

September 14, 2022

Dear Workshop participants,

Thank you for taking the time to reach this article. I look forward to discussing it with you. I first came to this topic after encountering the Emergency Court of Appeals while researching the administrative state during World War II. Having put it aside for a few years during the pandemic, I am now looking to polish it and submit it to peer reviewed journals in legal history. I have some space to expand and would welcome your thoughts on areas where you would appreciate more detail or analysis, as well as any and all feedback.

Thanks again,  
Catherine Baylin Duryea

**“Crumbs of Judicial Relief”?  
Judicial Review of Price Control during Wartime**

Catherine Baylin Duryea\*

Facing the threat of ruinous inflation during World War II, Congress empowered the Office of Price Administration (OPA) to enact an extensive system of price controls and rationing. The Emergency Court of Appeals (ECA) was a specialized court established to adjudicate disputes arising from these regulations. This court heard hundreds of cases and served as the judicial watchdog for one of the most important wartime agencies, but we know little about how it operated or the extent to which it deferred to OPA. Given the central importance of OPA, the ECA is a window into wartime views of the appropriate role of courts in checking administrative action. Both the President and the judges appointed to the ECA considered the threat of inflation too significant to allow individual injustices or mistakes to hinder the effectiveness of the system as a whole. The ECA only intervened when OPA acted egregiously, particularly when the results were grossly unfair, but it was not willing to disrupt the system of price controls. The judges selected for the court were predisposed to be deferential to OPA; they supported administrative agencies, accepted the prevailing economic wisdom, and were acutely aware of their own role in preserving a strong economy during wartime. Studying this highly deferential court helps uncover the move towards greater agency oversight that occurred between the 1930s and 1950s. But even more crucial is the insight this study provides into the current tendency to focus overwhelmingly on the standard of review when evaluating judicial oversight of administrative agencies. The story of the ECA suggests that other considerations – structure, staffing, and political culture – remain equally, if not more, important.

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“Illegal, absurd, useless, and conflicting.”<sup>†</sup> These were just some of the words Congress had in November 1943 for regulations promulgated by the Office of Price Administration (OPA) to limit inflation during World War II. The Roosevelt administration had established an extensive system of price controls and rationing to combat the threat of inflation brought about by massive wartime spending. Several agencies were involved, but the Office of Price Administration was at the forefront. At its height, OPA regulated the prices of consumer goods from meat to gasoline. It set rental prices for properties in large portions of the country. OPA utilized local boards and relied on tens of thousands of volunteers.<sup>‡</sup> The agency extended the reach of the federal government into daily life to an unprecedented level. Its sheer scope made it central to the war effort, but it also became a target for members of Congress who opposed the expansion of executive agencies.

World War II was a formative period in the creation of the modern administrative state.<sup>§</sup> New agencies, like OPA, were tasked with overseeing an enormous expansion of executive control over the economy. These wartime agencies were rooted in both the exigent circumstances of total war and the economic philosophies that drove the New Deal. But the expansion of executive power under the New Deal had already raised concerns about government overreach. Roosevelt’s court-packing plan had only increased allegations of totalitarianism. The outbreak of war changed the political calculus, but even New Deal supporters began to recognize that the agencies had too much un-checked power.<sup>\*\*</sup>

<sup>†</sup> Smith Commission, Second Intermediate Report, 20.

<sup>‡</sup> Meg Jacobs, “How About Some Meat?”: *The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941-1946*, 84 J. AM. HIST. 910, 911 (1997).

<sup>§</sup> Mariano-Florentino Cuellar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1346 (2013-2014); Reuel Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in TOTAL WAR AND THE LAW 185, 185 (Daniel Ernst and Victor Jew, eds., 2002).

<sup>\*\*</sup> Schiller, *supra* note 3, at 191.

