I. DELEGATION OF LEGISLATIVE AUTHORITY

THE CONSTITUTIONALITY OF THE WAGE & PRICE CONTROL LEGISLATION

In *Amalgamated Meat Cutters v. Connally*,[1] a three-judge panel of the District Court for the District of Columbia upheld the constitutionality of the Economic Stabilization Act of 1970[2] (ESA) and the subsequent Executive Order 11615,[3] which had established a ninety-day wage and price freeze, against the claim that the Act constituted an excessive delegation of power to the President in violation of the principle of separation of powers.[4] The Economic Stabilization Act authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970," with such adjustments as might be necessary "to prevent gross inequities."[5] Executive Order 11615 implemented the authority conferred by the ESA and directed that "[p]rices, rents, wages, and salaries . . . be stabilized for a period of 90 days" at levels not greater than the highest of those actually in effect with respect to "a substantial volume of transactions" during the preceding thirty days.[6] The Executive

1. ___F. Supp.___ (D.D.C. 1971).

2. Act of Aug. 15, 1970, 84 Stat. 799 (set forth in note following 12 U.S.C. § 1904 (1970)), *as amended*, Act of Dec. 17, 1970, Pub. L. No. 91-558, 84 Stat. 1468; Act of March 31, 1971, Pub. L. No. 92-8, 85 Stat. 13; Act of May 18, 1971, Pub. L. No. 92-15, 85 Stat. 38; Act of Dec. 22, 1971, Pub. L. No. 92-210, 85 Stat. 743. The Act was part of a measure providing for amendments to the Defense Production Act of 1950, 50 U.S.C. *Appendix* §§ 2061-2168 (1970). Since the decision in *Amalgamated Meat Cutters*, the Economic Stabilization Act has been further amended. Act of Dec. 22, 1971, Pub. L. No. 92-210, 85 Stat. 743 (1971).

3. 36 Fed. Reg. 15727 (1971).

4. U.S. CONST. art. I, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."

5. Economic Stabilization Act § 202, 84 Stat. 799 (1970).

6. Exec. Order No. 11615, § 1(a), 36 Fed. Reg. 15727 (1971). The order was effective from Aug. 15 to Nov. 13, 1971. The thirty-day period determinative of "a substantial volume of transactions" was that ending on August 14, 1971. Raw agricultural products were exempted from these controls. *Id.* § 1(c). Persons in the business of selling or providing commodities or services were required by the order to "maintain available for public inspection a record of the highest prices or rents charged" during the prior thirty days. *Id.* § 1(b).

Section 205 of the Economic Stabilization Act authorized the Administration to seek injunctions in federal district court to secure compliance with the Act, and section 204 provided for a fine of up to $5000 for willfully violating an order or regulation issued pursuant to the Act. These provisions were incorporated in section 7 of the Executive Order, with the addition of

Order also established the Cost of Living Council "as an agency of the United States"[7] and delegated to the Council "all the powers conferred on the President" by the Economic Stabilization Act.[8] The union sought to have the Act and Executive Order declared unconstitutional and to enjoin the Cost of Living Council from their further implementation.[9]

Although the doctrine of separation of powers is a cornerstone of the American constitutional system,[10] since the inception of the Republic, practical considerations have led to delegations of power which might properly be characterized as "legislative" to the executive branch.[11] Orthodox American judicial theory, however, long adhered to the view that a delegation of authority by one branch of government to another was impermissible because power that had been conferred by the sovereign could not in turn be passed on by the recipient branch.[12] As the nation grew and society became more com-

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words "for each such violation" immediately after the language authorizing the fine. *Id.* § 7(a), 36 Fed. Reg. at 15729. This language of the Executive Order was adopted in section 208 of the Economic Stabilization Act Amendments of 1971 (eff. Dec. 22, 1971), 85 Stat. 743.

7. Exec. Order No. 11615 § 2(a), 36 Fed. Reg. 15727 (1971).

8. *Id.* § 3(a), 36 Fed. Reg. at 15 728. Although this section of the Order grants to the Cost of Living Council all the powers conferred to the President "[e]xcept as otherwise provided herein . . . .," no such limitations or exceptions are indicated in the Order.

9. In count II of the complaint the union sought to compel the meat packing companies to grant a general wage increase of $0.25 per hour, effective Sept. 6, 1971, as provided by the union's contract. ___ F. Supp. at ___.

10. Abdication of responsibility by the legislature frustrates the will of the electors as manifested in the election process, especially if the new locus of power is not directly responsible to the electorate. Even assuming the identity of legislative interests with the policies and actions of the new power center, thereby assuring that the public will is carried out, democratic theory is compromised when legislative power is exercised by non-elected ministers or by elected officials chosen to perform non-legislative duties by the very fact of such exercise itself. *Cf.* J. STORY, COMMENTARIES ON THE LAW OF AGENCY 14 (1839); J. LOCKE, ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT § 141 (1690), wherein it is stated: "The Legislative cannot transfer the Power of making laws to any other hands, for it being but a delegated Power from the People, they who have it cannot pass it over to others."

