls may be instituted and to the price levels at which they may be established and maintained. This will eliminate some of the peripheral problems such as statutory restrictions on methods or techniques of control. Furthermore, I am not going to dwell at any length on the pricing of agricultural commodities. This is because Congress here provided very specific standards, chief of which is the traditional parity yardstick, below which the Director cannot go in pricing farm products. He has already manifested his intention to control them as rapidly as the law permits, and it can hardly be questioned that it is within his legal power to do this. Neither, I would say, is there a reasonable basis for questioning the policy judgment that the general controls already covering the rest of the economy should be extended to farm products when the statutory standard permits.

My discussion of pricing standards, statutory and administrative, will center upon six major questions which the Director either has decided or must decide. They are:

- (1) Should controls be imposed on a selective basis or generally?
- (2) When should they be imposed?
- (3) What technique of control should be resorted to in the first instance?
- (4) At what price levels should ceilings be fixed?
- (5) Under what circumstances is it necessary as a matter of law to modify price ceilings?
- (6) What are the most effective techniques of control that can be developed?

The first four of these questions have already been resolved by the Director, on January 26, by the issuance of the General Ceiling Price Regulation, and so in a sense they are academic. Nevertheless I think they merit some discussion, particularly as they are relevant to consideration of the future. I will take them up in order.

I. Should Controls Be Imposed on a Selective Basis or Generally

In form Congress offered a choice between proceeding through selective or general controls. In actuality, however, there was no such freedom of choice. This was because the act provided that when a price ceiling was fixed for a particular material or service wages must be stabilized in that industry at the same time. Obviously Congress was fearful lest price ceilings would be fixed and wages left free to move upward so as to cut unfairly into business profits. The principle that the general control of prices should be accompanied by the general control of wages is elementary, but when this sound general principle is applied to a single industry it becomes economically indefensible and politically impossible. To the manufacturer wages are part of his costs, and naturally he is worried by the prospect of frozen prices and fluid costs. To the worker, on the other hand, the price of the goods he makes is of little moment. His concern is with the cost of living generally — with what his wage dollar will buy in terms of food, clothing, and shelter. No convincing reason can be given him for freezing his wages when those of the neighbor he meets at the corner grocery store are not frozen.

There was, to be sure, the possibility of a limited use of selective controls despite this price-wage tie-up, and in two instances, automobiles and hides, the Director tried it. It was clear, however, that as a practical matter it was general controls or nothing.

II. When Should General Controls Be Imposed

The statute does not furnish an explicit guide to the Director's discretion on this question. Mandatory controls are permitted only to the extent that the objectives of the act could not be attained by voluntary action, a finding which it was not hard to make. As already stated, either selective or general controls are authorized. Control over an individual commodity required a finding that it "has risen or threatens to rise unreasonably above the price prevailing during the period from May 24, 1950, to June 24, 1950," and that "such price increase will materially affect the cost of living or the national defense." There is no corresponding provision with respect to general controls. In his statement of considerations for the general freeze, the Director found that prices generally had risen and were threatening further to rise to an extent inconsistent with the purposes of the act. It would seem that this finding, unassailable as a matter of statistical fact, justified the Director's action as a matter of law.

The only question fairly open was whether action should be

delayed because the agency was not yet staffed and ready for the job. It was a dispute on this issue that led to Mr. Valentine's resignation as Stabilization Administrator. The Washington staff was woefully small; field offices were non-existent. There was certainly basis for the fear that precipitate action in these circumstances would cause such havoc and confusion that the whole stabilization effort would be discredited for a long time to come. On the other hand the price picture was worsening at an unprecedented rate. The decision to act was a daring gamble that the lack of preparation would not prove too costly. Whether it will pay off still hangs in the balance.

III. *What Technique of Control Should Be Resorted to in the First Instance*

Actually the decision to act on January 26 left only one possible answer to this question. A general freeze was the only thing that could be done quickly. A handful of people, a few pairs of scissors, a pot of paste and copies of OPA's General Maximum Price Regulation and MPR 188 could do the job in short order. To the credit of Mr. DiSalle's lawyers, they were able, despite the time pressure, to make some drafting improvements and a few substantive changes. But essentially one of my colleagues summed it up when he greeted me with the words, "I see that OPA is playing a return engagement by popular demand—though without the original Washington cast."