Roosevelt and the architects of the wartime agencies faced a conundrum. In order to ensure adequate production of necessities from munitions to housing, they needed to expand economic regulation into nearly every commercial transaction in a way that satisfied internal and external demands for accountability. Given its central importance, judicial oversight of OPA is a window into contemporaneous views of the appropriate role of courts in checking administrative action. But the experience of judicial review during the war also helps clarify the move towards greater agency oversight that occurred between the 1930s and 1950s. Reuel Schiller has identified three features of the wartime experience that explain this shift: a fear of totalitarianism, the performance of wartime agencies, and a move towards using fiscal policy to control the economy.<sup>††</sup> The successful, if limited, record of judicial oversight during the war factored into evaluations of the performance of wartime agencies.

The House Select Committee to Investigate Executive Agencies (the “Smith Committee”), which authored the report quoted above, complained that OPA exceeded the scope of its authority. In addition to trampling individual rights, the Committee contended, OPA had usurped the authority of both Congress and the courts. The agency “assumed unauthorized powers to legislate by regulation and has, by misinterpretation of acts of Congress, set up a Nation-wide system of judicial tribunals through which this executive agency judges the actions of American citizens...depriving them in certain instances of vital rights and liberties without due process of law.”<sup>‡‡</sup> Lest this relatively dry language obscure the true feelings of the Committee, it went on to lament the “intricate and involved administrative review machinery”

<sup>††</sup> *Id.* at 185.

<sup>‡‡</sup> Smith Commission, *supra* note 1, at 2.

that left citizens “completely bewildered” before affording them the opportunity to access “a court which will grant them only the crumbs of judicial relief.”<sup>§§</sup>

The court in question, the Emergency Court of Appeals (ECA), was a specialized court established to adjudicate disputes arising from OPA regulation. This court heard hundreds of cases and, after its first year of operation, travelled around the country to literally bring administrative justice to the people. Aggrieved landlords, meat processors, and other producers brought their claims before the ECA after going through a lengthy internal process at OPA. Six men drawn from the federal bench decided all ECA cases during its twenty-year history. The court was the judicial watchdog to one of the most important wartime agencies and an important institution in the history of administrative law. But we know little about how it operated or the extent to which it deferred to the Price Administrator on questions of fact, statutory interpretation, agency procedure, or constitutional law.

Just as OPA had roots in the New Deal and left a post-war legacy,<sup>\*\*\*</sup> so too did the ECA. The court provided meaningful review of OPA action, but the threat of inflation was considered too significant to allow individual injustices or mistakes to hinder the effectiveness of the system as a whole.<sup>†††</sup> Preventing inflation was considered a matter of national security.<sup>‡‡‡</sup> In the beginning of the war, the ECA rarely found against the Price Administrator, and it was not until April 1944 that the court found any significant error in the way OPA was making decisions.<sup>§§§</sup> Thereafter, however, the court regularly ruled in favor of producers and against OPA. It limited

<sup>§§</sup> *Id.*

<sup>\*\*\*</sup> Jacobs, *supra* note 2, at 911.

<sup>†††</sup> United States Gypsum Co. v. Brown, Price Administrator, 137 F.2d 803, 807 (“When Congress committed to the Price Administrator the stupendous task of checking excessive price rises and inflationary tendencies in times of war, it obviously did not intend to limit the effectiveness of a broad program simply because an individual seller would suffer curtailment of its profits or income.” *See also* Chatlos v. Brown, 136 F.2d 490, 495 (1943) Lakemore Co. v. Brown, 137 F.2d 355 (1943).

<sup>‡‡‡</sup> *Roosevelt Statement*, N.Y. TIMES, Jan. 31, 1942, at 26.

<sup>§§§</sup> *See* Smith v. Bowles Price Administrator, 142 F.2d 63 (1944); Flett v Bowles Price Administrator, 142 F.2d 559 (1944).

and defined the scope of rents and prices that fell under OPA's mandate.<sup>\*\*\*\*</sup> It required the Administrator to re-consider cases based on additional facts.<sup>††††</sup> And it occasionally found that the Administrator had made a decision that was arbitrary and capricious.<sup>††††</sup> The ECA fulfilled its limited role as established by Congress by restraining OPA from acting wantonly without significantly interfering with its system of price regulation. Contrary to Congressional allegations at the time, and more recently scholarly interpretations,<sup>§§§§</sup> the ECA was not a rubber stamp. Ultimately, however, the ECA was set up to facilitate the expansion of government regulation into wide swaths of the economy, not to prevent it.