11. In its early sessions, Congress authorized the President, among other things, to fix the salaries of officers engaged in foreign service on behalf of the United States, Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128, and to prescribe regulations for trade with the Indians, Act of April 18, 1796, ch. 13, §§ 1-2, 1 Stat. 452. *See generally* B. PUTNEY, DELEGATIONS OF LEGISLATIVE AUTHORITY 424 (EDITORIAL RESEARCH REPORTS Vol. II, No. 20, 1935). Interestingly, these measures did not include a statement of legislative findings that delegation of such duties to the President was warranted or necessary under the circumstances.

12. *Cf.* Cheadle, *The Delegation of Legislative Functions*, 27 YALE L.J. 892, 893-94 (1918). *See generally* Field v. Clark, 143 U.S. 649, 692-93 (1892); Duff & Whiteside, *Delegata Potestas non Potest Delegari: A Maxim of Constitutional Law*, 14 CORNELL L.Q. 168 (1929).

plex, congressional willingness to delegate authority to the President increased,[13] culminating by the end of the nineteenth century in the establishment of administrative agencies[14] charged with carrying out programs enunciated by Congress only in terms of general principles. The courts accepted these innovations[15] even though they presented fundamental problems in democratic theory.[16]

Two significant exceptions to the judicial acceptance of increased delegation to the executive branch arose after the enactment of the National Industrial Recovery Act (NIRA) in 1933.[17] The Act gave the President authority to approve codes of fair competition proposed by trade or industrial groups,[18] the power to prevent the continued operation of businesses not complying with such codes,[19] authority to regulate certain facets of the petroleum industry,[20] and broad rule-making powers to implement the purposes of the Act.[21] In *Panama Refining Co. v. Ryan*,[22] the Supreme Court held that section 9(c) of

13. *Cf.* J. COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 17-18 (1927). Congress "came to see that it could not accomplish alone the aims it was continuously visualizing." As a result, there has occurred "a conscious effort to delegate to the 'expertise' a large portion of the burden which congressmen had been unable to carry because of impolicy or impracticability." *Id.* at 18.

14. *See, e.g.*, Interstate Commerce Act, ch. 104, § 11, 24 Stat. 383 (1887); 49 U.S.C. §§ 1 *et seq.* (1970).

15. *See, e.g., In re* Kollock, 165 U.S. 526 (1897); Field v. Clark, 143 U.S. 649 (1892); Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813). *See generally* DAVIS §§ 2.01-.10. Professor Davis observes that the judicial retreat from the doctrine of non-delegation has occurred in several steps. After recognition of an authority to formulate administrative rules as distinguished from delegation of legislative power, courts opposed delegation which lacked adequate standards to guide administrative actions. *Id.* § 2.01, at 27; see notes 23-33 *infra* and accompanying text. The final phase involved upholding highly ambiguous standards, a development which perhaps rendered meaningless the initial requirement of a standard. DAVIS § 2.01, at 27; see notes 34-40 *infra* and accompanying text.

16. See note 10 *supra*.

17. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The NIRA was intended to stimulate economic growth and employment by direct expenditures on public works, and through cooperation between government and private industry. *Hearings on H.R. 5664 Before the House Comm. on Ways and Means*, 73d Cong., 1st Sess. 91 (1933). *See generally* M. FINKELSTEIN, THE DILEMMA OF THE SUPREME COURT 1-14 (1933); M. GALLAGHER, GOVERNMENT RULES INDUSTRY 4-18 (1934) (discussing Title I of the NIRA).

18. NIRA § 3, 48 Stat. 196 (1933).

19. *Id.* § 4, 48 Stat. at 197. The President was authorized to establish a licensing procedure for industries or trades for which codes of fair competition had been established and (after hearing) to suspend or revoke the licenses of persons refusing to comply with the applicable code, thereby denying them the right to engage in such trade or industry.

20. *Id.* § 9, 48 Stat. at 200.

21. *Id.* § 10, 48 Stat. at 200.

22. 293 U.S. 388 (1935).

the NIRA,[23] which permitted the President to prohibit the transportation of petroleum products produced in excess of state-established quotas, constituted an excessive delegation of authority to the President because it gave him "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[24] The Court's decision was predicated on the finding that Congress had prescribed no standards to guide the President,[25] and it concluded that if section 9(c) were upheld "it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate its lawmaking function."[26]

In *A.L.A. Schechter Poultry Corp. v. United States*,[27] the second important exception to judicial acceptance of legislative delegation, the Supreme Court held that section 3 of the NIRA, which provided for industry and trade promulgation of "codes of fair competition" that "effectuate the policy of this title" to be effective upon presidential approval,[28] was an unconstitutional delegation of legislative

23. 48 Stat. 200 (1933).

24. 293 U.S. at 415.

25. After examining at length other portions of the NIRA from which the President might derive guidance, *id.* at 416-19, the Court concluded: "[t]here is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430.

26. *Id.* at 430. The *Panama* case is also notable for the fact that the two lower courts ruled upon an administrative provision which had been eliminated. Its revocation was unknown to both the plaintiffs and the Government attorneys, and the error was not discovered until certiorari had been granted by the Supreme Court. *Id.* 410-13. This error, embarrassing to all parties, gave impetus to the movement to codify federal regulations. *See* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 367-68 n.29 (2d ed. 1941); Jaffe, *An Essay on Delegation of Legislative Power II*, 47 COLUM. L. REV. 561, 571 (1947).

