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## REGULATION OF OIL IMPORTS

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### I

#### BACKGROUND

##### A. General

THE PROBLEM of oil imports<sup>1</sup> poses many of the almost insoluble economic problems that are common to the import of any commodity. The dimensions of the problem are, however, probably broader and deeper than those of most other commodities. Oil not only is involved in the turbulence of America's domestic politics,<sup>2</sup> but it has a keen impact on global strategy and world politics.<sup>3</sup> Oil is big business and is numbered among our ten largest industries.<sup>4</sup> In the year prior to the imposition of the 1957 voluntary quota system, oil imports were exceeded in dollar volume only by those of coffee.<sup>5</sup>

Defense and diplomacy, both involved in the oil import equation, do not always dictate the same course of action. While it is in the interest of diplomacy to foster free trade<sup>6</sup> among friendly nations, it is just as urgent a requirement of defense that oil, incapable of being stockpiled, be available in sufficient quantity in the event these nations are no longer friendly.<sup>7</sup> Protection and fostering of foreign investment is also at stake.

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<sup>1</sup> For a history of the federal government's exercise of its powers over oil in foreign commerce, see ELY, *CONSERVATION OF OIL AND GAS* 656-63 (1948); CLARK, *THE OIL CENTURY* 229-54 (1958).

<sup>2</sup> See, e.g., N.Y. Times, May 31, 1959, § 11, p. 12M, cols. 1-6.

<sup>3</sup> *Id.* at 14M, cols. 1-3.

<sup>4</sup> *Id.* at 12M, cols. 1-6.

<sup>5</sup> *U.S. Imports: Retarding the Inevitable*, 24 *PETROLEUM PRESS SERVICE* 322 (1957).

<sup>6</sup> 60 *DEPT STATE BULL.* 308 (1959).

<sup>7</sup> FANNING, *FOREIGN OIL AND THE FREE WORLD* 266-80 (1954). The statement

The goals of husbanding and restricting production of domestic reserves and of providing incentive for exploration and development of still further reserves (also to be properly conserved) perhaps appear as contradictions of policy as well. But policies and courses of action in this field are not clear-cut. They rather tend to blend into the twilight of uncertainty and experiment. For example, just eight days before the Presidential Proclamation establishing a mandatory quota system for the imports of oil in March 1959,<sup>8</sup> the *State Department Bulletin*, in the recitation of some excerpts from the economic report of the President, alluded to the United States policy of eventually eliminating trade barriers.<sup>9</sup> Prior to the imposition of the mandatory quota system, the federal government import policy was described as "pusillanimous," as abdicating to the states the determination of national supply and price, and as calling upon the large oil firms to play the role of the statesmen that the elected representatives were not assuming.<sup>10</sup>

The sobering part of the import problem as it applies to oil is that this commodity is so vital to our economy<sup>11</sup> and to our defense.<sup>12</sup> While there have always been discoveries to keep the reserves in pace with their use, there is certainly a limit to the domestic supply. This presages that we shall become increasingly more dependent on foreign oil in the

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of Oscar L. Chapman, Petroleum Administrator for Defense, made at an address before the American Petroleum Institute in 1952 is quoted in part at page 276: ". . . at present we do not begin to have the reserve we should have in order to provide, not absolute security, but just the minimum of security that would give use room for maneuver in the opening months of a war. Our only consolation can be that at the moment the Soviet and its satellites have much less oil than we do, only about one-eleventh in fact. But then that's a balance that could all too easily be disturbed almost overnight."

<sup>8</sup> Presidential Proclamation No. 3279, 24 Fed. Reg. 1781 (1959).

<sup>9</sup> 60 DEP'T. STATE BULL. 308 (1959). Coincidentally, this same report makes mention of the difficulty that United States coal was encountering in foreign markets. Coal interests, being willing to recapture some of the domestic market which has been lost to oil and natural gas, have a keen interest in oil imports.

<sup>10</sup> DE CHAZEAU & KAHN, *INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY* 253 (1959). This source advocates at page 252: ". . . mandatory unitization for all producing pools throughout this country under federal law."

<sup>11</sup> In 1958, petroleum was the source of more than 45% of all energy used in the United States. Natural gas was the source of over 26%. N.Y. Times, May 31, 1959, § 11, p. 13M, col. 1.

<sup>12</sup> If, as was said by Lord Curzon, The Allies floated to victory on a sea of oil in World War I, they gushed to victory in World War II. In World War II, it is reported by FANNING, *op. cit. supra* note 7, at 267, that to operate the Air Force 24 hours, 14 times as much gasoline was necessary as was shipped to Europe for all purposes during World War I.

future<sup>13</sup> and indicates that our policy toward foreign oil until such time should be such as to assure that it will be there when needed. How soon we shall need it and how much we shall need are just added uncertainties in the already lengthy and fuzzy equation.

### B. Beginning of Concern Over Oil Imports

Mexico and Venezuela exported oil to the United States early in the twentieth century. It was only in the 1930's, however, that some concern over oil imports began to manifest itself.<sup>14</sup> This was attributable to domestic prices and proration.<sup>15</sup> With the overabundance of production from the Oklahoma fields and the newly found East Texas fields adding to the supply, the wasteful prodigality of "find, produce quickly, and sell at any price" begot hard-fought conservation measures, such as proration and well-spacing. The mere prevention of physical and economic waste through domestic conservation measures was not satisfactory to producers, however, when the price could be held down by cheap imports. Congressmen from oil-producing states objected, accusing the large integrated and foreign operating oil companies of propagandizing for restriction of domestic production in order to create a home market for cheaply-produced and duty-free foreign oil.<sup>16</sup> There was a clamor for high tariff or legislative quotas on imports or both. As a result, the Internal Revenue Act of 1932 levied a tax of  $\frac{1}{2}$  cent per gallon on imported petroleum,  $2\frac{1}{2}$  cents per gallon on gasoline or motor fuels, and four cents per gallon on lubricating oil.<sup>17</sup> It has been suggested that this was a compromise measure; that some would have

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<sup>13</sup> *The Compulsory Cut in U.S. Imports*, 26 PETROLEUM PRESS SERVICE 126 (1959): "The development of indigenous shale oil production may help to postpone the time when the United States becomes increasingly dependent on imports. But that time will certainly come." Cf., KNOWLES, *THE GREATEST GAMBLERS* 338 (1959), wherein one of the interesting results of the Pratt and Weeks researches is recited as: "In the U.S., explorers have drilled one exploratory well for each 9.4 square miles of favorable land, whereas throughout the rest of the world one exploratory well has been drilled for each 1,100 square miles of favorable land."

<sup>14</sup> CLARK, *op. cit. supra* note 1, at 229; Hardwicke, *Adequacy of Our Mineral Fuels*, Annals, May 1952, p. 55.

<sup>15</sup> RISTER, *OIL! TITAN OF THE SOUTHWEST* 315-26 (1949). See also GLASSCOCK, *THEN CAME OIL* 307-11 (1938).

<sup>16</sup> CLARK, *op. cit. supra* note 1, at 231, reports that Congressman Garber from Oklahoma produced figures showing that oil could be delivered to the east coast for 75 cents per barrel, compared to \$1.75 per barrel of midcontinent oil.

<sup>17</sup> Int. Rev. Code of 1932, ch. 209, § 601, 47 Stat. 259. As a measure with the combined purposes of taxation and regulation of foreign commerce, this statute was upheld in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).

imposed a one dollar per barrel tax on crude oil, while others would have, by quota, restricted imports to about one-quarter of the 1929 and 1930 levels.<sup>18</sup>

At about this same time, Governor Murray of Oklahoma formed the Oil States Advisory Committee, which was generally concerned with the conservation of petroleum and the economic stresses of the industry. This Committee was the predecessor of the Interstate Compact.<sup>19</sup> Some of the governor members of the Committee solicited the aid of President Hoover to restrict imports. Owing to the President's influence (and perhaps to a threat of higher import restrictions and taxes), the larger companies cooperated in a voluntary reduction of imports in the amount of twenty-five per cent, using the year 1930 as a base. This probably softened the congressional impulse to enact strong import restrictions.

In 1933, the Petroleum Code, which was established under the National Industrial Recovery Act (NIRA),<sup>20</sup> authorized a quota on oil imports that the Secretary of the Interior, Mr. Ickes, put into force on September 2, 1933. The calculation of the allowable imports was based upon the actual imports during the last half of 1932 and amounted to 4.5 per cent of the daily domestic requirements.<sup>21</sup> This mandatory quota went out with the "sick chicken" case,<sup>22</sup> but the large companies (again, probably mindful of the congressional temper to assist the oil-producing states in their economic difficulties),<sup>23</sup> kept the imports at "about the same percentages permitted under the Code."<sup>24</sup>

As the 1930's drew to a close, the philosophy of conservation had acquired considerable momentum. Production control by administrative agencies had become the accepted rule.<sup>25</sup> The year 1939, however, saw a divergence in state and federal objectives. Then, the Texas Railroad Commission was much concerned over the low prices resulting from oversupply. Colonel Thompson, a dominant figure on the Commission, wrote and published a letter to the Governor:<sup>26</sup>

<sup>18</sup> ELY, *op. cit. supra* note 1.

<sup>19</sup> MURPHY, CONSERVATION OF OIL & GAS, A LEGAL HISTORY 545-55 (1948).

<sup>20</sup> 48 Stat. 195 (1933).

<sup>21</sup> CLARK, *op. cit. supra* note 1, at 239.

<sup>22</sup> Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

<sup>23</sup> One manifestation of this congressional temper was the passage of the Connally "Hot Oil" Act in 1935, which sought to assist the states in their attempts to control the amount of production. 49 Stat. 30, 15 U.S.C. § 715 (1958).

<sup>24</sup> ELY, *op. cit. supra* note 1, at 657.

<sup>25</sup> Davis and Willbern, *Administrative Controls of Oil Production in Texas*, 22 TEXAS L. REV. 149 (1943).

<sup>26</sup> *Id.* at 155.

This cut [twenty per cent] is wholly unwarranted . . . I am advocating to my colleagues on the Railroad Commission that we shut down all Texas oil fields for thirty days.

This was the same year in which the federal government, by a reciprocal trade agreement, halved the excise tax on oil imports from Venezuela, providing Venezuelan exports to the United States did not exceed five per cent of our previous year's crude run.<sup>27</sup>

### C. World War II and Naval Petroleum Reserves

World War II left the question of imports versus domestic production in a state of suspension. But while World War II was a balm to the problem of domestic overproduction, it was a catalyst to the problem of imports. The oil industry rose to the task demanded of it, but the drain on our resources was tremendous. For instance, from December 7, 1941, to June 30, 1946, the Defense Supplies Corporation purchased almost 132,000,000,000 gallons of 100 octane aviation gasoline.<sup>28</sup>

The Naval Petroleum Reserves had been created, commencing in 1912, with a view toward preservation in the ground of oil for the Navy's use in emergencies and military purposes. Although these reserves served their intended purpose during World War II, the occasion required more—a total mobilization of the industry. The O'Mahoney Committee, after making a 1945 survey of petroleum supply in 1945, reported that<sup>29</sup>

the total estimated recoverable oil from the three Naval Petroleum Reserves, other than Alaska, is only 376,000,000 barrels. It is obvious that the amount of oil producible from these modest reserves would constitute but slight assistance in the event of war. . . .

Albeit inadequate to meet the demands of total war, the idea of the Naval Petroleum Reserves (now including Oil Shale Reserves) is, from the standpoint of national security, hardly assailable. On the contrary,

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<sup>27</sup> ELY, *op. cit. supra* note 1, at 658.

