THE LEGAL MECHANISM OF RATIONING

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I. EARLY PERIOD

RATIONING began on January 5, 1942, the date on which certificates for new rubber tires were first issued by local Tire Rationing Boards. Immediately after Pearl Harbor it became apparent that tires must be rationed, and a legal basis for such action was found in the Priorities and Allocation Act of 1940. That Act authorized the President, if “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 account or for export,” to “allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.” The President had already delegated authority over allocation to the Office of Price Management, later replaced by the War Production Board and on December 10, 1941, the OPM had (by Supplementary Order M-15-b) prohibited virtually all sales, leases, trades, deliveries, or transfers of new tires and tubes.

Because rationing would directly affect all civilians, and because there are certain fundamental relationships between rationing and price control, it was decided the OPA should ration. Accordingly, the President and OPM joined in issuing Supplementary Order M-15-C on December 27, 1941, prescribing the terms of tire rationing and delegating the enforcement, interpretation and amendment of the order to OPA.

On January 24, 1942, the President and WPB joined in Directive No. 1, delegating to OPA the exercise of rationing control over the sale of products at retail, or to an ultimate consumer. Since that date, the rationing powers of OPA have at times been enlarged and modified by supplementary directives and amendments. It may be emphasized at this point that the responsibility of OPA is limited to providing for the equitable distribution of specific amounts of specific commodities. The type of goods to be rationed and the size of the “deposits” in the “bank account” against which OPA issues the “checks” are determined by other agencies on the basis of the facts as to supply, production, and military requirements.

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During the early period of rationing, no penalties were provided by Congress for violations of allocation or rationing orders. Where intended violations were discovered in advance several federal District Courts issued injunctions. Inadvertent violators frequently were willing to return the goods illegally obtained where the matter was brought to their attention. At the time of the original "freeze" order on new tires, dealers had been required to report the number of new tires and tubes on hand, and in several instances where wilful misstatements were shown, violators were prosecuted under a federal statute making it a penal offense wilfully to make a false statement in a matter under the jurisdiction of a United States government agency. Indirect means could be used in specific instances. For example when a tire dealer who happened to have been named a tire inspector violated the order, the local Board which appointed him gave considerable publicity to its action in dismissing him.

On March 27, 1942, there was enacted the Second War Powers Act which provided enforcement teeth for the rationing program. As in the Priorities and Allocations Act the powers were given to the President, with the provision that he may exercise the power through any government agency. The Act provided that a wilful violation of an order or regulation would be a misdemeanor, and established a penalty of not more than $10,000 fine or imprisonment for not more than one year, or both. It also gave the District Courts jurisdiction of any civil action to enforce liabilities or duties created by, or to enjoin violations of regulations or orders, and provided that no person should be held liable for a default under a contract, resulting from compliance.

II. THE RATION ORDERS

The Ration Orders now in force locally are as follows:

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<tr>
<td>Passenger Cars</td>
<td>R.O. 2B, Effective March 6, 1943, 10 Amendments, Original freeze effective Jan. 1, 1942.</td>
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<tr>
<td>(All 1942's, and 1941's driven less than 1,000 miles.)</td>
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<tr>
<td>Sugar</td>
<td>R.O. 3, Effective April 20, 1942, 109 Amendments</td>
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The number of amendments listed above is correct as of January 3, 1944. All orders and amendments are published in the Federal Register, but they are, of course, more readily available in various commercial services. The multiplicity of amendments stems in part from changing conditions and in part from the sheer complexity of the task of complete national regulation of the distribution of a commodity.

The sequence in which specific subjects are treated varies from order to order. Apart from that, however, the contents of the orders fall into a regular pattern. A group of sections prohibit certain acts involving the rationed commodity. One such section prohibits all "transfer" of the commodity unless such transaction is authorized by some other specific section of the order.

The word "transfer" is very broadly defined in a section devoted to the definition of terms. As an example, Ration Order 13 (Processed Foods) defines transfer as "to sell, give, exchange, lend, deliver, or consign." It includes any transfer of possession or title, however accomplished, and any movement of goods from one establishment to another. The use by any "person" of "processed foods" which he holds for sale or transfer is considered a transfer of those foods to himself. Also a transfer takes place when an industrial user uses processed foods which
he produced or imported after October 4, 1943. However, delivery to
a carrier for shipment is not regarded as a transfer to the carrier; and
delivery by the carrier to the consignee is not regarded as a transfer
by the carrier.