27. 295 U.S. 495 (1935).

28. 48 Stat. 196 (1933). The standards and other safeguards provided for the guidance of the President (aside from the policy declaration in section 1, see note 30 *infra*), set forth in section 3, were as follows: (1) that the codes be "codes of fair competition"; (2) that the trade associations promulgating the code have no inequitable restriction on membership and be truly representative; (3) that the codes not promote monopolies or monopolistic practices; (4) that the codes not discriminate against small enterprises; and (5) that there be a right to a hearing prior to approval of the code for persons not within the trade or industry who would be affected by it. NIRA § 3(a), 48 Stat. 196 (1933).

Section 3 authorized the President to impose such conditions as he deemed necessary (*e.g.*, requiring reports and financial statements) to protect the public interest, as a condition of code approval. In addition, the President was authorized to impose codes on his own initiative, after a hearing, if "abuses inimical to the public interest and contrary to the policy herein declared" were present. *Id.* § 3(d), 48 Stat. at 196. Violation of the codes constituted a misdemeanor punishable by a fine of $500, each day of violation constituting a separate offense. *Id.* § 3(f), 48 Stat. at 197.

power. It specifically rejected the suggestion that the term "fair competition" could be construed so as to limit the codes to proscribing unfair competition and, indeed, the Government did not contend that the NIRA contemplated such a limitation.[29] The Court also found the "Declaration of Policy"[30] to be too broad to provide proper standards to guide the President, concluding that his "discretion . . . in thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."[31] The *Panama* and *Schechter* decisions are the only cases in which congressional delegations of legislative authority to the executive branch were found to be unconstitutionally excessive. Both cases make it clear that some minimum standards must be legislatively prescribed to guide the President, but leave uncertain the precise degree of specificity required.[32] During World War II Congress again delegated to the President extensive powers to control the economy. The Emergency Price Control Act (EPCA), enacted in 1942,[33] created the Office of Price Administra-

29. 295 U.S. at 531-32. The Court took a similar position with respect to the phrase "unfair methods of competition" which is used in the FTC Act. *Id.* at 533-34. In its analysis the Court also observed that a delegation of legislative power to trade associations was entirely inconsistent with the Constitution. *Id.* at 537. Consequently the decision clearly turned upon the power of the executive to institute the codes.

30. NIRA § 1, 48 Stat. 195 (1933). After declaring a national state of emergency, section 1 (paraphrased below), delineated the following goals:

(1) the removal of obstructions to the free flow of interstate and foreign commerce;

(2) to promote the general welfare through the following means:

(a) cooperative action by industry.

(b) united action by labor and management.

(c) the elimination of unfair competition.

(d) the fullest utilization of productive capacities.

(e) the avoidance of undue restriction of productive capacity, except as temporarily required.

(f) increased consumption of industrial and agricultural products by increasing purchasing power.

(g) reduction of unemployment.

(h) improvement of labor standards.

(i) rehabilitation of industry.

(j) the conservation of natural resources.

31. 295 U.S. at 538-39, 541-42. The Court was also critical of the procedure provided for promulgating the codes, comparing them unfavorably with the more formal methods provided for other administrative agencies. Included in this criticism was a reference to the difficulty of conducting judicial review under the NIRA. *Id.* at 533.

32. Precisely what are the minimum standards can, at best, be inferred only negatively from the numerous faults attributed to the NIRA by the Court in the two decisions. *See generally* E. CORWIN, *supra* note 26, at 120-23.

33. 56 Stat. 23, *as amended, id.* at 765 (1942).

34. EPCA § 201, 56 Stat. 29 (1942). The direction of the Office of Price Administration and authority to make final decisions under the EPCA were vested in a "Price Administrator" appointed by the President.

tion[34] to "establish such . . . maximum prices as . . . will be generally fair and equitable and will effectuate the purposes of this Act."[35] More specific guidance was provided to the Price Administrator as follows:

> So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 . . . .[36]

In *Yakus v. United States*[37] the Court upheld the constitutionality of the EPCA and regulations prescribed pursuant thereto, finding that they did not contain the defects found by the *Panama* and *Schechter* Courts in the NIRA.[38] In *Yakus* the Court described the legislative function as one containing two essentials: (1) the determination of legislative policy; and (2) the formulation and promulgation of that policy as a binding rule of conduct.[39] "These essentials are pre-

35. *Id.* § 2(a), 56 Stat. at 24. The primary purposes of the Act were: "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency . . . ." The foregoing was followed by a recitation of specific evils which might result from uncontrolled inflation intended to be prevented by the Act. *Id.* § 1(a), 56 Stat. at 23-24.