<sup>28</sup> CLARK, *op. cit. supra* note 1, at 241. Clark also reports that the United States had produced 63.2% of all oil produced in the world up through 1950, having then only 26% of the world's reserves.

<sup>29</sup> ELY, *op. cit. supra* note 1, at 622. Pressure for discontinuance of the Naval Petroleum Reserves has been unrelenting and sometimes successful. See, for an interesting historic account, WERNER, TEAPOT DOME (1959). The quoted statement has since proven to be in gross error. There is now an estimated reserve of over 1,000,000,000 barrels in the Navy's Elk Hills, California, field alone.

it has become contagious. It is now realized from the lessons of World War II that our total reserves, indeed, the reserves of the Western Hemisphere, must be counted as critical for future security planning. In this milieu, the Navy's policy has served as precedent for later government planning and action. In a recent pamphlet, such policy was declared:<sup>30</sup>

Navy's policy as to the future administration of the Naval Petroleum Reserves will be, as it has been in the past, that there shall be the maximum conservation of the oil consistent with the needs of the national security. The Navy has regarded itself as charged by Congress with the responsibility for maintaining its present holdings of oil as a reserve in the ground, insofar as that can possibly be achieved, and for restricting production to the minimum necessary to maintain the field in a state of readiness.

It is abundantly clear, from the Navy's experience, that frugality is the best way to improve ones relative position in the possession of oil reserves.<sup>31</sup>

The oil reserves in the Naval Petroleum Reserve No. 1 are now in excess of 25% of those on the West Coast, and this Petroleum Reserve may expect to grow in stature as the domestic reserves of oil, not only on the West Coast, but also throughout the United States, dwindle.

The Navy's stewardship, following congressional mandate, is not motivated by profit-making policies. This is to be contrasted with private industry, which must profit in order to survive.

#### D. What Price Policy?

The United States oil industry was neither born nor nurtured in frugality. Reserves have been found for exploitation and not for preservation. Thus, owing to the sharp contrast of the double-edged desires of the Government at once to preserve our domestic oil and to keep a healthy oil economy, with the absolutely essential desire of the industry to *produce*, whether domestically or in foreign fields, the question of oil imports assumes riddle-like dimensions.

It is obvious that the more imported oil we use domestically, the less we shall be forced to use from our domestic reservoirs, the less will be

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<sup>30</sup> This pamphlet, entitled HISTORY OF NAVAL PETROLEUM AND OIL SHALE RESERVES, and prepared by the Office of Naval Petroleum and Oil Shale Reserves, is undated but contains factual data through Jan. 1, 1959. The quotation is from page 14.

<sup>31</sup> *Id.* at 15.

available for enemy use against us in the event of war, and the more will be left us for use in any future defense of our country. It is also good planning not to depend upon oil from foreign sources in the event of another total war. This indicates that our domestic reserves should be in a healthy state of readiness. To accomplish this, absent total government control or subsidization, the industry must make profits. Profits are made, however, only through extraction of the reserves in quantity. So, should one conclude that by using our reserves we are conserving them? This ludicrous-sounding statement emphasizes that there are premises in the picture from the present policy standpoint other than use or nonuse of domestic supply.

It has been suggested that petroleum prices wield the big stick in policy formation.<sup>32</sup> The history of the present legislative basis for mandatory import quotas, to be discussed later, gives testimony of the wedding of national security to the economic welfare of the country. This, in turn, is related to the health of the industry concerned.<sup>33</sup> When production is regulated by the states, as it is, and geared to market demand, as it is, some results are apparent. Included among them are that oil-producing states, following their self-interest, are going to maintain attractive price levels. Texas has a big share in this, producing one out of seven barrels of all oil produced in the world, and two out of five barrels produced in this country.<sup>34</sup> For this husbandry, the industry in Texas absorbs the market effects of those states that do not so regulate—at a cost to Texas operators.<sup>35</sup>

That a policy that at once endeavors to satisfy protective pricing and national defense would receive criticism, is inevitable. A sharp one is:<sup>36</sup>

There is a critical need for a coordinated, consistent policy toward this vital industry. No such policy now exists: what we have instead is a patchwork of interferences, concocted and administered piecemeal, pragmatically, under a variety of influences, by a variety of governmental agencies, directed to a variety of goals—none of them ever fully reconciled.

It does appear clear that from a long-term standpoint, goals of a healthy domestic industry and conservation of domestic supply for a future use cannot both be served by restriction of imports.

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<sup>32</sup> DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 218 (1959).

<sup>33</sup> See *U.S. Code Cong. & Ad. News*, 85th Cong. 2d Sess., 1958, vol. 2, p. 3609.

<sup>34</sup> MID-CONTINENT OIL & GAS ASSOCIATION, *TEXAS OIL AND GAS* (1959).

<sup>35</sup> DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 228. See also *What 8 Days Will Mean To Texans*, *Oil & Gas J.*, March 31, 1958, p. 47.

<sup>36</sup> *Id.* at 244.

The divergence of opinion within the industry itself reveals that we have yet to find some agreement as to the amount of allowable imports. The majors and the independents agree upon the desirability of the nation having a continued and reasonable oil supply. They also agree that it is desirable to keep a sound domestic industry. Furthermore, they agree that *some* imports are needed. From that point on, opinions differ. The independents stress that their production and their profits must be such as will allow them to have incentive for further search. They would have us drain all we can from our domestic reserves, even though the operation of marginal wells will mean some additional cost to the customer. On the other hand, the majors point out that domestic oil is becoming increasingly more difficult and expensive to find and that national security in the long run, depends just as much upon development of foreign petroleum sources in order to make our domestic reserves last longer as it does upon a sound and secure domestic industry. The majors also argue that they are not out to wreck the independents for the very good reason that they desire to profit from their own domestic affiliates.

Merit can be found in the arguments of both sides. The answer lies somewhere in the areas above outlined. As will be seen later, the federal government has arrived at an "in-between" area on policy regarding the amount of imports. This has resulted from an attempted compromise and resolution of the interests involved. Such is not uncommon in the formulation of congressional and executive policy. It may well be that the problem, by its nature, will not be a long-term one. With population and the demand for petroleum products on the rise, in a few years, we may welcome all of the oil imports that we are able to obtain. Moreover, if we are really serious about conservation of our domestic supply (and this has been questioned<sup>37</sup>), some consideration could be given to belt-tightening measures that would be calculated to require everyone to share the expense of conservation. When, as by restriction of imports, prices are maintained or increased, the consumer is forced to bear the cost of protection, rather than share in the cost of conservation.<sup>38</sup>

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<sup>37</sup> DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 230.

<sup>38</sup> We have paid \$15,700,000,000 (from 1953 to 1958) for farm subsidies, many of the products of which are surplus to our needs. *Life*, Dec. 7, 1959, p. 138. If we can afford this, perhaps we can afford a subsidy for *nonproduction* by the oil producer. This, in contrast to the farm subsidy, would allow us to keep the valuable produce for



## II

## MIDCENTURY OUTLOOK

## A. Renewed Concern Over Oil Imports

In 1944, the federal government took stock of the drain on the domestic oil reserves resulting from World War II and sought to participate in the hastening of the development of the reserves in the Middle East. American companies holding interests abroad refused to sell stock to the United States and resisted attempts of the federal government to get into the pipeline construction business.<sup>39</sup> There were, however, valid reasons for the United States to seek, by whatever measures "most economic and least disturbing, an increase in the American-controlled oil properties in the Middle East."<sup>40</sup> These reasons were bluntly summarized by Mr. Feis:<sup>41</sup>

The first reason is found in the prospect that before long increased production from those properties [Middle East] will be needed to meet the world demand. The second is that those properties should be drawn upon more amply than in the past in order to reduce the prospective drain on the reserves of this hemisphere; for these reserves would be essential to the security of the United States in the event of a future crisis.

International agreement for orderly development of and equal opportunity for world petroleum was considered, proceeded to the point of having tentative endorsement by the United States industry, and was reported upon favorably by the Senate Committee on Foreign Relations in 1947.<sup>42</sup> Industrial support of the proposed treaty waned,<sup>43</sup> however, probably because of fears of federal controls over the domestic industry. The treaty was, therefore, never ratified.

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future needs and allow us to trade our dollars for foreign irreplaceable resources in the meantime.

Knowledge can certainly be imputed to all of those interested, including the federal government, of factors such as encouragement of foreign investment and increase in domestic refining capacity, which were likely to lead to domestic oversupply in peacetime. This, in turn, was likely to lead to some demand for protection of the industry. See DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 218, 210, 484.

<sup>39</sup> ELY, *op. cit. supra* note 1, at 659.

<sup>40</sup> Feis, *Order in Oil*, 22 FOREIGN AFFAIRS 616, 626 (1944).

<sup>41</sup> *Ibid.*

<sup>42</sup> ELY, *op. cit. supra* note 1, at 661.

<sup>43</sup> In January 1946, the Independent Petroleum Association of America was still endorsing the treaty. *Oil & Gas J.*, Jan. 26, 1946, p. 151. With the resignation of Ickes, *Oil & Gas J.*, Feb. 23, 1946, p. 108, however, and the lifting of price controls, *Oil & Gas J.*, Aug. 3, 1946, p. 56, the industry enjoyed flexing its newly freed muscles of independence. By Sept. 7, 1946, the headline, *Oil Men Feel Time Not Ripe For Long-Range Foreign Policy*, appeared in the *Oil & Gas Journal* at page 52.

By 1947, foreign petroleum operations were twenty per cent owned by United States concerns,<sup>44</sup> and in the same year, the export-import balance had shifted, making the United States a net importer. This was occasioned by the unprecedented demand for petroleum products in peacetime. One senator proposed an immediate embargo on oil exports and a congressman declared:<sup>45</sup>

[T]he progressively increasing demand for petroleum in the United States and Europe, and the reliance which hitherto has been placed on greatly expanded petroleum production in the Middle East in supplying this growing demand in both continents, makes imperative a complete review of the degree of confidence which we justifiably may have in imports and foreign reserves, under changing political conditions.

So while there was both official and industrial concern over imports at the midcentury, there was by no means unanimity of opinion concerning the proper method of approach to the problem. Official thinking was "obsessed" by alarm at the prospect of imminent shortage,<sup>46</sup> while the industry was concerned with meeting increased demand for oil and for protection.<sup>47</sup>

So with some wanting controls on exports, others wanting more stringent import controls, and as many as nine federal agencies working on national oil policy at one time,<sup>48</sup> it is understandable that the report of the National Petroleum Council, an advisory body to the Secretary of the Interior, would attempt to gather all under its umbrella of announced policy.<sup>49</sup>

The nation's economic welfare and security requires a policy on petroleum imports which will encourage exploration and development efforts in the domestic industry and which will make available a maximum supply of domestic oil to meet the needs of the nation.

The availability of petroleum from domestic fields produced under sound conservation practices, together with other pertinent factors, provides the means for determining if imports are desirable to supplement our oil supplies on a basis which will be sound in terms of the national economy and in terms of conservation.

The implementation of an import policy, therefore, should be flexible so that adjustments may readily be made from time to time.

Imports in excess of our economic needs, after taking into account domestic production in conformance with good conservation practices and

<sup>44</sup> Oil & Gas J., Dec. 20, 1947, p. 42.

<sup>45</sup> Oil & Gas J., Jan. 29, 1948, p. 138.

<sup>46</sup> World Oil, July, 1949, p. 29.