### *The Menace of Inflation and the Emergency Price Control Act of 1942*

To President Roosevelt and many of his policymakers, the threat of inflation was no less real than the threat of military attack. “Nothing could better serve the purposes of our enemies,” Roosevelt said, “than that we should become the victims of inflation.”<sup>\*\*\*\*\*</sup> Inflation was a complex problem, calling for a multi-faceted effort. Months before the attack on Pearl Harbor, the Roosevelt administration laid the groundwork for wartime anti-inflationary regulations. By executive order on April 11, 1941, the President created the Office for Price Administration and Civilian Supply within the Office for Emergency Management.<sup>††††</sup> In August, the civilian supply function was transferred to another agency and the name shorted to the Office for Price Administration.<sup>††††</sup> After the United States entered the war, Congress provided statutory

<sup>\*\*\*\*</sup> See e.g., *Automatic Fire Alarm Co. et al. v. Bowles*, Price Administrator, 143 F.2d 602 (1944); *Adams, Rowe & Norman, Inc. et. al. v. Bowles*, 144 F.2d 357 (1944).

<sup>††††</sup> See e.g., *Homewood Development Co. v. Bowles*, 148 F.2d 850 (1945); *Hawaii Brewing Corp. v. Bowles*, 148 F.2d 846, (1945).

<sup>††††</sup> See e.g., *Flett v. Bowles*, Price Administrator, *supra* note 10.

<sup>§§§§</sup> James Conde & Michael Greve, *Yakus and the Administrative State*, 42 Harv. J. L. and Public Policy 808-870.

<sup>\*\*\*\*\*</sup> Statement on Signing the Emergency Price Control Act of 1942 (Jan. 31, 1942) (<https://www.presidency.ucsb.edu/node/210140>).

<sup>†††††</sup> Exec. Order No. 8734 6 F.R. 1917 (1941).

<sup>†††††</sup> Exec. Order No. 8875 6 F.R. 4483 (1941).

authorization for OPA in the Emergency Price Control Act of 1942 (EPCA).<sup>§§§§§</sup> The statute gave price regulations teeth by authorizing penalties for violations. It also created the ECA, outlining a formal process for judicial review of agency action.

The EPCA empowered the Price Administrator to regulate prices and rents in order to stabilize prices and prevent speculation.<sup>\*\*\*\*\*</sup> Before setting a maximum price for commodities, the Act required the Administrator to find that prices “have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of the Act.” At that point, he could set a maximum price that would “be generally fair and equitable.”<sup>†††††††</sup> However, this requirement was relaxed on April 28, 1942 with the issuance of the General Maximum Price Regulation, known as the General Max.<sup>†††††††</sup> The General Max authorized the Administrator to set a ceiling on the prices of all commodities, with some exceptions, using prices charged in March 1942 as a benchmark.<sup>§§§§§§§</sup> The Administrator was also empowered to freeze rents at the rate prevailing on April 1, 1941 in any geographic area where the rent had increased due to defense-related activities.<sup>\*\*\*\*\*</sup> Landlords could petition for relief under several grounds.

The EPCA included few guidelines for how the Administrator was to make decisions. He was obligated to “advise and consult with representative members of the industry which will be affected” only “so far as practicable.”<sup>†††††††††</sup> Each regulation or order was to be “accompanied by a statement of the considerations involved in the issuance of such regulation or order.”<sup>†††††††††</sup> But beyond these minimal requirements, the Price Administrator enjoyed wide latitude to make

<sup>§§§§§</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

<sup>\*\*\*\*\*</sup> *Id.* § 1(a), 56 Stat. at 23-4.

<sup>†††††††</sup> *Id.* § 2(a), 56 Stat. at 24.

<sup>†††††††</sup> 7 F.R. 3153 (1942).

<sup>§§§§§§§</sup> See U.S. DEPT. OF LABOR, THE GENERAL MAXIMUM PRICE REGULATION 9-11 (1946) (discussing the inadequacies of selective price regulation and the decision to switch to a broader price ceiling).