36. EPCA § 2(a), 56 Stat. at 24. Section 2 of the EPCA was applicable only to commodities. Agricultural products were covered under section 3, 56 Stat. 27. When the Act was subsequently amended the President was authorized "to issue [within 30 days] a general order stabilizing prices, wages, and salaries affecting the cost of living . . . on the basis of levels which existed on September 15, 1942." 56 Stat. 765. In addition to changing the base period, this broadened the scope of the EPCA's coverage by permitting the issuance of a comprehensive order rather than an order fixing an individual commodity's price. Further guidance was provided the President as follows: "[t]he President may . . . provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequitites." *Id.* The amendment to the EPCA also contained separate provisions for agricultural products. 56 Stat. 766 (1942). Notably, the EPCA also provided for judicial review by an Emergency Court of Appeals. EPCA § 204, 56 Stat. 31 (1942).

37. 321 U.S. 414 (1944), *discussed in* Note, *Administrative Law: Emergency Price Control Act: Constitutional Delegation of Legislative Powers to Administrative Agencies*, 30 CORNELL L.Q. 504 (1945).

38. 321 U.S. at 424. Interestingly, the Court concluded that the directions that prices should be fixed at a level which is fair and equitable and that they should promote the purposes of the EPCA, see text preceding note 36 *supra*, conferred "no greater reach for administrative determination than the power to fix just and reasonable rates . . . or the power to approve consolidations in the 'public interest.'" 321 U.S. at 427. Compare the term "fair competition" as used in the NIRA. See note 28 *supra*.

39. 321 U.S. at 424-25. The Court indicated that it was no objection that the ascertainment of the fact called "for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework," *id.* at 425, and asserted that "[t]he standards prescribed by the present Act, *with the aid of the* 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise . . . ." *Id.* at 426 (emphasis added).

served," the Court indicated, "when Congress has specified the basic conditions of fact upon whose existence . . . it directs that its statutory command be effective."[40] Accordingly, the Court established the following rule:

> Only if we could say there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . .[41]

The *Yakus* decision, therefore, refined the approach taken in *Panama* and *Schechter* by moving beyond merely finding the legislative standards and evaluating them for sufficiency as guidelines for the executive branch, and toward requiring a formulation of congressional policy precise enough to permit a determination that administrative action was either consistent or inconsistent with that policy. Other judicial decisions on legislative delegation after *Yakus* have, with some exceptions,[42] followed the rationale laid down therein.[43]

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40. *Id.* at 425.

41. *Id.* at 426. If pursued to its logical conclusion, this test would permit the upholding of an administrative scheme under which determining whether the legislative policy had been complied with was *very difficult*, although *not impossible*. It is therefore susceptible to judicial expansion.

42. Of considerable constitutional significance are cases of judicial approval of exercises of extensive regulatory controls without any explicit congressional guidance. *See generally* Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 715 (1969). The leading decision illustrating this phenomenon is *In re* Permian Basin Area Rate Cases, 390 U.S. 747 (1968). The FPC had regulated the rates for sales of natural gas in interstate commerce pursuant to the statutory guideline that they be "just and reasonable," 15 U.S.C. § 717c(a) (1970), on an individual producer basis. After experience indicated that this approach was unworkable, the Commission abandoned it and initiated a program of fixing *maximum rates for each of the major producing areas*, despite the fact that the statute did not appear to contemplate the establishment of *area* rates. In upholding this administrative scheme the Court in *Permian Basin* indicated that in the absence of "compelling evidence" that Congress had intended a narrow construction of the applicable provisions of the Natural Gas Act, 15 U.S.C. § 717 (1970), it would be "unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes." 390 U.S. at 780. Professor Davis concluded that in *Permian Basin* "the whole policy of the government on the particular subject was made by the agency without guidance from Congress." Davis, *supra*, at 715. While this may overstate the case, inasmuch as rates determined on an area basis, so long as appropriate exceptions are permitted by the FPC, may still be "just and reasonable," the *Permian Basin* decision does call into question the need for statutory standards which meet the *Yakus* test. *See also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); American Trucking Ass'n, Inc. v. Atchison, T. & S.F. Ry., 387 U.S. 397 (1967). On the need for requiring clear statutory standards see Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469, 473 (1968).

43. *See, e.g.*, Carlson v. Landon, 342 U.S. 524 (1952) (holding that the delegation of authority under section 20(a) of the Immigration and Naturalization Act to the Attorney General to detain, without bail, aliens who are members of the Communist Party under certain

The next major delegation to the President of extensive powers to control the economy occurred with the adoption of the Defense Production Act,[44] shortly after the beginning of the Korean conflict. It granted the President broad powers to mobilize the economy in support of the war effort,[45] including the power to stabilize wages and prices.[46] The stabilization provisions in the Defense Production Act were set forth in great detail,[47] leaving relatively little doubt concerning the legislative policy to be implemented by the President. It is not, therefore, surprising that no constitutional challenge to the Defense Production Act on the basis of improper delegation reached the Supreme Court.[48]

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conditions, was not unlawful since legislative "policy and standards . . . [were] clear and definite"); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (holding that Title II of the Housing and Rent Act of 1947, 61 Stat. 196, was a valid exercise of the war power and contained standards sufficient to "pass muster under our decisions . . . ."); Bowles v. Willingham, 321 U.S. 503 (1944) (decided the same day as *Yakus*, upholding the constitutionality of the rent control provisions of the EPCA against an attack based on the Act's alleged grant of "unbridled administrative discretion"). *See also* Quincy College & Seminary Corp. v. Burlington N., Inc., 328 F. Supp. 809 (N.D. Ill. 1971). *But see* DAVIS § 2.04 (asserting that the *Yakus* rationale had not been uniformly applied by the Court).