<sup>47</sup> *Ibid.*

<sup>48</sup> Oil & Gas J., March 31, 1949, p. 55.

<sup>49</sup> CLARK, *op. cit. supra* note 1, at 246.

within the limits of maximum efficient rates of production, will retard domestic exploration and development of new oil fields and the technological progress in all branches of the industry which is essential to the nation's economic welfare and security.

The headline, "Washington Hopes for Agreement on U.S. Oil Imports"<sup>50</sup> is a most eloquent summation of the foregoing quotation. The more responsible segment of the oil industry desired that the large importers exercise temperance, having in mind the alternative—the establishment of a quota system and the embryo of government control. The larger importers exercised restraint in 1950 and cut down their scheduled shipments for the year by a total of 70,000 barrels daily.<sup>51</sup>

#### B. Crisis Again Postpones—Then Rushes Action

Any further attempts to fuse the desires to keep our oil and use it, too, into a workable long-term policy were temporarily suspended by the Korean conflict—and later influenced by the Suez crisis. Both events tendered obvious lessons of history for those willing to accept. Korea and Suez both demonstrated United States political maturity and global responsibility. Both demonstrated that our oil is available for use at present when called upon. Suez was later to demonstrate that foreign oil supply to the United States and friendly Europe is, at best, at the mercy of the changing complexion of cold war.

In January 1951, President Truman formed the Materials Policy Commission. About eighteen months later, the report of the Commission's study, described as "one of the most exhaustive studies ever made of the problem of strategic materials for defense,"<sup>52</sup> was released. The report was no prophecy of doom, but was a frank prediction of progressive inadequacy of petroleum to satisfy future domestic energy requirements. The 1975 demand for petroleum is expected to be more than double the 1950 demand in the United States. In other parts of the free world, the demand is expected to be three and four times as great as in 1950.<sup>53</sup>

The tonic of new discoveries<sup>54</sup> after Korea allowed the continuation

<sup>50</sup> World Oil, March 1950, p. 41: "Congressional subcommittees will continue to study the subject, but if the oil industry can meet the situation by voluntary action, it will be a relief to many members and to some if not all administrative agencies."

<sup>51</sup> *Ibid.*

<sup>52</sup> FANNING, *op. cit. supra* note 7, at 274.

<sup>53</sup> 3 PRESIDENT'S MATERIALS POLICY COMM'N, RESOURCES FOR FREEDOM: THE OUTLOOK FOR ENERGY SOURCES (1952).

<sup>54</sup> FANNING, *op. cit. supra* note 7, at 277. In May 1953, 20 new fields in Texas

of the study of the problem of oil imports in an atmosphere of deliberativeness rather than panic. So it was when President Eisenhower in July 1954 appointed the Committee on Energy Supplies and Resources to broadly examine all factors pertaining to United States energy and resources "with the aim of strengthening the national defense, providing orderly industrial growth, and assuring supplies for our expanding national economy and for any future emergency."<sup>55</sup> With no immediate emergency in sight, it is not surprising that one of the uppermost and most insistent cries that occupied the Committee's mind was that penetrating rhetorical outburst made by E. O. Thompson, Railroad Commissioner of Texas, who said, in hearings before the House Committee on Interstate and Foreign Commerce: "How can a Texas twenty barrel allowable compete with a five thousand barrel well!"<sup>56</sup> In addition, the demands of the coal interests for import restrictions, the concern of Venezuela and Canada, and the desire to build up Western Hemisphere petroleum supply facilities and vital reserves thickened the porridge. It is no wonder that Mr. Fanning declared, "There is no easy answer to the import problem—no more so than there is to the entire question of foreign oil and the Free World."<sup>57</sup>

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were discovered, bringing the year's total to 266 in the state. This was an increase of 62 fields over the previous year.

<sup>55</sup> *Ibid.*

<sup>56</sup> CLARK, *THE OIL CENTURY* 244 (1958).

<sup>57</sup> FANNING, *op. cit. supra* note 7, at 278. One might wonder, in the consideration of this entire question, why more emphasis is not placed on exports. An embargo on exports, see text at note 45 *supra*, as well as restriction upon imports would aid in the desired end of husbanding our reserves for domestic use. It is to be expected that restrictions upon imports will reflect upon exports in that the less we import the easier it will be for domestic producers to find profitable domestic markets. The record since 1958 bears this out, showing a decline in exports. In 1958, we exported 276,000 barrels per day. The estimate for 1960 is 230,000 barrels per day. *Oil & Gas J.*, Jan. 25, 1960, p. 173. Most of this 1960 amount, 224,000 barrels per day, is expected to be in products rather than crude. In addition, examination of the legislative basis for modern regulation shows unmistakably that the dominant forces in policy formation are primarily concerned with protection of a healthy industry. This means encouragement of discovery and production from domestic reserves. Disposition of the product, so encouraged, has been of secondary importance. Since national security depends upon possession and use of these same reserves, it is difficult to reconcile how a healthy industry will preserve national security. The reconciliation involves a gamble on timing and total availability of reserves for the free world. If we seriously deplete our reserves in order to keep the industry healthy until "X" day when domestic demand will overtake supply, then we may win the battle of a healthy industry, to the detriment of our national security. In the meantime, it appears that exports will, to the extent they contribute to a "healthy industry," be involved in the same gamble.

## III

## LEGISLATIVE BASIS FOR MODERN REGULATION

## A. Immediate Preludes to 1955 Legislation

Soon after Congress met in 1955, the White House released the report on energy supplies and resources policy. The Committee<sup>58</sup> had concluded that in the interests of national security, imports of crude and residual oils should be kept in balance with the domestic production of crude oil at the proportionate relationships that existed in 1954<sup>59</sup>—about ten per cent imports, ninety per cent domestic.

As a result of this Committee's study, the importing companies were requested to restrict imports of petroleum to the United States on a voluntary, individual basis in conformity with the policies enunciated by the Committee.<sup>60</sup> The overriding concern of the Committee was "inadequate incentive for exploration and the discovery of new sources of supply," which, it believed, would be detrimental to the future demands of civilian use and national defense.<sup>61</sup>

The immediate preludes to the passage of the 1955 amendment to the Reciprocal Trade Agreements Act (Trade Agreements Extension Act)<sup>62</sup> were: (1) Senator Neely of West Virginia demanded an arbitrary limitation of imports to ten per cent of demand;<sup>63</sup> (2) Standard Oil of New Jersey indicated that it would hold its imports down, based on a 1954 ratio, and Gulf agreed to go along "so long as other importers do likewise";<sup>64</sup> (3) the Independent Petroleum Association of America

<sup>58</sup> This is the cabinet committee that President Eisenhower appointed the previous July. See text at note 55 *supra*.

<sup>60</sup> For text of this portion of the Energy and Resources Report, see Oil & Gas J., March 7, 1955, p. 85. This being a cabinet committee, agreement was reached as to the broad policy on imports without any statement of opposition. This is not to say that the way was clear to all or that there was general agreement. The hearings on the Trade Agreements Extension Act developed the traditional "foreign policy versus domestic producers" conflict of opinions. The General Agreement on Tariffs and Trade (GATT) also came under sharp criticism.

<sup>60</sup> In editorial comment on the report, World Oil, April 1955, p. 29 declared: "The chief value of the reports lies in bringing out clearly the issue between those who believe that the national welfare is best served by preserving freedom of initiative to the individual and holding necessary controls so far as possible to local levels and those who favor the continuous extension of government control and management over industry."

<sup>61</sup> Oil & Gas J., March 7, 1955, p. 85. Just the week before, in the Oil & Gas J., Feb. 28, 1955, pp. 82, 83, the headlines were, *Import Estimates Rising* and *Imports Hit All-Time High*.

<sup>62</sup> Trade Agreements Extension Act, ch. 169 § 7, 69 Stat. 166 (1955), 19 U.S.C. § 1364 (1953).

<sup>63</sup> Oil & Gas J., March 21, 1955, p. 122.      <sup>64</sup> *Id.* at 123.

(IPAA) backed the Neely amendment;<sup>65</sup> (4) the State Department opposed the Neely amendment, as the Department "saw no evidence that either [coal or oil] has . . . suffered from imports . . . as to justify the junking of the historic policy of permitting freedom of enterprise. . . .";<sup>66</sup> (5) more all-time highs in imports were noted,<sup>67</sup> with another trim in the Texas allowable;<sup>68</sup> and (6) Congress, exercising political wisdom, indicated a penchant to frame legislation in such a fashion as to put the responsibility upon the executive branch to determine when and how much to restrict oil imports.<sup>69</sup>

### B. 1955 Legislation

The amendment that was to become applied in the restriction of petroleum imports was:<sup>70</sup>

(b) In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.

It should be noted that the words of the statute avoid the issue of how much imports will threaten to impair the national security. Impairment of national security is clearly the evil legislated against, but exactly what gave rise to the evil was still unclear.

For those interested in strong protection, the evil was foreign competition, "and [it was] adverse to the national interest, economy, security, and independence."<sup>71</sup> And, in spite of the language of the bill

<sup>65</sup> Oil & Gas J., April 4, 1955, p. 106.

<sup>66</sup> Oil & Gas J., April 18, 1955, p. 111.

<sup>67</sup> Oil & Gas J., April 25, 1955, p. 82.

<sup>68</sup> *Id.* at 98.

<sup>69</sup> Oil & Gas J., May 2, 1955, p. 63.

<sup>70</sup> Trade Agreements Extension Act, ch. 169 § 7, 69 Stat. 166 (1955), 19 U.S.C. § 1364 (1958).

<sup>71</sup> Statement of Senator George W. Malone of Nevada, *U.S. Code Cong. & Ad. News*, 84th Cong., 1st Sess., 1955, vol. 2, p. 2111. In spite of statements like this, which tend to place all or most of the ills on the oil industry upon imports, one should not be unmindful that the flattening of demand for petroleum is the real problem in the

quoted above, it was hotly declared:<sup>72</sup>

There is not one word guaranteeing any American market or supplier against suffocation by foreign imports. There is not one word in this bill that offers real safeguards from cutrate foreign competition to any American employed in a domestic industry or whose dollars are invested in America. . . .

This 1955 amendment was never invoked to *require* any restriction upon imports. How much of a deterrent, if any, it was to those who would break away from the "voluntary" import quota system, is a matter for speculation. Administration of the import program, during this phase of regulation will be treated in more detail later.

### C. 1958 Modifications

The Trade Agreement Extension Act of 1958 contains present legislative authority for regulation of imports.<sup>73</sup> Existing law is strengthened by a requirement that no action shall be taken to decrease the duty on an article if the President finds such reduction would threaten to impair the national security.<sup>74</sup>

Under the 1955 amendment, the onus was upon the President to cause an investigation if he were advised that some article was being imported into the United States in quantities that threatened to impair the national security. Now, the Director of the Office of Defense Mobilization (his title has been changed to "Director of the Office of Civil and Defense Mobilization") does the investigation upon his own motion or upon request of some other governmental agency. If, then, he believes that the national security is being impaired, he is enjoined so to advise the President. At that point, the President is required to take the needed action, *unless* he finds that the imports of the article are not in such quantities as would threaten national security. The act does not say whether the President would cause another investigation. Presumably he could reject the advice of the Director without an investigation—but this, being an impolitic move, is not likely to occur.

The addition of subsection (c) gives some criteria for the Director and the President to follow, "without excluding other relevant fac-

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United States industry. If imports were entirely shut off, there would still be too much oil. World Petroleum, June 1960, p. 5.

<sup>72</sup> U.S. Code Cong. & Ad. News, 84th Cong., 1st Sess., 1955, vol. 2, p. 2115.