Other sections of the order describe certain transfers which are
permitted without the exchange of coupons, certificates, stamps, ration
checks, or other ration evidences. For example, Ration Order 13 pro-
vides that "no points need be given up for a transfer of processed
foods as part of a judicial proceeding, or by operation of law, or for a
transfer made under the direction of or pursuant to the order of a
court or by judicial process." Exports are generally permitted, because
control is exercised by other agencies.

Other sections prescribe the manner in which goods may be trans-
ferred, in exchange for ration evidence, between dealers at different
distribution levels, and the manner in which they may be transferred
to consumers, in exchange for ration evidences.

Another group of sections covers the registration of the dealers and
producers at the different levels of distribution, and prescribes the
records which must be kept and the reports which must be made. The
procedure under which new businesses may receive permission to oper-
ate or under which existing establishments may be transferred are also
stated.

Under most of the orders a dealer's inventory of the rationed com-
modity plus his ration evidences on hand should not vary, except for
such reasons as the change in point value in the processed foods and
meats and fats programs. Under Ration Order 5C, for example,
(gasoline) a dealer's total registered storage capacity is his fixed
allowable inventory. The amount of gasoline on hand plus gallonage
value of ration evidences on hand must always equal such storage
capacity. Provisions are made for issuance of ration evidence to offset
certain justified losses of the commodity or of other ration evidence.

"Flowback" is the term used to describe the control resulting from
requiring ration evidence to be surrendered at each level of distribution
as well as at retail. Ration evidence is issued by OPA initially to the
users of products, i.e. consumers, institutional users (eating places),
industrial users, and industrial consumers. Some of the evidence issued
may not be used, but whatever amount is used to buy commodities, an
equal amount must be returned to OPA at one of the higher levels of
distribution in order to insure that the theoretically closed system is
correctly operating. In many cases, the ration evidence must be ac-
counted for by the producers, or the importers of the commodity. In
the case of gasoline it is considered that the state tax laws impose an
effective control upon the licensed wholesaler (licensed distributor as
he is called in the Ration Order) and the flowback of ration evidence stops with him.

The issuance of ration evidence to the ultimate user is committed to the Local War Price and Rationing Boards. A group of sections in each ration order deals with the mechanism and basis of such issuance. Food and shoe rationing for consumers is based primarily upon a mathematically equal distribution of a portion of the available supply. General purpose books now in use were issued under General Ration Orders 12 and 14. Food is allocated to institutional users under General Ration Order 5, the amount allowable being determined according to a formula which involves the usage of food in December, 1942, the number of persons served, the dollar revenue, and certain factors established by OPA. Food is allocated to industrial users (now under General Ration Order 16) in an amount produced by applying a percentage to the amount used in a base period.

The issuance of fuel oil for heating purposes is, generally speaking, regulated by a percentage of the usage in 1941-'42, subject, in the case of private dwellings, to certain maxima and minima established by OPA on the basis of statistical studies as being equitable and necessary modifications of a percentage cut. Tires and gasoline, except for the automatic issuance of Basic rations for all cars other than fleet and official cars, involve the exercise of judgment in individual cases by the Local Boards. Eligibility (the question whether a car or truck will be used for one of a list of specified purposes) and need for the rationed commodity are the paramount issues for decision by the Boards. The need for deciding close questions of fact is indicated by the fact that 3,061 gasoline appeals have been decided by the Milwaukee District Office in one year.

Each food rationing order contains a provision permitting the filing at the Local Board of applications for certain adjustments or order relief, and requiring that these applications be forwarded through the District Office to Washington until such time as the Board or District Office is authorized to act. Adjustments have at times been granted by the Washington office in certain cases not otherwise provided for. As the types of cases where the policy of the rationing program required the granting of relief have crystallized, the Washington office has from time to time either amended the order, or issued instructions to District Offices or Boards to grant certain relief without forwarding the application.

Two other series of orders issued by the Administrator are of importance in the rationing field. General Ration Orders from 1 through 16 deal with a variety of matters of general application.

General Ration Order 5 deals with the allocations of rationed food to institutional users. General Ration Order 11 deals with the alloca-
tion of rationed foods to replace foods used in products acquired by the Army, Navy and other designated agencies. General Ration Order 16 deals with the allocation of rationed foods to industrial users.

General Ration Order 3A deals with the manner in which persons permitted by other orders to open ration bank accounts must deal with such accounts. This order is of great importance since ration evidence under most of the programs is deposited in a bank after one or two transactions and is thereafter represented by a bank credit. General Ration Order 7 concerns the required method of surrendering stamps or coupons where gummed sheets are not available, and General Ration Order 8 sets forth certain uniform prohibitions which apply to all ration orders, such as improper acts with reference to ration documents, attempts to violate a ration order, and the transfer of any rationed commodity in the course of trade or business at a price in excess of the maximum established by OPA.