44. 64 Stat. 798 (1950). Portions of the Act, as amended, are still in effect. *See* 50 U.S.C. *Appendix* §§ 2061-68 (1970). No proclamation of emergency was incorporated in the Act, but a presidential proclamation of national emergency still in effect today followed the enactment by several months. Proclamation No. 2194, 15 Fed. Reg. 9029 (1950). For discussion of the Defense Production Act, see Auerbach, *Presidential Administration of Prices and Wages*, 35 GEO. WASH. L. REV. 191, 199 (1966); Correa, *The Organization for Defense Mobilization*, 13 FED. BAR J. 1 (1952) (tracing evolution of President Truman's attitude toward price controls); Note, *The Defense Production Act: Choice as to Allocations*, 51 COLUM. L. REV. 350 (1951).

45. The Act granted the President the authority to determine production priorities, Defense Production Act, Title I, 64 Stat. 799 (1950), requisition supplies and property under certain circumstances, *id.* Title II, 64 Stat. at 799, increase productive capacity by providing financial and other assistance to industry, *id.* Title III, 64 Stat. at 800, stabilize wages and prices, *id.* Title IV, 64 Stat. at 803, promote the settlement of labor disputes, *id.* Title V, 64 Stat. at 812, and impose certain controls on financial credit, *id.* Title VI, 64 Stat. at 812.

46. *Id.* Title IV, 64 Stat. 803. All controls imposed under this title during the Korean conflict were terminated by executive order on Feb. 6, 1953. Exec. Order No. 10434, 18 Fed. Reg. 809 (1953). This title expired on April 30, 1953. 50 U.S.C. *Appendix* § 2166 (1970).

47. Title V, 64 Stat. 812. This title also expired on April 30, 1953. 50 U.S.C. *Appendix* (1970).

48. *See, e.g.*, United States v. Ericson, 102 F. Supp. 376, 386-87 (D. Minn. 1951), *appeal dismissed per stipulation*, 205 F.2d 420 (8th Cir. 1953), wherein the constitutionality of the Defense Production Act was upheld against a due process attack. The most important case involving executive assumption of legislative power during this period was Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which held unconstitutional a presidential order directing the Secretary of Commerce to seize and operate most of the nation's steel mills. The Government, however, did not rely on the Defense Production Act or any other statutory

The Economic Stabilization Act, challenged in *Amalgamated Meat Cutters*, is the most recent in the series of enactments delegating extensive controls over the economy to the President. Unlike its statutory predecessors which resulted from exigencies of a war or economic depression, the ESA was enacted as a preventive measure in response to an increasingly unstable economic situation. Strong inflationary pressures in the economy which had been continuing for several years, combined with the anomaly of a simultaneous partial recession,[49] led Congress, over some objections,[50] to adopt the ESA to provide the President with all the tools[51] it believed necessary to effectively combat such pressures.[52]

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authority to justify this order, *id.* at 585-86, but rather on article II of the Constitution. The Court indicated that the Constitution "refutes the idea that [the President] is to be a lawmaker" and that the order constituted an attempt to legislate which could have been carried out only by Congress. 343 U.S. at 587-88 (opinion of Black, J.).

49. *See generally* H.R. REP. NO. 91-1330, 91st Cong., 2d Sess. 10 (1970); 116 CONG. REC. 7457 (1970); *id.* at 7507 (remarks of Congressman Albert); *id.* at 7512 (remarks of Congressman Reuss). *But see id.* at 7508 (remarks of Minority Leader Ford).

50. H.R. REP. NO. 91-1330, 91st Cong., 2d Sess. 11 (1970). Objections to the ESA on the part of *supporters* of the legislation were centered upon the broad authority the measure would confer upon the President. In reporting H.R. 17880, the Chairman of the House Committee on Rules argued that the controls should be mandatory. Failure to so provide, he argued, constituted an abdication by Congress of its responsibility. 116 CONG. REC. 7457 (1970) (remarks of Congressman Colmer). Interestingly, an amendment to H.R. 17880 was introduced under which a joint committee of Congress would be established to make policy decisions, which would then be implemented by the President. The sponsor of this measure reasoned that its adoption would make "a proper distinction between the legislative and executive functions." *Id.* at 7520 (remarks of Congressman Brown). Proponents of the measure argued that non-mandatory controls were better suited to managing a huge economy and that greater flexibility was needed than existed under price controls during World War II and the Korean conflict.