<sup>73</sup> 72 Stat. 678, 19 U.S.C. § 1352a (1958). This modification was brought about at the insistence by some that imports were still too high. See Oil & Gas Journals, May 12, 1958, p. 81; May 19, 1958, p. 99, and May 26, 1958, p. 59.

<sup>74</sup> 72 Stat. 678, 19 U.S.C. § 1352a (a) (1958).

tors."<sup>75</sup> They are enjoined to give consideration to: (1) domestic production needed for projected national defense requirements, (2) existing and anticipated availabilities of resources essential to the national defense, (3) growth requirements and stimulation necessary to assure such growth, and (4) how imports will affect the foregoing.

The Director and the President are also required to recognize the close relation between economic welfare of the nation and national security and to consider foreign competition versus: (1) economic welfare of individual domestic industries, (2) substantial domestic unemployment, (3) decrease in government revenues, (4) loss of skills or investment, or (5) "other serious effects."<sup>76</sup>

From the foregoing, a burden of highly-skilled, if not impossible, omniscience has been placed upon the Director and President. The record clearly shows that Congress, the fact-finder and policy-maker, has not been able to synthesize all of the ingredients of the problem into a workable formula. A part of Senate Report 1838 of July 15, 1958, tacitly admits as much:<sup>77</sup>

A great deal has been said about the large numbers of workers dependent on foreign trade but the committee was unable to uncover any information as to the overall displacement of workers as a result of imports. . . . In the meantime, there is convincing evidence that in certain areas, in segments of vulnerable industries, and across the nation as a whole, excessive imports have caused unemployment and otherwise weakened the economy which is in itself a vital part of our national security. . . .

Since this burden involves the task of continual resolution of relative values, it is to be expected that the debate from interested sources will require frequent re-evaluation of any action taken. So if a decision is about to be reached to restrict imports to a certain percentage figure that will permit more imports than before, it follows that those adversely effected will make their position known. While this will undoubtedly cause some illumination upon the path of policy, one might wonder whether "national security" will become highly colored by definition from the loudest and most insistent groups seeking a *particular* brand of economic welfare.

In this respect, the individual views of Senator Douglas, in opposi-

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<sup>75</sup> 72 Stat. 678, 19 U.S.C. § 1352a (c) (1958).

<sup>76</sup> *Ibid.* The remaining added subsections relate to publication of reports and reports to Congress.

<sup>77</sup> *U.S. Code Cong. & Ad. News*, 85th Cong., 2d Sess., 1958, vol. 2, p. 3620.



tion to this so called "National Security Amendment," are of interest.<sup>78</sup> He foresaw the national security amendment as subject to abuse in order for special tariff treatment.

He saw in the amendment an "implicit syllogism," which is:

- (1) The economic welfare of the country affects national security.
- (2) Any industry that is injured by imports weakens the economic welfare of the country.
- (3) Therefore, injury to a domestic firm or product, or unemployment, or a decrease in government revenues, loss of skills or investment, affects the national security.

Senator Douglas listed some industries that have sought escape-clause relief in the past (special tariff protection), and which he believed could now seek relief as national security industries. He listed about fifty items,<sup>79</sup> among them: spring clothespins, glace cherries, pregnant mares urine, rosaries, red fescue seed, hatter's fur, ferrocerium (lighter flints), watches, and bicycles. In short, he was opposed to expansion of protection. Protection, however, is precious to those who have it and who want more of it.<sup>80</sup>

#### IV

##### VOLUNTARY PHASE OF REGULATION

###### A. Districts for Administration

In order to deal with the events leading to the establishment of the voluntary phase of regulation, coordination districts have been set up. These districts are now divided, for the purposes of administration, into two categories. These are Districts I-IV and District V. The former districts (composed of all the states, with the exceptions of the West Coast states, Nevada, Arizona, Alaska, and Hawaii), have a substantial production capacity that is in excess of actual production. This is largely

<sup>78</sup> *Id.* at 3630.

<sup>79</sup> *Id.* at 3631.

<sup>80</sup> Dallas Morning News, Dec. 5, 1959, § 1, p. 8, col. 4 reported that Senator Yarborough of Texas declared: "Congress should act to protect our valuable domestic petroleum industry, its employees and our federal, state and local governments . . . We need a stronger basis for the control of oil imports than this." [referring to the mandatory quota system].

Incidentally, the Joint Committee for American-Flag Tankers and the Committee of American Tanker Owners, Inc., now want protection from the Office of Civil and Defense Mobilization. Their desire is for a regulation requiring that 50% of all oil imports be carried in American-flag tankers. The tanker interests' argument is that without such protection, they could not compete with foreign tankers and that such a result adversely affects national security. Oil & Gas J., Jan. 25, 1960, p. 130.

because of the control of state regulatory commissions.<sup>81</sup> On the other hand, District V, which is composed largely of California oil fields, does not have production control as in Districts I-IV. Production is declining steadily and imports are necessary to meet demands. Furthermore, the separation of these two categories is such that transportation from Districts I-IV to District V is difficult. This situation was improved in 1958 by additional pipeline capacity from Texas and Oklahoma to the West Coast.

#### B. Events Leading to Voluntary Quota System

The policy of voluntary restriction worked reasonably well until about the middle of 1956.<sup>82</sup> This voluntary restriction was the type wherein the importing companies were requested to keep their crude imports within the 1954 production ratio. This ratio was slightly in excess of ten per cent.<sup>83</sup> The Special Committee to Investigate Crude Oil Imports (a blue-ribbon committee composed of the Secretaries of the Departments of State, Defense, Treasury, Interior, Labor, and Commerce) found, however, on the basis of schedules submitted to the Office of Defense Mobilization, that a sharp rise in imports was scheduled for the last half of 1956 and 1957. The following table, taken from the Report of Special Committee to Investigate Crude Oil Imports, July 29, 1957, reveals the imports by categorized districts and the progression of the percentage ratios of imports to production:

It will be seen from the foregoing table that imports increased only slightly in Districts I-IV in 1955 and the first half of 1956. This brought the ratio up to 11.9 per cent. There was a sharp rise in the third quarter of 1956 to 13.5 per cent. The drop in the fourth quarter may be attributed to Suez.<sup>84</sup> After Suez opened, the schedules filed rose, as may be seen, to sixteen per cent.

The rise of imports and planned imports in District V was even more pronounced, going from 5.2 per cent to a projected 29.8 per cent for the second half of 1957.

The Under Secretary of State, Herbert Hoover, Jr., was, in June 1956, reflecting the country's diplomatic viewpoint in declaring that discriminatory measures, quotas, and governmental regulation, were

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<sup>81</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (July 29, 1957) (no pagination).

<sup>82</sup> *Ibid.*

<sup>83</sup> The ratio for all imported petroleum products was in excess of 16%.

<sup>84</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (July 29, 1957).

PERCENTAGE RATIO OF CRUDE OIL IMPORTS TO UNITED STATES  
CRUDE OIL PRODUCTION (THOUSANDS OF BARRELS DAILY)

	1954	1955	1st half 1956	3rd quarter 1956	4th quarter 1956	2nd half 1957
<i>Districts I-IV</i>						
Imports.....	605	689	735	830	718	971 <sup>1</sup>
Production.....	5367	5835	6199	6155	6212	6079 <sup>2</sup>
Percentage Ratio.....	11.3	11.8	11.9	13.5	11.6	16.0
<i>District V</i>						
Imports.....	51	93	153	212	198	275 <sup>1</sup>
Production.....	975	972	967	959	949	923 <sup>2</sup>
Percentage Ratio.....	5.2	9.6	15.8	22.1	20.9	29.8
<i>Total United States</i>						
Imports.....	656	782	888	1042	916	1246 <sup>1</sup>
United States Production.....	6342	6807	7166	7114	7161	7002 <sup>2</sup>
Percentage Ratio.....	10.34	11.5	12.4	14.7	12.8	17.8

<sup>1</sup> The importing companies in filing reports with the Office of Defense Mobilization estimated that their imports into District V for this period would be 296,000 barrels per day. There is reason to believe, however, that these imports will not exceed 275,000 barrels per day and, as a result, this figure is being used throughout the report.

<sup>2</sup> Estimated, Office of Oil and Gas, Department of the Interior.

not favored by the administration.<sup>85</sup> Quotas were described as placing "shackles on an industry whose dynamic qualities should be fostered rather than hampered." Mr. Hoover also warned that quotas would ultimately lead to governmental price fixing and further controls.<sup>86</sup> Mr. Hoover received a hot rejoinder, reflecting clearly that all were not so frightened of government control.<sup>87</sup> The IPAA, indeed, asked for control. On August 7th, they asked that action be taken under the portion of the 1955 Trade Agreements Extension Act quoted above.<sup>88</sup>

After receiving the request of the IPAA, the Director of Defense Mobilization caused a public hearing to be held from October 22-24, 1956.<sup>89</sup> As the hearings were held, imports were showing gains.<sup>90</sup> No action was taken immediately, but the Director declared that, but for the Suez crisis, he would have no course but to make a certification under the Trade Agreements Extension Act of 1955 that projected import plans constituted a threat to national security.

<sup>85</sup> CLARK, *op. cit. supra* note 1, at 247. Clark's source is from a speech delivered at the 1956 midyear meeting of the Interstate Oil Compact Commission, held in Dallas, Texas.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Id.* at 248. Mr. Warwick M. Downing, Colorado's representative at the meeting declared "Free enterprise has never meant that business should be free of Governmental control . . ."

<sup>88</sup> See text at note 70.

<sup>89</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (July 29, 1957).

<sup>90</sup> Oil & Gas J., Oct. 29, 1956, p. 77.

## I. *Considerations of the Special Committee to Investigate Crude Oil Imports*

The facts of rising imports are recorded in the above table. The Committee considered that there was a direct relationship between the nation's security and available sources of energy. Not seeing any immediate replacement for oil and gas, which account for two-thirds of consumed energy in the United States,<sup>91</sup> available supplies were considered important. The crux of the Committee's rationale was that a limitation of imports will tend to insure a "proper balance"<sup>92</sup> between imports and domestic production.

The Committee rejected a plan of importing foreign crude oil into the United States and storing it within completed fields or elsewhere as being too costly and as presenting too many physical problems. Also rejected was a course of action that would enlarge government participation in exploring for oil reserves, which would be shut in as reserves. This, too, was considered too costly and "contrary to the principles of free enterprise which characterize American industry."<sup>93</sup>

Outright encouragement of increased imports in order to conserve domestic reserves was rejected as unsound. It was believed that this would: (1) result in a flow of foreign oil that was in excess of the quantities needed to supplement domestic supply; (2) discourage and decrease domestic production; (3) cause a marked decline in domestic exploration and development; and (4) because of the time lag between exploration and production, leave the nation years away from the attainment of any emergency supply of fuel.

The Committee declared that it had considered the foreign policy aspects of limiting petroleum imports as well as the interests of domestic consumers. The impact of restricted imports on the latter group was rationalized by declaring that excessive reliance on the low-cost imported oil may put the consumer in a long-term vulnerability of facing a shortage and possible unavailability.

## 2. *Recommendations*

In view of the foregoing, it was recommended, commencing the last half of 1957 and the first half of 1958, that all large importing companies that were importing into Districts I-IV cut back imports to ten

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<sup>91</sup> N.Y. Times, May 31, 1959, § 11, p. 13M, col. 1.

<sup>92</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (July 29, 1957).