General Ration Order 1 covers the granting of exceptions by the Deputy Administrator in Charge of Rationing, at Washington, where the granting of the exception would not defeat or impair the effectiveness or policy of the Ration Order involved, and would not be an exception to standards of eligibility or need.

Procedural Regulation No. 12 deals with the replacement of ration books or coupon sheets when lost, stolen, destroyed, mutilated or wrongfully withheld.

III. ADMINISTRATIVE REMEDIES

Procedural Regulation No. 9 sets forth an appeal procedure by which original decisions of Local Boards and District Directors may be reviewed. This procedure applies generally to decisions on the granting of rations by Local Boards and to a few types of original decisions made by the District Director under the respective ration orders. The time limit within which to appeal is thirty days. An appeal on form R-122 is filed with the Local Board which made the decision. The Board reconsiders its action and, if it does not reverse its prior decision, forwards the appeal and file to the District Director. A written decision is issued by the District Director. A second appeal may be filed with the District Director who reconsiders, and, unless he reverses his prior decision, forwards the file to the Regional Administrator.

A similar procedure applies to appeals from the decision of the Regional Administrator to the Washington Office, except that the Washington Office may simply refuse to pass upon the appeal. Appeals to Washington are decided by the Deputy Administrator in Charge of Rationing.
IV. Specific Allocation Orders

As has been indicated, a ration order specifies how commodities shall be allocated by stating fact standards upon the basis of which ultimate users may receive rationed commodities and rules under which dealers may receive them for resale. Principles of need, of essentiality to the war effort and public welfare, and of equality of treatment are all recognized up to a degree and the result is expressed in the ration orders. The Local Boards, and in a few instances, the District Offices, decide when the standards have been met. Occasions arise, however, where the impropriety with which an individual uses or deals in the rationed commodity results in the issuance of an allocation order which relates to the specific individual and diverts the flow of the commodity from him, permanently or temporarily.

One instance of this type of order is the revocation or denial of a gasoline ration, or right to receive a tire certificate, by a Local Board. The revocation of a gasoline ration is provided for in Section 1394.8105 of Ration Order 5C. The order requires service of a three day notice of hearing specifying the violation charged. After hearing, the Board may issue its written order. An appeal may be filed within 15 days by filing a statement of objections with the Board and the matter is then heard de novo by the District Director or a Special Hearing Officer. There is no further appeal within the OPA.

The matter may be originally noticed before a Special Hearing Officer rather than a Local Board, and in such case appeal lies to the Regional Hearing Commissioner.

Another instance of the specific allocation order is a suspension order, prohibiting an individual from receiving or dealing in a rationed commodity, and entered by a Regional Hearing Commissioner. Procedural Regulation No. 4 provides for the issuance of such orders and the administrative review thereof.

Where the Enforcement Department of OPA deems the action warranted, by reason of violations of Ration Orders or General Ration Orders, it may bring proceedings to have a suspension order issued. A notice of hearing is served, giving at least three days notice. The hearing may be held before a Hearing Commissioner or a Presiding Officer designated by a Hearing Commissioner. The Procedural Regulation specifies that the hearing must be public, that the respondent may be represented by counsel, that the rules of evidence prevailing in courts shall not be controlling. Either the Enforcement Department or the respondent may obtain the issuance of subpoenas. A stenographic report must be taken. A Presiding Officer has no power to issue an order, but makes an advisory report to the Hearing Commissioner, containing findings of fact, conclusions of law, and recommendations. Briefs
may be filed with the Hearing Commissioner, who issues the appropriate order.

An appeal may be taken by either party from any order entered. Provision is made for the granting of a stay pending determination of the appeal. The record, including the transcript, is forwarded to the Office of the Hearing Administrator at Washington. Briefs may be filed, and the Hearing Administrator affirms, reverses, or modifies the order of the Hearing Commissioner.

As complete a separation as is possible is maintained between the Hearing Administrator and his staff and the rest of the OPA. The Hearing Administrator is responsible only to the Price Administrator. Although Hearing Commissioners have their offices at the Regional Offices of OPA, they are not, as are all other departments, subject to appointment, dismissal and direction by the Regional Administrator.