I am sure the OPS lawyers were fully aware of the difficulties inherent in a general freeze—the problems of definition ("purchaser of the same class", "most closely competitive seller of the same class" and so on); the inevitable gaps and distortions; the squeeze and the retail lag; the problem of the seasonal commodity with an abnormal base period price; the difficulties in enforceability; all these and many others were an old story to lawyers who had been in OPA, as the chief draftsmen of the present freeze had been.

The inescapable fact remains, however, that once the decision to take action was made, there was no practicable alternative to the general freeze. The difficulties, which multiply greatly with the passage of time, point up the desirability of moving as rapidly as possible away from the freeze. They do not provide effective argument against the freeze as a stop-gap method, useful until something better can be worked out.

I remarked in an article in the November, 1950, *Harvard Law Review* that a responsible government surely ought to avoid if it can the creation of the inequities and dislocations inherent in a

general freeze until it is equipped to correct them with reasonable speed. I still think that was a sound observation. I am confident that those who decided to go ahead on January 26 would not challenge its soundness. They went ahead with the hope, rather than with the assurance, that they could create the necessary organization in time and were well aware of the consequences if they failed. In the light of the frightening upsurge of prices, I am not disposed to quarrel with the decision. I do quarrel, however, with the fact that so little was done to build the organization in the four and a half months after Congress enacted the Defense Production Act. There lies the root of the present atmosphere of chaos. In fairness it must be conceded that it was and is hard to get first-rate people to accept government jobs. There have been so many instances of irresponsible criticism of honorable and conscientious public servants that the reluctance to subject one's self and one's family to the possibility of unwarranted personal attack is understandable, and this is no small factor in the recruitment problem. It nevertheless remains true that much more could and should have been done to prepare for the clearly foreseeable day when controls would be needed.

IV. *At What Levels Should Maximum Prices Be Fixed*

This question runs into the succeeding ones because the statutory standards for the initial imposition and for the subsequent maintenance of controls are the same, although the administrative standards may be very different. At this point a scrutiny of the statutory standards is necessary. The primary standard, as it was in the Emergency Price Control Act, is that prices must be "generally fair and equitable" and must effectuate the purposes of the act. It is perfectly apparent that this standard is so general that the Director has very broad discretion in deciding at what level to establish a ceiling. To be sure, somewhat more specific standards appear later in the same section of the act. The Director "so far as practicable" must give "due consideration" to prices prevailing in the May 24 to June 24 period, or the nearest representative period. He must also give "due consideration" to the national effort to achieve maximum production and to such relevant factors as he may determine to be of general applicability, including among others general increases or decreases in profits earned by sellers subsequent to June 24, 1950. The enumerated factors were also substantially copied from the Price Control Act, and the history of OPA regulations in the courts demonstrates, if demonstration be necessary, how slight an impediment these added standards are to the exercise of the Director's judgment. It is the Director who decides how far it is "practicable" to consider, what consideration

is "due", what factors are "relevant" and of "general applicability" and so on. As a practical matter, they call for care in the composition of the "statement of considerations" required to accompany each regulation but they give little comfort to the seller seeking to attack the regulation in court. It is reasonable to assume, since the standards of the former law were so religiously followed by Congress, that the judicial decisions under that law are highly relevant to the question of the scope of the Director's powers.

Congress must be assumed to have known what the Price Administrator did, and what the courts upheld as within his power to do. It is highly significant, particularly when we remember how thoroughly OPA eventually outlived its Congressional welcome, that Congress when confronted by a new emergency was content to delegate its powers in virtually the same terms as before. It is of especial significance that scarcely a trace of the spate of post-war restrictive amendments is found in the new law. Congress can, of course, recall any part of the power it has given if it does not approve the way it is exercised. That is an essential part of our democratic processes. It is heartening, however, that the new Director is not starting out with the same shackles that were finally forged for his predecessors.

Given these statutory standards and having determined on the freeze method, the crucial question becomes the freeze date. It may be taken as thorough settled by the OPA court decisions that the words "generally fair and equitable" do not require that each individual seller be assured of maximum prices which will permit him a profit either on an over-all basis or with respect to a particular commodity. Hence there is an overwhelming presumption that prices frozen at current levels, as was done in the recent regulation, are generally fair and equitable to sellers at the time of the freeze. That they may not remain so in the face of rising costs is quite another question. It is also reasonably clear that a freeze as of an earlier date would have been legally justifiable. The OPA Administrator issued the GMPR on April 28, 1942, and took the month of March as the base period. The failure to "roll back" prices this time has been a source of much criticism.