<sup>93</sup> *Ibid.*

per cent below their average for the years 1954, 1955, and 1956. Small importers (those who had imported less than 20,000 barrels per day in 1954) were not asked for percentage cuts, but were requested to import as per submitted schedule, and in any case, not to exceed 12,000 barrels per day over their 1956 imports.<sup>94</sup>

No requested restrictions were recommended for District V at this time, as the level of imports was considered to be within the difference between market demand and domestic production. It was planned, however, to review the District V situation in about six months and the entire situation every year, at least.

The over-all requested restrictions were calculated to maintain a ratio between imports and domestic production of about twelve per cent, or between imports and domestic *demand* of about 9.6 per cent.

Provision was made for fitting new importers into the total scheme. It was recognized that the plan might be circumvented by the transfer of allotments, oil sale and product purchase agreements, and the importation of products rather than crude, so the Office of Defense Mobilization was enjoined to observe the situation. It was recommended finally that the Department of the Interior, under policy guidance from the Office of Defense Mobilization, administer the plan.

The foregoing recommendations were put into effect on July 29, 1957.<sup>95</sup> Secretary of the Interior Fred A. Seaton requested and obtained the services of Captain Matthew V. Carson, Jr., U.S.N., to administer the program.<sup>96</sup>

### C. The System of Control

As has been seen above, the goal of restriction based on the July 29, 1957, recommendations (which were adopted by the President on the same day) was not to roll back imports to a figure pegged on the 1954

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<sup>94</sup> *Ibid.*

<sup>95</sup> White House Memorandum for Secretary of the Interior and Director of the Office of Defense Mobilization, July 29, 1957. It is interesting that this plan would be put into effect when the analysis of the problem and the answer to it was slanted differently by the English trade newspaper, Petroleum Press Service. In an article titled, *Lagging U.S. Reserves*, it was pointed out that "merely to maintain the present ratio between United States domestic production and reserves, and between production and imports in the period up to 1965, for example, would require an average annual rate of gross additions to proved reserves about 50% higher than in recent years." 24 PETROLEUM PRESS SERVICE 169 (1957). It was generally concluded that rising imports would be needed.

<sup>96</sup> Capt. Carson was once counsel and Director of the Office of Naval Petroleum Reserves.

imports, but to take into the account all imports for the years 1954, 1955, and 1956 in fixing the import quota. The recommendations represent an important step in the definition of the proper balance between imports and domestic security and in the definition of the point where imports begin to effect national security. A judgment was reached that 17.8 per cent of imports to crude oil production (in all districts) was too much in the way of imports. This was to serve as a starting point and as precedent for the same type of administrative judgments that were to be made when the program became mandatory. Although what transpired during the voluntary system of control will not be legally binding upon what will transpire under the mandatory program, the voluntary system of control afforded a good opportunity to ascertain what was reasonable in the way of restriction. That is to say, if controls were reasonable enough to beget cooperation under a voluntary program, the same area of reasonability, with its defined periphery, would likely be "reasonable" in a legal sense in the administration of a mandatory program.

Based upon the evidence of records and schedules and submitted by the established importers, allowed imports for each, expressed in thousands of barrels daily and calculated upon the formula that was applicable to Districts I-IV, were set up. For example, Sinclair was found to have a three-year average of 69,100 barrels per day. The imports per formula were thus 69.1 minus 6.9, or 62,200 barrels per day. The new and small importers were treated in the manner recommended.<sup>97</sup>

No sanctions were provided for refusal to comply with the allowed imports. The desire of the industry to stay as free as possible from control, plus whatever patriotic suasion was generated by the knowledge that imports had been found to pose a threat to national security, were expected to achieve cooperation.<sup>98</sup> Lacking cooperation, the program would never have gained headway.

At the outset, provision was made to hear appeals of those companies that claimed inequitable treatment, and Captain Carson received initial encouraging information from most companies, indicating their willingness to participate.<sup>99</sup>

Forms, the *sine qua non* of the regulators and the bane of the regu-

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<sup>97</sup> See text at note 94 *supra*.

<sup>98</sup> Oil & Gas J., Aug. 19, 1957, p. 97.

<sup>99</sup> Oil & Gas J., Aug. 12, 1957, p. 71. Sun Oil Company said flatly that it was afraid of anti-trust laws and would not comply. Others failed to state specifically what they intended to import.

lated, were prepared for obtaining records of each company's actual monthly imports and planned imports. Effective April 1958, certificates of compliance were issued to importing firms. An importing firm was not in compliance if it exceeded its established allocation in any three consecutive months.

Even though the program was from the outset called "voluntary," it was realized by all concerned that the overtones of compulsion were present. For instance, all of the results of the program were to be published, and a "violator" would thereby be made known to the public. Further, it was realized that statutory machinery was available to be called in to assist in *requiring* instead of *requesting*, by the same agency that was then requesting. The IPAA had no illusions about the program being completely voluntary.<sup>100</sup>

#### D. Operation and Success of the Program

##### 1. *Regulation for District V*

It will be recalled that the recommendations of the first report of the Special Committee to Investigate Crude Oil Imports called for no restrictive action in District V. However, this Committee reappraised the situation as they indicated they would, in December, 1957.<sup>101</sup>

They found that the programmed imports for the first half of 1958 were 348,800 barrels per day. This was upon the basis of information submitted to the Administrator, Captain Carson. It was also found that the deficit between production and estimated demand was approximately 220,000 barrels per day. This required a reduction of thirty-seven per cent of programmed imports. It was recommended, as before with Districts I-IV, that the cuts be made on a percentage ratio of previous imports. For the majors in District V, this amounted to fifteen per cent of the 1956-57 daily average. The small and new importers were also given special treatment in District V.

The Office of Defense Mobilization and Department of Interior were cautioned to watch for indirect noncompliances with the recommended formulae. The President directed all the recommended action to be placed into effect.<sup>102</sup>

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<sup>100</sup> Oil & Gas J., Aug. 12, 1957, p. 74. See also Oil & Gas J., July 22, 1957, p. 47, wherein it was stated that the voluntary program would be "backed up by the gun of public opinion and the threat of government enforced quotas . . ."

<sup>101</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (Dec. 12, 1957) (no pagination).

<sup>102</sup> White House Memorandum for the Secretary of the Interior and the Director of the Office of Defense Mobilization, Dec. 12, 1957.

2. *Special Committee Report of March 24, 1958*<sup>103</sup>

This report was a review of the voluntary plan to date and was again concerned with Districts I-IV. The Committee found that all but three "substantial importers" had complied with the voluntary program, and that in a number of instances, companies did not import the full amount of their assigned quotas.<sup>104</sup>

Keeping of the voluntary program was recommended. It was noted that the industry had not yet bounced back from the post Suez let-down. The original twelve per cent ratio of imports to production was kept, with a resulting eight per cent required cut in current imports.<sup>105</sup>

The Committee noted that it had anticipated that new importers could be accommodated without curtailing the established importers. This was because of an expected increasing rate of production. Production having declined, it was announced that established importers would have to "move over" to provide for these newcomers.<sup>106</sup>

As a measure to strengthen the voluntary program, it was recommended that the provisions of the Buy American Act<sup>107</sup> be incorporated in the procurement contracts of all agencies of the government purchasing petroleum under contract.<sup>108</sup> This, then, was a tacit admission that some help was needed to accomplish the aim of restricted imports.

The recommendations of the Committee were approved by the President on March 25, 1958.<sup>109</sup>

The program was undergoing obvious stress, but had managed to hold together. Congress was in session, and some members wanted stronger import controls.<sup>110</sup> Further, the industry was not as healthy economically as had been expected.<sup>111</sup>

<sup>103</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, SUPPLEMENTAL REPORT (March 24, 1958).

<sup>104</sup> *Id.* at 1.

<sup>105</sup> Oil & Gas J., March 31, 1956, p. 50.

<sup>106</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, SUPPLEMENTAL REPORT 3 (March 24, 1958).

<sup>107</sup> Buy American Act, 47 Stat. 1520 (1933), as amended, 41 U.S.C. §§ 10a-d (1958).

<sup>108</sup> This was implemented by Executive Order No. 10761, 23 Fed. Reg. 2067 (1958). Anyone selling petroleum products to any agency of the United States had to agree to the following provision: "The contractor agrees that during the contract period he will comply in all respects with the Voluntary Oil Import Program."

<sup>109</sup> White House Memorandum for the Secretary of the Interior, March 25, 1958. For the tabulated effect of the recommendations as they pertained to each company, see Oil & Gas J., March 31, 1958, p. 51.

<sup>110</sup> Oil & Gas J., May 5, 1958, p. 75.

<sup>111</sup> *E.g.*, U.S. Oil Makes Heavy Going, 25 PETROLEUM PRESS SERVICE 84 (1958): "The essence of U.S. producers' present difficulties lies in the extent to which they have



### 3. *Nine Months' Appraisal*

The dual headlines of "Tough Import Plan Fading in Congress"<sup>112</sup> and "Voluntary Import Plan 97% Effective"<sup>113</sup> had obvious kinship. That is to say, the success of the voluntary program was a large factor in the avoidance of congressionally fixed, arbitrary, and mandatory quotas. This, coupled with probable congressional unwillingness to tackle a factually and politically tough problem resulted in the 1958 legislation that put the burden on the Executive to do the restricting.<sup>114</sup>

The Administrator, Captain Carson, was apparently pleased with the ninety-seven per cent effectiveness of the program and complimented the complying companies for their "business statesmanship." Two of the three leading companies that had failed previously to comply with the program appeared ready to stay within the quotas set by the formula. Only one persisted in the disregard of quotas. This importer, Eastern States Petroleum and Chemical Corporation, had contracted for more foreign oil than its officers had requested quotas for. Apparently being unable to replace a lost Japanese sales outlet, the Company was caught with an excess of imports. While trying to arrange for a market, the Company put its excess in bonded storage in accordance with the Customs rules. When it found itself in non-compliance with the program (after it had no more storage available), the Company also found itself in the position of losing two government contracts and losing future government contracts because of the President's Executive Order that brought the Buy American Act in to support the voluntary oil import program.<sup>115</sup> The Company, unsuccessful in its attempts to have the quota revised through the appeals procedure to the Administrator, attacked the legality of Executive Order 10761 of March 27, 1958, as well as the propriety of the action of the Administrator in refusing a revised quota. The District Court first dismissed Eastern's motion for preliminary injunction, finding that the Executive Order was lawful both under the Buy American Act and under the Government's power to buy from whomever it pleased.<sup>116</sup> The Court of Appeals of the District of Columbia reversed, as the tendered issue of the arbitrary action in the implementation of the Voluntary Oil

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over-extended their productive capacity, some of which though profitable, is quite uneconomic when measured against imports."

<sup>112</sup> Oil & Gas J., May 5, 1958, p. 74.

<sup>114</sup> See text at page 190 *supra*.

<sup>113</sup> *Id.* at 75.

<sup>115</sup> See text at notes 107, 108 *supra*.

<sup>116</sup> Eastern States Petroleum & Chem. Corp., v. Seaton, 163 F. Supp. 797 (D.D.C. 1958).

Import Program should have been considered. This was considered later,<sup>117</sup> and the Administrator's refusal was specifically found to be not so arbitrary as to warrant a preliminary injunction against the Government to restrain cancellation of government procurement contracts. While a hardship undoubtedly existed, the Administrator had apparently determined that such had arisen as a result of the Company's business judgment and private contractual difficulties. Upon a short review of the facts of the case, the court found that there was "ample evidence" to sustain the Administrator.