51. The House bill incorporated the authority to control interest rates under section 202. H.R. 17880, 91st Cong., 2d Sess. (1970). The Senate bill, S. 3302, 91st Cong., 2d Sess. (1970), was silent concerning stabilization measures and was limited to extending the effective period of the Defense Production Act and to providing for establishment of uniform cost accounting procedures for certain defense contracts. 1970 U.S. CODE & CONG. AD. NEWS 3769. In conference, the Senate conferees accepted the entire House measure "except for the deletion of interest rates from the standby controls title." H.R. REP. NO. 1386, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3784. The House conferees accepted the omission of interest rate regulation "because the President was already given standby authority to control interest rates . . . ." *Id.*

52. H.R. REP. NO. 91-1330, 91st Cong., 2d Sess. 10 (1970). In introducing the legislation on the House floor, Congressman Patman referred to the measure as providing "something like a shotgun in the corner." 116 CONG. REC. 7502 (1970). The majority agreed that the President should take stronger measures: "[t]he lesson from history, particularly in the late 1950's, is that economic policies which rely exclusively on fiscal and monetary measures, such as the administration's, lead to unjustified price increases in the concentrated industries long after general demand has slacked off." *Id.* at 7512 (remarks of Congressman Reuss).

In *Amalgamated Meat Cutters*[53] the court relied heavily on the *Yakus* case[54] and adopted the *Yakus* test to ascertain whether the standards prescribed by the Economic Stabilization Act were sufficient to sustain the imposition of the ninety-day wage-price freeze—whether the legislative description of the delegated authority "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[55] In finding that the Act did "sufficiently mark the field" the court took special cognizance of several factors. First, it noted that the statute was precise concerning the minimum level at which prices and wages could be stabilized—at not less than the levels prevailing on May 25, 1970.[56] Second, the court pointed out that the provision prohibiting "stabilization" of a particular industry unless predicated upon a finding that wages and prices had risen disproportionately in that industry,[57] served to narrow the authority conferred upon the President in comparison with that granted by the EPCA,[58] while at the same time clarifying the will of Congress by indicating that Congress preferred an across-the-board imposition of controls.[59] And third, the court concluded that the ESA was fortified by two historical dimensions which gave meaning to the measure. First, the legislative history, as reflected in the pertinent congressional committee reports,[60] made the goals Congress sought to achieve suffi-

53. ___ F. Supp. ___ (D.D.C. 1971). The court assumed at the outset, without discussing the matter, that the case raised a substantial constitutional question so as to justify convening a three-judge court. *Id.* at ___. *Compare* California Teachers Ass'n v. Newport Mesa Unified School Dist., 333 F. Supp. 436 (C.D. Cal. 1971), wherein the court reached precisely the contrary conclusion. The court also concluded it had the requisite equity jurisdiction to warrant a three-judge court, primarily because of the hardship that might otherwise inure to union members if improperly deprived of their wage increases and because of the multiplicity of litigation which would arise.

54. See notes 37-43 *supra* and accompanying text. The court distinguished the *Panama* and *Schechter* cases as having validity "reserved for the extremist instance" and without vigor with respect to the ESA in the context of historical experience with anti-inflation legislation. ___F. Supp. at ___.

55. ___ F. Supp. at ___, *quoting* Yakus v. United States, 321 U.S. 414, 425 (1944). Accordingly, the court points out, the question is not one of the narrowness or breadth of the delegation. A broad delegation of authority, if drawn specifically, would not pose a problem. ___ F. Supp. at ___.

56. ESA § 202(a), 85 Stat. 38 (1971), *as amended*, ESA § 203(a), 85 Stat. 744 (1971).

57. ESA § 202(b), 85 Stat. 38 (1971).

58. ___ F. Supp. at ___.

59. *Id.* at ___.

60. See notes 50-52 *supra*.

ciently clear to compensate for the absence of a declaration of legislative purpose in the ESA.[61] The absence of such a declaration was understandable, the court noted, in view of the fact that the prior laws had been drafted by the executive branch, while the ESA had been drafted and enacted by Congress over the objections of the President.[62] The second clarifying historical dimension was the " 'common lore' of anti-inflationary controls" established by the EPCA, the Defense Production Act, and agency and court decisions made under those acts.[63] While recognizing that the ESA was not intended to duplicate the earlier measures, the court nonetheless indicated that:

> those laws and their implementation do provide a validating context as against the charge that the later statute stands without any indication to the agencies and officials of legislative contours and contemplation.[64]

Thus, the court concluded that "[t]here can be no doubt that in its broad outlines the general freeze ordered by the President [in Executive Order 11615] conforms to the legislative intention."[65]

The foregoing conclusion notwithstanding, the court was unwilling to go beyond the precise issue presented by the case to determine whether such an executive policy could be continued for the duration of the effective period of the ESA.[66] The court did, in fact, add a cautionary note that without the development of administrative standards and procedures to implement fairness and equity, the current policy would "run the risk of betraying the concept of responsible government."[67] Consequently, the court rendered a two-part judgment:

> first, that the statute does at least contain a standard of broad fairness and

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61. The NIRA, EPCA, and Defense Production Act all contained declarations of legislative purpose. See notes 30, 35, and 45 *supra*, respectively, and accompanying texts. This notwithstanding, the court concluded that "[w]hether legislative purposes are to be obtained from committee reports, or set forth in a separate section of the text of the law, is largely a matter of drafting style." ___ F. Supp. at ___.

62. ___ F. Supp. at ___.

63. *Id.* at ___.

64. *Id.* at ___.

65. *Id.* at ___. The court also noted that the interrelation between domestic economic policies and international trade and monetary policy was so close that it enhanced the range of power which could permissibly be delegated to the President. *Id.* at ___.