The decision, to "roll-back" or not to "roll-back", points up Chester Bowles' frequent comment, "There are no *good* alternatives in price control — only a choice between poor ones." There is certainly force to the argument for a roll-back. A freeze at current levels favors the inflationist and penalizes the seller who has tried to hold his prices down because he was asked to by his government. On December 19, 1950, Administrator Valentine issued and published in the Federal Register a set of voluntary pricing standards, in which he solemnly gave the assurance "that no seller will

derive any advantage from price increases after December 1." Here was a pledge of the government's good faith by a man then entitled to pledge it. That pledge was broken. Such a breach of faith is a bad thing at best, justifiable only if the alternative is a worse thing.

Actually, there were many persuasive administrative reasons for not attempting a roll-back at this time. (Of course the decision does not preclude later roll-backs in particular cases.)

When OPA issued its general freeze, the agency had 3711 employees in the national office; it had regional and district offices with good-sized staffs already intensively trained to administer this regulation. ESA had only 650 employees in all (most of them apparently engaged in trying to hire others) and no one whatever in field offices except a handful of housekeepers charged with the mechanics of organization. There was no one to explain or interpret what was of necessity a complicated regulation. By saying, "Your prices when you open today must be just what they were when you closed yesterday", the immediate problems of interpretation were reduced to the minimum. A seller could comply by doing nothing to change his existing prices. A roll-back would have required the consulting of records and extensive repricing — the GMPR allowed a three-week period for retailers between the announcement and the effective date, and the country was flooded with 2 million pamphlets on "what every retailer should know about GMPR." Moreover, the problems bound to come under any freeze as the seller's shelves empty and are replaced by new and different goods at new and higher prices, would have come that much sooner if a roll-back had been used. The OPS was buying valuable time to prepare itself for action by adopting a current freeze.

V. Under What Circumstances Is It Necessary as a Matter of Law to Modify Price Ceilings

I have already described the statutory standards for maximum prices. While they pose no very serious legal problems in connection with a general price freeze at current levels, the question of when a price ceases to be generally fair and equitable is the hardest of all the Director's problems.

It must be recognized that the business of regulating prices throughout our economy has to be the work of many hands. The Director can only give general policy guidance to his staff and make major policy decisions. If he says to his various commodity branches, "Maintain generally fair and equitable prices giving due consideration to all the things the law says we should", what would happen? The question is a rhetorical one.

The Director is bound not merely by the statute but by the general requirements of constitutional and administrative law. This means that he cannot accept the freedom of action that Congress has apparently given him. He cannot proceed on a case by case basis with unsystematized notions of what the statutory standards mean. He must narrow his own range of discretion by formulating administrative standards and applying them evenhandedly. Effective internal administration and decent industry relations (and congressional relations) compel this course as a matter of good sense. It is equally compelled as a matter of law. If the Director is arbitrary or capricious, the courts will call him to account. His only effective defense against the charge of arbitrary or capricious conduct is to decide how in his judgment "generally fair and equitable" should be translated into official action and then to act consistently within his self-imposed limits. To be sure, he has a broad area of choice at the outset. "Generally fair and equitable" are not words of fixed and invariable content. He is in no way bound to use the same standards the OPA Administrator did and that the court then approved. Neither is he bound to adhere to the same standards indefinitely. They can and doubtless will be modified in the light of experience and changing conditions. But he cannot, without a clear justification, depart for the purpose of an individual case from the standards to which he purports to adhere.

In point of fact, instead of adding to his burden in the courts by these self-imposed limits on his own discretion, the development of administrative standards lightens the burden of litigation. Once such a standard has been sustained on judicial review, it is validated for the future and the question for review in succeeding cases is whether the Director has abided by his own rules or justified a departure from them.

I will not be so bold as to suggest what these administrative standards should in fact be. I will, however, set forth some of the things which it can be asserted with confidence are within the Director's legal power to do. This confidence is based upon Emergency Court of Appeals decisions with respect to the OPA Administrator's powers.

1. As already mentioned, a price may be "generally fair and equitable" even though some high cost individual sellers cannot operate at a profit within the ceilings. They may, of course, be given special treatment to assure needed production or for other reasons, but they cannot demand it as of right.

2. A cost increase to a manufacturer or to a distributor does not necessarily have to be reflected by a price increase in order to keep a ceiling generally fair and equitable. Indeed, it is the Director's duty so far as possible to require cost increases to be absorbed

where there is an existing margin of profit reasonably sufficient to absorb them.