It is difficult to see how the action of the Administrator could have been otherwise and also consistent with a fair policy toward all importers. If internal difficulties of an importing company were to serve as a springboard for preferential treatment, an equitable allocation among all would soon be a thing of the past. The judgment of the court is, therefore, considered sound. In reaching such a conclusion, one must not be unmindful of the very real hardship that must have been placed upon Eastern, which endeavored, apparently as long as it could (and consistently with its contractual arrangements), to comply with the program. Hardship, however, is not unusually a predicate of regulation, as regulation must strike a balance to achieve its goal. The direct effect of the striking of the balance is to curtail freedom of those regulated.

#### 4. *Mid 1958 Reports by Special Committee to Investigate Crude Oil Imports*

By June 1958, petroleum products importations in Districts I-IV were giving the Special Committee some concern. They had found that while crude importation was being kept within tolerable limits, the voluntary import program was being threatened by the importation of products. As a consequence, it was recommended that the Administrator commence a voluntary system to govern the importation of unfinished gasoline and other unfinished oil.<sup>118</sup> At that time, it was concluded that residual fuel oil and miscellaneous product imports did not constitute a threat to the voluntary program, but the Director of the Office of Defense Mobilization and the Administrator were asked

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<sup>117</sup> *Eastern States Petroleum & Chem. Corp., v. Seaton*, 165 F. Supp. 363 (D.D.C. 1958). For a related case concerning Eastern's attempt to test taxation statute on oil imports, see *Eastern States Petroleum Corp. v. Rogers*, 265 F.2d 593 (D.C. Cir. 1959).

<sup>118</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (June 4, 1958). These recommendations were approved by White House Memorandum for the Secretary of the Interior, June 4, 1958.

to keep the situation with respect to petroleum products under constant review.<sup>119</sup>

With respect to District V, the June 30 report of the Special Committee found that the imports into this District had been less than the limit set. It, therefore, recommended that the 221,100 barrels per day ceiling remain and that the allocation for new importers and increases granted be within that over-all figure. These recommendations were approved by the President on July 1, 1958.<sup>120</sup>

## V

### VOLUNTARY TO MANDATORY—IN TRANSIT

An objective appraisal of a program wherein the importers "voluntarily" tightened their import belts in order to bring about a healthy result to the economy and in furtherance of national security must include the adjective "successful." It was a success to get the program operating at all. The ninety-seven per cent effectiveness figure could not, of course, have been attained without excellent cooperation of the industry.

With the aid of hindsight, it can now be seen that as the program's success was growing, pressures were building that would lead to a logical and short step to further control as 1959 approached.

Districts I-IV importers were multiplying and claiming a share of the total "allowable" barrels per day imports to that area. This meant that the major importers were having to reduce their quotas to make room.<sup>121</sup> How long the majors would be willing to absorb the resolution of inequities of small importers, at the formers' expense, was a delicate question.<sup>122</sup> Add to this circumstance the combination of many others, and the seams of the voluntary program would be expected to receive strain and stress, if not to burst. Items:

(1) Eastern was unhappy (to the point of litigation) with even the voluntary program.

(2) The midyear 1958 Oil and Gas Journal report showed: (a) refinery runs had to be cut in order to reduce product surplus—runs

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<sup>119</sup> *Id.* at 3.

<sup>120</sup> White House Memorandum for the Secretary of the Interior, July 1, 1958.

<sup>121</sup> Oil & Gas J., June 23, 1958, p. 80.

<sup>122</sup> *Ibid.* The words of DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 248, become prophetic here: "Since this method of control can only become increasingly burdensome and arbitrary as the number of firms in possession or potential possession of foreign oil grows, quotas must be regarded as no better than a stop-gap measure."

barely exceeded 1955's;<sup>123</sup> (b) production for first half (1958) was over 1,000,000 barrels per day lower than for the comparable period in the previous year;<sup>124</sup> (c) free foreign production exceeded United States output by more than 2,000,000 barrels per day;<sup>125</sup> (d) imports of products other than residual fuel gained 119 per cent over the previous year;<sup>126</sup> and (e) about fifty newcomers (importers) were looking for quotas.<sup>127</sup>

(3) With oil just beginning to show a climb out of the doldrums indicated above,<sup>128</sup> pressure for protection of domestic industry and prices was a predictable sequel.

As the year 1958 went on, requests for import quotas kept coming in.<sup>129</sup> The total requested daily boosts in imports (Districts I-IV) totaled approximately 1,000,000 barrels per day. This is a large increase, considering that the daily quota for those districts was, at that time, 713,100 barrels per day.<sup>130</sup> Coal men and independents were concerned about the rise in imports of refined products and wanted curbs.<sup>131</sup> August and September imports of crude and unfinished oils were above quota; Eastern States, having lost its court battle, was importing almost four times its quota; and a new plan, setting quotas on the basis of historical imports combined with refinery runs was being considered.<sup>132</sup> As 1958 drew to a close, a coal state congressman, James E. Van Zandt of Pennsylvania, announced plans to have Congress set quotas, declared that Congress never should have thrust the job of regulating imports upon the Executive, and was reported as favoring a cut-back in residual imports in order to bring "new hope" to coal miners.<sup>133</sup>

That a revamping of the voluntary import program was in all likelihood to come was verified by an interim report of the Special Committee to Investigate Oil Imports, on December 22, 1958.<sup>134</sup> The Committee reported that it was engaging in an intensive review of the program and was going to present certain recommendations for change. Pending submission of those recommendations, the Committee desired that importers be advised that no changes would be made through February 28, 1959, in crude oil allocations, and that they also be re-

<sup>123</sup> Oil & Gas J., July 28, 1958, p. 135.      <sup>124</sup> *Id.* at 138.

<sup>125</sup> Oil & Gas J., June 23, 1958, p. 140.      <sup>126</sup> *Id.* at 142.

<sup>127</sup> *Id.* at 105.      <sup>128</sup> *Id.* at 100.

<sup>129</sup> *Import Quota Bids Mushroom*, Oil & Gas J., Aug. 11, 1958, p. 78.

<sup>130</sup> *Ibid.*      <sup>131</sup> Oil & Gas J., Aug. 18, 1958, p. 105.

<sup>132</sup> Oil & Gas J., Nov. 3, 1958, p. 48.      <sup>133</sup> Oil & Gas J., Dec. 29, 1958, p. 73.

<sup>134</sup> Approved by White House Memorandum for the Secretary of the Interior, Dec. 22, 1958.

quested to limit their importation of unfinished gasoline and other unfinished oils to the present allocations.

## VI

### MANDATORY PHASE OF REGULATION

#### A. Machinery of Implementing Mandatory Phase

In accordance with the Trade Agreements Extension Act of 1958,<sup>135</sup> the actions of the Special Committee, the Director of the Office of Civil and Defense Mobilization, the Secretary of State, the Deputy Secretary of Defense, and the President combined to implement this new phase of regulation. It should be recalled that the Act itself does not require mandatory controls, but that such controls could be imposed by the will of the President.<sup>136</sup>

#### B. Actions Taken

At the instance of the Special Committee, the Secretary of State and the Deputy Secretary of Defense requested that the Director of the Office of Civil and Defense Mobilization, pursuant to the Trade Agreements Extension Act, make an appropriate investigation to determine the effects on the national security of imports of crude oil and its derivatives and products.<sup>137</sup>

This investigation was undertaken by the Director on January 28, 1959.<sup>138</sup> The Director reviewed the program and concluded that notwithstanding the effectiveness of the voluntary limitation plan, the quantities and circumstances of oil imports had not been stabilized. With particular mention of crude oil derivatives and products, it was cautiously tendered that there had been a circumvention of the limitation program. It was opined that imports had been a major contributing factor to the decline in drilling operations. The voluntary program was given credit for curtailing what would have been importation in drastic quantities. World oversupply was noted with a statement that without control, there would be substantial economic incentives to increase imports. In a supplemental memorandum, the Director noted that for the period 1954 to 1958, the domestic crude oil reserves were increasing only

<sup>135</sup> See text at page 189.

<sup>136</sup> 72 Stat. 678, 19 U.S.C. § 1352a (b) (1958).

<sup>137</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (March 6, 1959).

<sup>138</sup> Director of Civil and Defense Mobilization, Memorandum for the President, Feb. 27, 1959.

2.8 per cent,<sup>139</sup> while demand for petroleum products increased 15.5 per cent. This indicated to him that an incentive for exploration was needed. The determination was reached that crude oil and the principal crude oil derivatives and products were being imported in such quantities and under circumstances that threatened to impair the national security.

With the Director's recommendations in hand, the Special Committee recommended on March 6, 1959 that the Voluntary Oil Import Program be replaced by a mandatory program that would (1) limit imports, and (2) distribute allocations among companies in a "fair and equitable manner."<sup>140</sup> Specific reasons for the need of a mandatory program were: (a) excessive imports by companies that had not complied with the Voluntary Program, (b) a threat to the success of the Voluntary Program because of increased importation of unfinished oils and products, (c) the likelihood of increased noncompliance among companies now having allocations when they were asked to cut back imports voluntarily in order to provide allocations for newcomers to the program, and (d) the impossibility of working out a desirable and legally permissible revision of the Voluntary Program acceptable to the Committee.

#### 1. *Recommended control*

The Committee then recommended specifics for the mandatory program.<sup>141</sup> It listed the derivatives that should be controlled as well as crude oil. Districts I-IV imports were to be related to demand, and the limitation was to be about nine per cent of total demand in such districts. Within that maximum limit, imports of finished products were not to exceed the 1957 level. In District V, the imports were to be sufficient to make up the difference between domestic production and demand, again with derivatives and residual oil to be used as fuel to be topped at the 1957 level. In general, these amounts were to be subject to change by the Secretary of the Interior in order to meet minimum requirements of refiners and to meet the over-all objectives of the program as they pertained to the imports of residual fuel oil to be used as fuel in District I-IV.

In addition, Puerto Rican imports were to be watched. The Secre-

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<sup>139</sup> Director of Civil and Defense Mobilization, Supplemental Memorandum for the President, March 4, 1959.

<sup>140</sup> SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (March 6, 1959).

<sup>141</sup> *Ibid.*

tary of the Interior was to restrict allocations to those having refinery capacity in the United States. Exchanges of foreign for domestic crude and products were to be made only when advance authorization was granted by the Secretary. Original allocations were to be made to those companies that imported in 1957 and in the amounts imported by them during such period. Controls were to become effective, at the latest, on April 1, 1959, and the Secretary of the Interior was to review allocations every six months. It was also recommended that the Director and the Secretaries of State, Defense, Treasury, Interior, Commerce, and Labor keep a close surveillance of imports that might indicate the need for further presidential action. An appeal board was recommended that was to be comprised of a representative from the Departments of the Interior, Defense, and Commerce, which could alleviate hardship or error or other special circumstances, but within the limits of the maximum level of imports.

C. Executive Proclamation 3279 of March 10, 1959<sup>142</sup>

This proclamation of March 10, 1959 gave presidential blessing to a mandatory program. The recommendations of the Special Committee, with more detail and definition, were adopted. The Secretary of the Interior was authorized to issue regulations to implement the program. Such regulations were to provide for the revocation or suspension by the Secretary of any allocation or license on grounds relating to the national security, or for the violation of the terms of the proclamation or any regulation or license issued pursuant to the proclamation.

The executive order<sup>143</sup> providing for the Buy American phase of the voluntary program, no longer needed, was revoked, and the Special Committee was discharged.