66. The wage-price freeze was initiated on August 15, 1971. The ESA was to expire on April 30, 1972. ESA § 206, 84 Stat. 900 (1970).

67. ___ F. Supp. at ___. The most serious challenge to the ESA was the charge that it gave the President a "blank check" for internal affairs which in fact permitted him to be unfair and inequitable without transgressing the limits of the statute, particularly since the ESA failed

> avoiding gross inequity,—leaving to the future the implementation of that standard; second, that this statute is not unconstitutional as an excessive delegation of power by the legislature to the executive for the limited term of months contemplated by Congress to follow the initiating general freeze.[68]

The court found authority for the foregoing holding in the recognition in *Yakus* that a congressional delegation to the executive could properly contemplate "the formulation of subsidiary administrative policy within the prescribed statutory framework,"[69] and the fact that in *Yakus* the standards prescribed by the Price Administrator had been taken into account in determining that he had complied with the congressional will.[70]In refusing to hold that the ESA was unconstitutional with respect to the period after the expiration of the ninety-day wage-price freeze, the court determined that the Cost of Living Council was subject to the Administrative Procedure Act,[71] thereby rejecting the Government's contention that judicial review of action taken pursuant to the ESA's authorization could arise only under the measure's enforcement provisions.[72] This provision for judicial review, in the court's view, lessened the possible susceptibility of any future administrative scheme established under the ESA to constitutional

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to provide for a system of administrative and judicial review. The court met this argument, in the first instance, by noting that the ESA did permit the President to make "such adjustments as may be necessary to prevent gross inequities." ESA § 202(a), 85 Stat. 38 (1971). Compare this language with that providing for "fair competition" in the NIRA, note 28 *supra* and accompanying text, and the duty to be "generally fair and equitable" under the EPCA, note 36 *supra* and accompanying text. A second consideration cited by the court was that a broad equity standard is "inherent" in a stabilization program. ___ F. Supp. at ___ Third, the court observed that construing the statute to permit unfairness would be an "extremist" position in view of the ESA's legislative history and the general proposition that statutes should be construed so as to uphold their validity. *Id.* at ___ In this connection the court cited *Permian Basin*, note 42 *supra*, for the proposition that when agencies have enormous regulatory tasks, courts are lenient in construing the underlying statutes so as to take into account what is feasible. And finally, the court observed that "a freeze is always arbitrary to some extent, and . . . such arbitrariness can be sustained *for a relatively short-range initial period.*" *Id.* at ___ (emphasis added).

68. ___ F. Supp. at ___

69. Yakus v. United States, 321 U.S. 414, 425 (1944).

70. ___ F. Supp. at ___

71. *Id.* at ___ In reaching this conclusion the court noted that the Cost of Living Council was "an agency of the United States," *id.* at ___, and that there was no indication that Congress had intended that the APA be inapplicable, let alone the "clear and convincing" evidence of such legislative intent required by Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 140-41 (1967). From its extended discussion of this matter it appears that the court considered this to be of considerable importance.

72. ___ F. Supp. at ___

attack, because "[t]he safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers."[73]

It is difficult to disagree with the decision in *Amalgamated Meat Cutters*, yet the case leaves the impression that Congress would be hard put to contrive a delegation of power that would not be judicially sustained. Several elements of the court's analysis, for example, appear to have stretched the law in the Government's favor. First, while it is undoubtedly accepted practice to refer to the legislative history of a statute to ascertain "legislative contours and contemplation,"[74] the appropriateness of referring to earlier and different legislation for this purpose is more questionable.[75] If Congress had thought this appropriate it could readily have so indicated in a statement of pur-

73. *Id.* at ____ This notwithstanding, the court indicated it had no basis for "speculating" whether subsequent action taken under the ESA would become subject to challenge for failure to provide a means of presenting objections. *Id.* at ____ The court also dismissed several other objections to the ESA not considered in the foregoing analysis. One of these was the delegation to the President of the power to institute wage and price controls at any time of his choosing within the effective period of the ESA. Pointing out that "the legislature may delegate powers that cannot meaningfully be retained . . .," *id.* at ____, the court cited three factors which justified delegation of the timing of any action to be taken to the President: (1) that the President was not in accord with Congress concerning the necessity for such stabilization controls, and could not be compelled to institute them, so that Congress could only provide him with the proper tools in case he should choose to use them, *id.* at ____; (2) that in order to avoid an inflationary spiral immediately prior to the institution of stabilization controls it would be preferable to have the announcement of such policy come without prior publicity, *id.* at ____; (3) that Congress might not be in session at the time the President decided it was necessary to act. *Id.* at ____

The court also held that the failure of the ESA to require a presidential declaration of emergency prior to aeting did not justify holding the ESA invalid because "emergency is instinct in the situation." *Id.* at ____ The court also rejected an attack based on the impairment of contracts caused by the ESA, observing that the impairment of contracts clause was applicable only to the states, U.S. CONST. art. 1, § 10(1), and that the pertinent federal consideration, whether there had been due process of law, would be determined by the administrative policy for implementing the statute. ____ F. Supp. at ____ Finally the court determined that the ESA authorized the application of wage-price freeze to fringe benefits. *Id.* at ____