V. CONSTITUTIONALITY

A number of courts have sustained the validity of the Priorities and Allocations Act, the Second War Powers Act, and several of the Ration Orders issued thereunder. 5

The suspension order procedure has been challenged. It has been asserted that the issuance of such an order is an exercise of judicial power and is the imposition of a penalty by the executive. The contrary position is that a suspension order is an allocation of a scarce commodity (or viewed from a different angle, the withdrawal of an allocation), and the incidental hardships and disadvantageous consequences do not make it other than remedial.

The decisions are in conflict, some having sustained the procedure while others have held that it is invalid. 7

The opposing theories are well stated in excerpts from the opinions. In Wilemon v. Brown, 8 the District Court conceded that "if there was authority for the procedural order it sufficiently guarded the safety and rights of the plaintiffs." The court proceeded, however, in part as follows:

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"If we consider the breadth and scope of the order entered against the plaintiffs, we find considerable difficulty in concluding that it is 'merely remedial.' It is not the legitimate outgrowth of the right to allocate, or to ration. It borders on a confiscation of the plaintiffs' business for two weeks. It destroys that business for that period. Both employees and customers are, and necessarily will be, demoralized. The loss will be heavy.

"One always feels the poverty of words when it comes to defining the simple. This case really must be ruled by deciding whether this order was remedial or punitive.

"The Congress did not vest in the defendants such a power as is here exhibited. If it did, it presumed to act improperly, which presumption will not be indulged.

The 'Hearing Administrator' unknown to and unprovided for by the Congress, presumes to conduct a court. Procedure is prescribed by his superior for such conducting. He enters a judgment concerning which there is no limit fixed. No Maximum. No Minimum. He acts without any fear of consequences for malfeasance, or misfeasance. If he can suspend for two weeks, he can suspend for two years. He is not only unknown to the Congress, but he is unknown to the Constitution. Art. 3, Sec. 1, vests such power in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges hold during good behavior, and receive a stated compensation. They must be appointed by the President and confirmed by the Senate. They may be impeached.

"What the 'Hearing Administrator' does is beyond the reach of Executive forgiveness. He, himself, is beyond the reach of any Constitutional removing power. He is a modern instance of pure dictatorship.

"Sec. 2 of the same Article, vests this sort of power in all cases arising under the Constitution. This is a case that arises directly under the Constitution because of the declaration of war and the following of that declaration by the passing of the statutes out of which grow the delegations of authority for allocation. As a result of such delegation of authority, there was conceived and born a 'Hearing Administrator' who is and was without Constitutional father or mother. No attempt at baptism in the waters of conflict can change his parentage and make it legitimate.

"This view of a penalty, or, punishment, is sustained by a further reading of the Allocation Act, which provided for the criminal punishment of the citizen who violates its provisions, and also for equitable restraints, both of which take place in named courts."

In a unanimous decision reversing the District Court, the Circuit Court of Appeals, Fifth Circuit, said of the suspended dealer:

"Nothing that is his is really taken from him. His private interest has merely come into collision with a public interest and has
had to yield. A suspension which affects nothing but the rationing of gasoline is a proper implementation of rationing and it is not a penalty.”  

In Perkins v. Brown\(^9\) it was said:

"Under the Act the President, through his delegate, is authorized to allocate shortage materials 'in such manner, upon such conditions and to such extent' as he shall deem necessary or appropriate in the public interest and to promote the national defense. It seems clear to me that a suspension order such as here involved is authorized by that section of the Act. If the rationing regulations had provided generally that vital materials such as gasoline should be distributed only by named employees of the government or that only those dealers who in the past had observed the rationing regulations were eligible for allocation of rationed commodities, there could be little doubt that such provision would be an exercise of the statutory power to allocate and to prescribe the conditions for allocation. Precisely, the same effect is produced by a ration system which permits the receipt and transfer of commodities by all dealers, subject to subsequent elimination from eligibility of those found to have violated the rationing regulations. The suspension order is itself an allocation. Rationed commodities are allocated away from the violator for a period deemed reasonable under the circumstances, and at the same time the amount actually or potentially allocable to other and more trustworthy recipients of rationed commodities has been increased. A distributor of gasoline may be likened to a licensee whose license runs during good behavior.

"The authority to issue suspension orders established, it is immaterial that the order may have penalizing consequences. The validity of the Administrative exercise of a granted power is not impaired by consequences that collaterally may be of a punitive character. The fact that the exercise of the granted power may have penalizing effects which there was no statutory authority to impose affirmatively as punishment does not impair the validity of the exercise of the power.