As an example of how an inarticulate predicate of a recommendation can easily become a firm criterion of regulation, recall that the OCDM and the Cabinet secretaries were, by the Special Committee's recommendation, to keep a constant surveillance of imports, etc. When that recommendation was presented for the President's pen and signed, it had grown to include:<sup>144</sup>

In the event *prices* of crude oil or its products of derivatives should be increased after the effective date . . . such surveillance shall include a determination of

<sup>142</sup> 24 Fed. Reg. 1781 (1959).

<sup>143</sup> 23 Fed. Reg. 2067 (1958).

<sup>144</sup> Presidential Proclamation No. 3279, § 6(a), 24 Fed. Reg. 1781 (1959). (Emphasis added.) It is hazarded that this was included by work of the staff. No other explanation for its inclusion has been found.

whether such increase or increases are necessary to accomplish the national security objectives. . . .

The President's statement in issuing the proclamation noted his regret in having to make the system mandatory because of the unwillingness of a few to join in the voluntary program. Actually it was a rather painless step to take, as it would serve to equalize responsibility among all and would benefit those who had been previously complying by a more equitable division of quotas.

#### D. The Shape of Administration

The Oil Import Regulation<sup>146</sup> implementing the presidential proclamation was issued soon after (March 13, 1959) by the Secretary of the Interior. Its pattern of allocation was as recommended and discussed above. Allocations were made according to past refinery inputs and past imports, in an effort more equitably to distribute the allocations.<sup>146</sup> Sections nineteen and twenty contain the teeth of control as they relate to criminal penalties and revocation or suspensions of licenses.

Clarifications were soon made with respect to unfinished oil importation<sup>147</sup> and proper method of exchanges (oil for oil only—not oil for money or for credit).<sup>148</sup> Also, the Oil Import Appeals Board was authorized to make its own procedural rules;<sup>149</sup> proclamation number 3279 was modified;<sup>150</sup> and notice of miscellaneous amendments was given on May 28, 1959.<sup>151</sup> From this emanated the June 6, 1959 "Oil Import Regulation 1 [Revision 1]."<sup>152</sup>

The launching of the mandatory phase of the program was perhaps made more propitious by a rising domestic demand.<sup>153</sup> The first half of 1959 demand was 6.4 higher than the first half of 1958 demand. It was thus possible to launch the mandatory program with a 30,000

<sup>146</sup> 24 Fed. Reg. 1907 (1959).

<sup>146</sup> *Id.* at §§ 10 and 11.

<sup>147</sup> 24 Fed. Reg. 2361 (1959).

<sup>148</sup> *Ibid.*

<sup>149</sup> 24 Fed. Reg. 3527 (1959).

<sup>150</sup> *Ibid.* By this, products entering the U.S. by pipelines or overland means were exempted from restriction. This was primarily for the mutual benefit of District V and Canada. The President announced on April 30 that this was in the interests of joint defense of the hemisphere and that Venezuela and other Western Hemisphere countries had not been forgotten. Press release by James Hagerty, Press Secretary to the President, April 30, 1959.

<sup>151</sup> 24 Fed. Reg. 4379 (1959).

<sup>152</sup> 24 Fed. Reg. 4654 (1959). This was amended on Aug. 14, 1959 by revising the definition of refinery inputs to conform to Presidential Proclamation No. 3290, §.1(c), 24 Fed. Reg. 3527 (1959).

<sup>153</sup> *Mid-Year Report, Oil & Gas J.*, June 27, 1958, p. 132.



barrels per day increase, making the July 1 to December 31, 1959 allowable at 1,450,362 barrels per day.<sup>154</sup> Mandatory controls were no panaceas for old plagues, however. By the end of June, eighty-one petitions for revisions in import quotas had been filed.<sup>155</sup> This amounted to about one-third of the importers. For those who were not in accord with the philosophy of quotas, as compared to some other method of control, a mandatory program vis-à-vis a voluntary one, offered no succor.<sup>156</sup>

Eastern States Petroleum and Chemical Corporation was still not satisfied with its particular quota and again sought the assistance of a federal court.<sup>157</sup> In two cases<sup>158</sup> decided by the United States District Court for the Southern District of Texas on September 18, 1959, plaintiffs sought declaratory judgments and injunctions against the Collector of Customs to restrain him from enforcing the mandatory program. Texas-American, a newcomer to refining, had no history of refinery input. Texas-American, although not unaware of the forthcoming restrictions in 1959, entered into a contract to buy a special type of Venezuelan crude, called Bachaquero crude, for its asphalt plant. The regulation, when it came out, would only permit the granting of allocations to those with a history of refinery inputs. Claiming hardship, Texas-American asked for a quota in order that it might fulfill its contract to purchase the Bachaquero oil. The quota was refused on the ground that there was no history of refinery inputs. While the action was brought to test, the validity of the administrative ruling denying a license and an allocation was questioned, and the holding of the case was that the Administrator and the Appeals Board were indispensable parties. Although the following are in the nature of dicta, the court, in discussing the merits of the case, declared that: (1) the President had not acted arbitrarily or capriciously in causing the regulations to be made; (2) the Administrator correctly construed the regulations; and (3) no one had any vested right to carry on foreign commerce and that governmental regulation of foreign commerce, if based upon congressional policy, was not invalid, even if it resulted in the regrettable consequence of forcing a company or an industry out of business.

<sup>154</sup> Oil & Gas J., June 15, 1959, p. 61.

<sup>155</sup> Oil & Gas J., July 6, 1959, p. 68.

<sup>156</sup> DE CHAZEAU & KAHN, *op. cit. supra* note 10, at 253 (1959): "Imposition of compulsory quota controls in March 1959 represented a more forthright course of action; but it makes no more economic sense than the policy it supplanted."

<sup>157</sup> Oil & Gas J., June 15, 1959, p. 63.

<sup>158</sup> Texas Am. Asphalt Corp. v. Walker, 177 F. Supp. 315 (S.D. Tex. 1959); Eastern States Petroleum & Chem. Corp. v. Walker, 177 F. Supp. 328 (S.D. Tex. 1959).

Another issue raised by Texas-American was based upon section twelve of the then current regulations, which provided the authority to allocate imports of crude oil by a refiner who was unable to obtain quantities of domestic crude oil by ordinary and continuous means, such as barges, pipelines, or tankers, "sufficient to meet his minimum requirements." To this sufficiency, Texas-American would have read into the regulations the words "efficiently and economically." The court pointed out, however, that Texas-American was able to obtain domestic crude oil continuously. The circumstance that the type of crude oil locally and continuously obtainable was not the best and most economical type for the company's operation did not require the Administrator to grant an allocation. This, again, is an example of reasonable regulation that by its very nature creates individual hardship as the equities are averaged.

Eastern States Petroleum, on the other hand, had a history of refinery inputs, but desired a larger allocation than had been granted. As in the Texas-American case, the holding turned on the indispensability of parties. Eastern declared that it was not challenging the validity of Proclamation 3279 or of the oil import regulation, but was just seeking an adjustment in its allocation, on the grounds of hardship. The essence of the hardships was that the company had failed to include all of its planned imports in its submitted estimate and that it was exporting some of its imports, for which it was not receiving credits against imports. The court pointed out that there was no regulation providing for export credits, thus implying support of the refusal of the Oil Import Appeals Board to grant any relief on that score. Further, the court declined to invade the administrative function of finding whether there was any hardship that would merit special consideration.

In both cases, the district court noted that it was passing judgment on the merits because of the likelihood of appeal. Due to the firmly established congressional power of regulation of foreign commerce, as well as its power with regard to national security, a wholesale attack upon the program of mandatory restrictions is not likely to meet with success. While further litigation is to be expected, it is most likely to be confined to that narrow field where, under present administrative law, there is an occasional chance of success—*i.e.*, the arbitrariness or capriciousness of the regulations or the administration thereof.

It, therefore, appears that a lawful, reasonable, and perhaps manageable system of equitably allocating imports has evolved from the thirty years of national concern over the problem. It is the opinion of

government experts that the voluntary program averted severe economic difficulties in the oil industry. Whether the industry would wholeheartedly join in such a conclusion is problematical (for some are importers and some are not), but the continued support of the oil states for import restrictions indicates, from a practical standpoint, that the majority of industry members (in a political sense) is for oil import restrictions. And they want more.<sup>159</sup> On the other hand, the Oil Compact Commission is keeping a close watch on the coal-industry backed "national fuels policy," undoubtedly to see that the coal industry does not obtain any synthetic support in its competition with petroleum, via imports or any other method.<sup>160</sup>

Perhaps one of the most difficult administrative problems of the program will be to keep its function within the intended scope of its creation—*i.e.*, for the purpose of national (and now hemispheric) security. Pressures for changing the mold of the program will inevitably be generated from "grass roots" economics as it affects politics of the same ilk. Unfortunately, the voices of the guardians of the bigger, longer-term picture, while agreed with in principle, are drowned in the clamor of the daily pursuit of the Yankee dollar.<sup>161</sup> Admiral Rickover, one of these voices, warned that our "belief that our high standard of living guarantees political and military supremacy" is potentially "our most dangerous illusion."<sup>162</sup> We can certainly ill-afford mistakes in many or large "pragmatic adjustments" when it comes to our national security, for they could mean the historic difference between survival and requiem.

Overconcern about prices is a large threatened derailment of the true purposes of the regulation. As mentioned above,<sup>163</sup> the matter of petroleum prices found its way into the President's March 10th proclamation. This was immediately picked up by a foreign-trade journal, as "an entirely novel aspect of the new imports controls which could have far reaching results. . . ."<sup>164</sup> No amount of study of the *raison d'être*

<sup>159</sup> Dallas Morning News, Dec. 5, 1959, § 1, p. 8, col. 4. Here Senator Yarborough (D. Tex.) was reported as describing the mandatory oil import program as "a slender reed. . . . We need a stronger basis for the control of oil imports than this."

<sup>160</sup> N.Y. Times, Dec. 4, 1959, p. 45, col. 4: *Compact Urges Close Watch on Fuels Policy Movement*. See also *Coal Aims to Undermine Oil's Markets*, Oil & Gas J., Dec. 14, 1959, p. 41.

<sup>161</sup> *E.g.*, Dallas Morning News, Dec. 10, 1959, § 1, p. 22, col. 1: *Rickover Says High Living Standard May be Liability—Admiral Deplores Decline in U.S. Natural Resources*.

<sup>162</sup> *Id.* at p. 1, col. 2.

<sup>163</sup> See note 144 *supra* and accompanying text.

<sup>164</sup> 26 PETROLEUM PRESS SERVICE 126 (1959).

of import controls can justify the use of price controls in order to curtail what someone considers to be excessive profits or, on the other hand, what someone envisages as an "operation bootstraps" to protect an ailing and unable-to-compete industry. It would be truly ludicrous if the program were used for the latter purpose—for if the industry were so ailing, then it would be high time that we turn our efforts, from a national security point of view, into the stimulation of imports!

It may well be that rising demand will be the end of government regulation in this field. The import quotas for the first half of 1960<sup>105</sup> continue the trend of rising imports based on percentage of total demand. What is happening in District V may well be the prelude of what will happen in the other districts. There (District V), the demand keeps increasing, while domestic production is not satisfying the need. Even with the exemption of Canadian overland oil, the difference jumped from a 265,500 barrels per day deficit between supply and demand during the last half of 1959 to 279,000 barrels per day (estimated) during the first half of 1960.<sup>106</sup>

Current periodicals and discussion groups are showing much concern over the enormity of the geometric "population explosion." Partial realizations of these predictions in the near future will have an impact on the reserves of all our natural resources. While one periodical sees Europe and the United States safely through 1975, with petroleum and *additional imports* satisfying most of the demand,<sup>107</sup> there will undoubtedly be an increased flexibility of choice and use of products for creation of energy as dictated by economics.<sup>108</sup>

This all portends that government regulation may eventually be, if at all, in the field of rationing imports, rather than in restricting them!