3. It is appropriate in considering the need of a price increase to apply the "generally fair and equitable" standard to the over-all operations of an industry rather than to each individual commodity. The Price Administrator developed as a basic standard the proposition that price relief was called for only if the over-all earnings before taxes of the industry in question were less than in a representative peace-time period, ordinarily 1936-39. This was supplemented, as applied to an industry making several products, by the further proposition that relief was required for a particular product only if the members of the industry, excluding the high-cost marginal fringe, were incurring out-of-pocket losses on that product. The Emergency Court of Appeals upheld both the "industry earnings" and the "product" standard. These decisions would seem to justify a similar approach to the problem this time, since there is no significant change in the statutory language.

If the Director should formulate a new "industry earnings standard" as the basic criterion for the need of a price increase and should select, for example, the years 1946 to 1949 as a representative period for purposes of comparison, it is reasonable to predict that the court would sustain him. I might add that I did not pick the years 1946-49 out of thin air — they are the years Mr. Valentine used for his proposed voluntary pricing standards last December. Of course I have no knowledge that the Director plans to use this particular period.

4. It is appropriate in considering the need for price relief to look to the adequacy of earnings before rather than after taxes. As obvious as this may seem, the contrary was earnestly urged upon OPA until the matter was settled by judicial decision.

VI. *What Are the Most Effective Techniques of Control That Can Be Developed*

This question clearly crosses the line staking out the area of the lawyer's special competence. I should nevertheless like to venture a few observations.

Direct controls over prices and wages are not designed to cure the disparity between purchasing power and available goods. That must be done by other means — heavy taxation, curbs on credit, and the like. Direct controls are designed to prevent wages from pushing up prices and prices pushing up wages in never-ending succession. Hence the attack on prices should be concentrated where they produce the spiral. Essential foods, clothing and shelter should be controlled as firmly as possible. This is the bare mini-

num to which some other cost of living items should probably be added.

Most other prices could, in my opinion, wisely be freed of controls. If the fear is that scarce materials or manpower would be diverted to these uncontrolled areas, it seems to me much more sensible to prevent this diversion when necessary by direct control over these materials and labor rather than by indirect control through price ceilings.

OPA had many regulations it made no pretense of enforcing. The agency's field investigators were officially instructed not to waste the limited enforcement manpower on commodities not vital to the cost of living. I believe that a regulation not important enough to try to enforce is not important enough to write, particularly in view of the fact that we are devising a regulatory structure that may well have to last for a long time. I think that reasonable doubts should be resolved against, not in favor, of, controls.

My recommendations for future action would include the following:

(1) Replace the freeze with specific regulations on basic raw materials, using May-June 1950 prices as a point of reference so that unwarranted price increases since then would be cancelled out.

(2) For such manufacturing industry as there is sufficient reason to continue and control, replace the freeze with a formula type of regulation designed at least to limit unit dollar margins over direct cost to those prevailing in the pre-Korean period.

(3) For the distributive trades, replace the freeze with regulations designed to preserve the individual seller's historic percentage markup over acquisition cost. The technique developed by OPA in its MPR 580 in the latter stages of its history was generally satisfactory and is worth copying. I believe that in fact, such a regulation is now in process of preparation. Ideally the historic markup should be that prevailing in the month of May 24 to June 24, 1950. I do not know, however, whether investigation would indicate that there have been enough increases in such markups in recent months to justify the added burden of trying to go back as far as pre-Korean records to determine the historic markup. That burden would be great, as many retailers' records have probably not been preserved.

(4) Place controls on agricultural commodities as soon as the statutory standards permit and apply the general principles already suggested to the later stages of processing and distribution.

(5) The methods so far proposed would produce retail prices varying from store to store. In order to make enforcement easier and consumer participation possible, I would move as rapidly as feasible to uniform dollar-and-cent ceilings on critical food items,

notably meat. Meat price control was the thorniest single problem before and it doubtless will be again, but it is one that must be effectively solved if the program of controlling living costs is to have any chance to succeed.

(6) Similarly I would put uniform dollar-and-cent controls on basic low-cost apparel items. This program will be effective only if the government by vigorous use of its allocation powers sees to it that such items are produced in quantity. Otherwise past history will repeat itself and low-priced goods will disappear from the market in favor of high-cost higher-profit items, a shift which ceiling prices cannot prevent.

I cannot promise, of course, that prices fixed as suggested and wages fixed by whatever stabilization formula is adopted will wind up in fair balance. Some further accommodation may have to be made. It is too much to expect any general agreement as to what is a fair balance among the competing demands of the worker, the farmer, and the businessman. But this much is clear; it is to the long-run interest of all groups that a balance be struck and held, and that the wage-price spiral be arrested.