"The suspension order here involved, however, is not in the constitutional sense penal in its nature; it allocates; it controls, as specifically authorized by the statute, the 'conditions' of eligibility for allocations; it revokes or modifies a license. None of these things primarily is penal. The purpose of the order is not to penalize but to remedy a disruption in the allocation program and to correct an improper diversion in the flow of scarce commodities occasioned by the violator's misuse.

"The suspension orders involved in Wright v. Sec. & Exchange Commission, 112 F. (2d) 89 (CCA 2nd, 1940) in Nichols & Co. v. Secretary of Agriculture, 131 F (2d) 651 (CCA 1st 1941); and in Nelson v. Secretary of Agriculture, 133 F (2d) 453 (CCA

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though having penalizing effect, were specifically characterized by the courts as remedial rather than punitive. The word 'penalty' is sometimes loosely used to include all actions which involve hurtful or disadvantageous consequences (cf. Wilemon v. Brown, DC, Ni Tex, as yet unreported). But if the word is used in that loose sense it has no legal significance in this case. Many an allocation of commodities on short supply involves a 'penalty' (e.g., cutting the value of gasoline coupons or ration points), so that the same act can be an allocation and incidentally a 'penalty' at the same time. Moreover, the revocation of a license is clearly a 'penalty' in the loose sense referred to above. Yet it is not that kind of a penalty which may not be put into the hands of an administrative body without an unconstitutional delegation of legislative or judicial power. The incidental effect of hardship resulting from such suspension order can in no way detract from the essential nature of such order as the means of avoiding misuse in a critical field. War by its nature results in hardship. The power of Selective Service to draft available manpower is in no sense diminished by the inevitable hardship resulting to the individuals and families affected. The right of carrying on the peacetime pursuit of dealing in gasoline is no more vested.

"The Hearing Commissioner and Hearing Administrator have not presumed to act as judges in the sense of the Constitution but have conducted themselves as delegates of the Administrator in determining whether (to take) an allocation away from a violator on the conditions imposed upon dealers in a war-scarce-commodity is necessary or appropriate in the public interest and to promote the national defense. The Administrator has delegated to officers, divorced, as I understand it, from the customary enforcement functions of his agency, his duty to withdraw allocations from persons who have shown themselves to be irresponsible or untrustworthy. The withdrawal may be temporary (as here) or permanent, at least, for the duration of the war emergency. He has likewise set up an administrative procedure to accord a full and fair hearing for persons charged with violations of the conditions of their eligibility to continue dealing in rationed goods. This he has done so that an equitable system of allocation shall not work inequitably as to a particular individual. In the exercise of this function there is no exercise of the 'judicial' powers of the United States. See Union Bridge Co. v. United States, 204 US 364. This court has the same right to review the determination of the Administrator to ascertain whether the same is supported by substantial evidence as it has to review the orders of peacetime administrative agencies. I cannot regard the action by the Administration as a forbidden exercise of the judicial power."

What may be regarded as the official view of OPA is the following excerpt from a statement recently issued in answer to the Second
Intermediate Report of the Select Committee to Investigate Executive Agencies:

"Exercise of the authority to allocate necessarily involves two phases: (1) the affirmative direction of shortage material to approved, essential users; and (2) a resultant withholding of that material from other uses regarded as non-essential or wasteful. For example, both Factory A and Factory B may seek a certain lot of aluminum. A WPB allocation of that aluminum to Factory A necessarily results in a withholding of the same lot from Factory B.

"When, as in tire rationing, classes of eligible purchasers of new tires are fixed, the administrative decision again involves a choice among competing demands. Allocation of existing tire supplies to the more essential users, physicians, clergymen, and the like, means that tires will be withheld from users thought less essential. This choice between the essential and the non-essential, or between the worthy and the unworthy, is of the essence of the power to allocate. Such a choice is authorized by the Act so long as it can reasonably be said to be 'in the public interest and to promote the national defense.'

"The basic reason underlying rationing suspension orders is simply that distributors who have shown themselves to be law-abiding and trustworthy must be preferred to those whose past unlawful conduct has shown a disregard of their wartime business obligations. If a rationing regulation provided generally that only those dealers were eligible for allocations who in the past had observed the rationing regulations, clearly this provision would be 'necessary or appropriate in the public interest and to promote the national defense.' Precisely the same effect is produced by a rationing system which instead permits the receipt and transfer of rationed commodities by all dealers, subject to the condition that those found to have violated the rationing regulations will be eliminated from the eligible list. Differentiation in treatment between the trustworthy and the untrustworthy is as just, reasonable, and necessary as differentiation between essential and unessential uses."