## VII

### SUMMARY OBSERVATIONS

An attempt has here been made objectively to synthesize the legal economic and political factors that have contributed to the evolution of the segment of governmental regulation of the oil and gas industry under study. It is clear that if our policy and lawmakers saw the prob-

<sup>105</sup> N.Y. Times, Dec. 14, 1959, p. 51, col. 3. . . <sup>106</sup> *Ibid.*

<sup>107</sup> 27 PETROLEUM PRESS SERVICE 41-43 (1960).

<sup>108</sup> A present example of this is the shift from oil to gas and coal. See Dallas Morning News, Feb. 28, 1960, § 4, p. 3, col. 1. At col. 4-7, the headline is, *U.S. Study Sees Long-Range Oil Need*, with a report that a rise in demand in the United States from 1959's 9,700,000 to 17,100,000 barrels per day is predicted by 1976. Population by that time is expected to reach 230,000,000.

lem in such a fashion that controls *ought to be* different, then what the law *is* would be quickly changed to conform. Thus, the role of the jurisconsult in this field is necessarily limited. Once he had developed the evolution and statutory basis of oil import regulation, the job of framing the case for change rests with those who would have the change, based upon their facts and reasons, whether they be political, economic, or military.

In this regard, the foregoing study reveals a plethora of interests to be weighed in the regulation of oil imports and a modicum of illumination of the correct paths to follow. Stated otherwise, it demonstrates that we probably do not know the answers to basic questions sufficiently well to forge conclusions as to what policy changes, if any, should be made. Summarized further and more cryptically, "Wanted: constructive criticism, conclusions, and a denouement."

It would be desirable as a contribution to the welfare of this country if one could conduct a legal examination of the conflicting parameters in the import equation and offer a neatly packaged solution that, after having balanced the interests of the oil industry, the consumer, and national defense, could tender the best results for all. The writer does not pretend such omniscience.

In a democracy such as ours, restrictions on the complete freedom of one to deal with his share of our wealth of natural resources have come to us through the process of reluctant evolution rather than experimental fiat. Individual voices sometimes cry out in indignant frustration, "There ought to be a law!" or "Why don't they do something about it?" As a chorus, however, the *vox populi* is more temperate and is not panacean in nature. The role of the federal government in the formulation of our oil import policy has been described as pusillanimous and has been criticized for its lack of coordination and consistency. It is difficult to see how it could be otherwise in light of the Government's efforts to satisfy all. It has reached no heights or penetrated to no depths other than has been demanded of it. It is the best product that our political processes have been able to manufacture with the raw material furnished by our expert economists and our defense establishment. State conservation policies do, of course, play a part in the rate of production of petroleum and its prices.<sup>169</sup> Responsibility for the regulation of oil imports, however, belongs exclusively to the federal government.

To the discerning, it should be abundantly clear from this study that

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<sup>169</sup> See text at p. 181.

our policy difficulties have stemmed largely from the dichotomous desires of keeping our oil and using it too. The facts here are eloquent, without any additional articulation. An umbrella of policy attempting to satisfy both of these desires must, by its nature, be *ad hoc*, pragmatic, and as tractable as crisis demands.

Paradoxical as it may seem, the cautious policy with respect to these bifurcated goals is proceeding successfully without any notable detriment to the country, to the industry, or to the national defense. Complacency, however, is not a logical predicate. This is because the present success will continue only so long as the dimension of time and abundance of resources do not demand an immediate accounting.<sup>170</sup> But there's the rub. When an immediate accounting looms necessary, it may be too late. A boy never knows how many green apples it takes to make him sick until he has completed his experiment. Happily, he is likely to recover from his reckless prodigality and live to be the wiser. When time and abundance of domestic resources reveals that our consumption is rapidly overtaking supply of petroleum, the prognosis for the continued welfare of the nation is not as good as the little boy's. Legislation, belt-tightening, or late-arriving wisdom will not replace the irreplaceable. The illusion about which Admiral Rickover spoke—*i.e.*, that our high standard of living guarantees political and military supremacy—will have been dissipated.<sup>171</sup>

This brings the wedding of national defense to a healthy industry under the spotlight of examination. At this point, politics and economics appear on the scene. "What's good for X industry is good for the country" has been recently a popular (and maligned) slogan summarizing our abiding faith in our capitalistic system. As noted above, this philosophy has been criticized by Senator Douglas as containing an "implicit syllogism" that concludes that the health of every industry is complementary of our total economic welfare and national defense. While one may generate a chuckle out of the niche that pregnant mare's urine occupies in his examples of protected products, one must be sobered when considering a replaceable product *vis à vis* a wasting and irreplaceable one. Many a pauper has arrived at his status by contributing too vigorously to the national economy by freely circulating his money. This does not change his status as a pauper. Likewise, it must be conceded that a healthy petroleum industry contributes to the general welfare of the country. But the unanswered and unknown is how soon such prosperity, dependent upon consumption, will, by the momentum

<sup>170</sup> See text at p. 186 and note 57.

<sup>171</sup> See text at p. 209.

of its enterprise, hurl itself out of existence. When this occurs, the ruin will not be confined to the petroleum industry. It will cripple the entire country, unless by that time other sources of energy, such as atomic energy, have replaced hydrocarbons.

This brings us to the moment of truth, the point where the wealth of the petroleum interests for the present is in conflict with the welfare of the country in the future. Unless one is thoroughly dedicated to the present and the dollar, there can be no quibbling about whether the nation or the petroleum industry should suffer. The industry has no vested rights of supremacy to the detriment of all. Quarrels about whether it is wise to maintain reserves in the ground for the purpose of national defense must be stripped bare and the intent of the proponents revealed. Greed and avarice did not cease with Teapot Dome.

Should we, therefore, rest content on the conclusions of the Special Committee to Investigate Oil Imports that, *inter alia*, rejected as unsound the outright encouragement of increased imports in order to conserve domestic reserves?<sup>172</sup> It would seem that we should not. A large part of the Committee's rationale appears to have been influenced by solicitude toward the industry.<sup>173</sup> The interests of the nation and the consumers were subordinated and rationalized.

Continued re-examination of our policy is recommended in the hope that it may be molded to coincide with cogency, conservation, and conscience. If it be decided that a hedge on the safe side will best serve everyone, then everyone can share in the cost of conservation rather than take the gamble on having the consumer and the nation bear the cost of protection.<sup>174</sup> We should continue to examine courses of action that have been rejected as being too costly, as presenting too many physical problems, and as "contrary to the principles of free enterprise which characterize American industry."<sup>175</sup> That is, we should continue to seriously consider such courses of action as: (1) importing foreign crude into the United States and storing it in completed fields or elsewhere, and (2) enlarging government participation in exploring for oil reserves that would be shut in when discovered. Furthermore, if the petroleum industry is found to be ailing as a result of an overabundance of free imports, perhaps a better way to treat the industry would be to let it suffer until better days (which are sure to arrive) when imports will be

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<sup>172</sup> See text at p. 194.

<sup>173</sup> Perhaps the industry is in continued need of solitude as of the first half of 1960. See *What the Crude Market is up against*, Oil & Gas J., May 23, 1960, p. 61.

<sup>174</sup> See text at p. 182.

<sup>175</sup> See text at p. 194.

welcomed by all. Or if the industry must be aided through a period when imports are hurting it, we should consider a type of subsidy that involves financial support *only*—that is a financial support that is not predicated upon an accelerated withdrawal of our petroleum reserves.

Thus, the problem clearly points up, from the jurisprudential side of legislative policy, that the most static part of the problem is the varied opinion. To a large extent, these differences of opinion are likely to continue until opinions are displaced by facts. To aid in the formulation of legislative policy, the military and the economists have the task of developing these facts. In the meantime, it is probably the wiser course of the law to remain static.

National security pervades much of our current foreign and domestic policy today. As such, national defense and security is a handy whipping boy, either pro or con, on a variety of subjects. The legal history of the present import regulations shows that national defense considerations were said to have been a prime factor in the present system of regulation. Upon such a thesis, we are now proceeding. Is it wrong?

Will a future war last long enough for us to be concerned about vast reserves of oil? If not, will our oil reserves have dwindled to such a point that we could not sustain even a short war? How frequently and of what duration may we expect "brush fire" wars? Are we better gamblers than Nazi Germany was, recalling that a Nazi Germany decided, upon a weighted judgment, to start a war (a decision that the United States would probably never make) and found out that when petroleum supplies failed, the end came? Will the atom and solar energy sources antiquate the use of petroleum as an energy source of importance before petroleum reserves are depleted?

And further, what about the over-all problem of foreign oil development by American companies? Should this endeavor be encouraged or discouraged? How are the values of statesmanship and national interest going to be fitted into the mosaic of economic reality?

If Government encourages foreign oil development and then regulates imports in such a fashion as to deny swift recovery of the investment, the investment is placed in jeopardy and government policy is susceptible to criticism. If, on the other hand, foreign oil development is officially discouraged, a void for Soviet exploitation will have been created and a greater burden of drain will have been placed upon our domestic reserves.

Breaking the unknowns down further into practical economics, should we favor the few large integrated companies that gain more from



imports than the independents, or the independents that seem to wield more political power? How should quotas be affected by our foreign policy, if at all? And militarily, do we have any *real* hope of evading foreign submarines with our tankers, should the need arise? If so, how bright are our chances in keeping the foreign land masses containing petroleum out of unfriendly hands?

A look at the map and a cursory knowledge of the Soviet Union's ambitions and capabilities of mustering a huge land force does not give one cause for optimism. But, the independents would not conclude therefrom that we should accelerate importation of Middle Eastern oil.

And finally, what about the oil import regulation itself. Is the quota system economically sound?<sup>176</sup> Certain changes have been made since its original writing,<sup>177</sup> and only time will tell whether it will accomplish its intended purpose. In the meantime, the lawyers and lawmakers should maintain an open and sympathetic ear for any additional factual data that can be produced by the industry, the politico-economists, and the military.

Many studies have made economic and political appraisals touching on the answers to some of the foregoing rhetorical questions.<sup>178</sup> These have not resulted in sufficient unanimity of conclusion to dictate that our policy should be different from what it is. When, within the industry itself, the majors urge that freedom of imports will promote national security and the independents urge that more stringent restrictions of imports will promote national security, one must conclude that they cannot both be right and that "national security" is given a meaning that is promotional of self interests. This is a large part of the "problem" in the regulation of oil imports.

The current legislation is flexible enough to meet whatever is demanded of it in the way of increased or decreased imports. Administrative changes can be made without any additional legislation. The Office of Civil and Defense Mobilization is charged with constant surveillance of the program, and it is the forum through which any administrative recommendations for change under current legislation could and should be made.

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<sup>176</sup> See text at p. 209.

<sup>177</sup> See text at p. 206.

<sup>178</sup> See generally, DE CHAZEAU & KAHN, *op. cit. supra* note 10; Raciti, *The Oil Import Problem*, 6 STUDIES IN INDUSTRIAL ECONOMICS (1958); PETROLEUM INDUSTRY RESEARCH FOUNDATION, U.S. OIL IMPORTS: A CASE STUDY IN INTERNATIONAL TRADE (1958); PETERSON, THE QUESTION OF GOVERNMENT OIL IMPORT RESTRICTIONS (1959).