74. ____ F. Supp. at ____

75. *But see* Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541 (1954), wherein the Supreme Court, in upholding the authority of the government to establish administrative agencies to enforce economic regulations promulgated under the Defense Production Act, read the latter legislation with reference to the Stabilization Act of 1942, 56 Stat. 765. The reasons for so doing in the *Grand Central Aircraft* case, however, are much stronger than in *Amalgamated Meat Cutters*, particularly in view of specific indications in the legislative reports accompanying the Defense Production Act which indicated that the language of the earlier statute was being adopted. 347 U.S. at 550.

pose incorporated in the legislation. Similarly, the conclusion that a "broad equity standard is inherent in a stabilization program"[76] seems strained. Congress could easily have stipulated a duty to be "fair and equitable," and its directive that adjustment be made "to prevent gross inequities"[77] does not quite meet this burden. In this context, it seems appropriate to compare the decision in *Panama Refining Co. v. Ryan*.[78] Surely the authorization in section 9(c) to the President to prohibit the transportation of oil if production exceeded certain state-determined limits could have been construed in a fashion that would have permitted the President to exercise this power only in a fair and equitable manner under even-handed regulations. Thus it seems that, but for the intervention of the *Yakus* decision and the more congenial attitude of the court in *Amalgamated Meat Cutters*, the court could have attained the same result reached in *Panama Refining*. Accordingly, the court's conclusion that *Panama Refining* today has validity only for the extreme instance[79] perhaps understates the case.

On the other hand, the court's careful limitation of its holding to the executive action taken in imposing the ninety-day wage-price freeze is illustrative of the redeeming virtue in the judicial policy of avoiding the unnecessary decision of constitutional issues, for it served to give both the President and Congress the opportunity to mold future action taken to implement stabilization so as to conform with constitutional requirements. Indeed, congressional response to the *Amalgamated Meat Cutters* decision has been swift.[80] In December, 1971, a congressional extension and amendment of the ESA was approved.[81] This new legislation attempts to meet all the objections to the ESA raised in *Amalgamated Meat Cutters*. It indicates both a recitation of congressional findings[82] which justify the measure and a

76. ___ F. Supp. at ___.

77. ESA § 202(a), 85 Stat. 38 (1971).

78. 293 U.S. 388 (1935); see notes 22-26 and accompanying text *supra*.

79. ___F. Supp. at ___.

80. S. REP. NO. 507, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 4007-4036 (Jan. 20, 1972), indicates that Congress specifically had the *Meat Cutters* decision in mind while framing amendments to the ESA. 1971 U.S. CODE CONG. & AD. NEWS at 4008-09.

81. Economic Stabilization Act Amendments of 1971, P.L. No. 92-210, 85 Stat. 743 (1971), *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 3893, 3908 (Jan. 20, 1972).

82. ESA Amendments of 1971 § 202.

detailed national policy statement.[83] It specifies in some detail the standards to be followed by the President in administering the ESA,[84] including the duty to "be generally fair and equitable."[85] The amended ESA also provides explicitly for the administration of the stabilization program.[86] Interestingly, the amendments provide that the APA, with the exception of the rulemaking and public information provisions, shall not be applicable to the ESA.[87] Nonetheless, it does incorporate detailed provisions for judicial review,[88] thereby meeting the *Amalgamated Meat Cutters* dictum that effective judicial review is essential. In summary, it may be said that *Amalgamated Meat Cutters* is a case in which the judiciary rendered substantial assistance to Congress and the President in outlining the contours necessary for proper legislation.

II. FREEDOM OF INFORMATION

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT

Definition of "Agency"

The Freedom of Information Act[1] (FOIA) addresses itself to "each agency"[2] and in 1971 the courts for the first time attempted to define that term.[3] Although it is clear that major units, such as the

83. *Id.* § 4.

84. *Id.* § 203.

85. *Id.* § 203(b)(I).

86. *Id.* §§ 207(b)-(c).

87. *Id.* § 207(a). The portions of the APA which are applicable are: 5 U.S.C. § 552 (1970) (public information, agency rules, opinions, orders, records, and proceedings); *id.* § 553 (rule making); and *id.* § 555(e) (providing for prompt notice of denial of a written application).

88. Economic Stabilization Act Amendments of 1971, §§ 210-11, 1971 U. S. CODE CONG. & AD. NEWS at 3899. Persons suffering "legal wrong" under the Act are authorized to seek redress in any district court, regardless of the amount in controversy. ESA Amendments of 1971 § 210(a). Exclusive appellate review is vested in a new Temporary Emergency Court of Appeals. *Id.* § 211(b). The Supreme Court may grant review by writ of certiorari. *Id.* § 211(g).

1. 5 U.S.C. § 552 (1970). For a discussion of the general operation of the Freedom of Information Act see *1970 Duke Project* 164-65 and *1969 Duke Project* 72-76. *See also* DAVIS (Supp. 1970) § 3A.

2. "Each agency shall make available to the public information as follows . . . ." 5 U.S.C. § 552(a) (1970).

3. International Paper Co. v. FPC, 438 F.2d 1349 (2d Cir. 1971); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).