<sup>\*\*\*\*\*</sup> Emergency Price Control Act, *supra* note 18, § 2(b), 56 Stat. at 25.

<sup>†††††††††</sup> *Id.* § 2(a), 56 Stat. at 25.

<sup>†††††††††</sup> *Id.*

determinations as he saw fit. The Act established a procedure through which individuals could challenge a price or rent regulation.<sup>§§§§§§§§</sup> Originally individuals had only 60 days to file a protest, but the Stabilization Act of 1944 amended that portion of the Act to allow a protest “at any time.”<sup>\*\*\*\*\*</sup> The 1944 Act also introduced some reforms to the procedure within OPA that increased the number of protests and reduced the penalties assessed for price violators.<sup>††††††††</sup> Roosevelt was concerned that the reforms would “make it somewhat harder to hold the line” on price controls but still signed the bill.<sup>††††††††</sup> The Administrator had 30 days to respond to a challenge, after which the complainant could appeal to the Emergency Court of Appeals if the protest was denied.

The review process was designed to favor the Price Administrator and facilitate the continued operation of price controls, including those facing a legal challenge. Even the amendments in 1944, which gave petitioners greater access to review both within OPA and at the ECA, did not significantly impede the agency. The ECA could not grant any interlocutory relief. The court could only set aside regulations which were “not in accordance with law” or “arbitrary or capricious.”<sup>§§§§§§§§</sup> The standard of review common.<sup>\*\*\*\*\*</sup> But what made the ECA deferential to agency action was not its standard of review, but the structure of the court itself and the disposition of the judges who staffed it. The court had “*exclusive jurisdiction* to set aside such regulation order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding.”<sup>††††††††††</sup> In other words, OPA orders could not be challenged in district

<sup>§§§§§§§§</sup> *Id.* § 203(a), 56 Stat. at 31.

<sup>\*\*\*\*\*</sup> See *Utah Junk Co. v. Porter* 66 S. Ct. 889 (1946).

<sup>††††††††</sup> FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1944-45 VOLUME, VICTOR AND THE THRESHOLD OF PEACE: COMPILED WITH SPECIAL MATERIAL AND EXPLANATORY NOTES BY SAMUEL I. ROSENMAN* 47 (1945).

<sup>††††††††</sup> Roosevelt, “Statement of the President on Signing the stabilization Act. June 30, 1944,” in *id.* at 46.

<sup>§§§§§§§§</sup> Emergency Price Control Act, *supra* note 18, § 204(b), 56 Stat. 23.

<sup>\*\*\*\*\*</sup> JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL XX* (2012).

<sup>††††††††††</sup> *Id.* (emphasis added).



courts. Enforcement proceedings, however, could be brought by the government in district courts. Criminal enforcement actions against alleged price violators could proceed even as disputes worked their way through OPA's administrative process and eventually to the ECA. This meant that a producer could be fined, or even jailed, for violating a price regulation that might eventually be found unlawful by the ECA.\*\*\*\*\*

### *Exclusive Jurisdiction*

Granting the ECA exclusive jurisdiction arguably promoted consistency and ensured a universal, national approach to price controls. This element of the statute, which one contemporaneous scholar called "one of the most controversial legal features of wartime price and rent control,"\*\*\*\*\* was highly contested. It left the ECA was answerable only to the Supreme Court, which rarely intervened to overturn its decisions.\*\*\*\*\* District courts were stripped of jurisdiction to hear claims about the validity of regulations themselves, but they were called on to oversee enforcement efforts, bringing the operation of OPA into their gambit. Their decisions reflected a range of viewpoints on the constitutionality of this structure revealing that Roosevelt was correct to worry that the judiciary might not uniformly embrace the EPCA.

Many judges supported the exclusive jurisdiction of the ECA, particularly early in the war. In 1942, Judge Hopkins of the District Court of Kansas stated "[t]hat rent control is necessary to the effective prosecution of the war effort is not open to doubt...If the Act is an appropriate means to a permitted end there is little scope for the operation of the Due Process

\*\*\*\*\* Yakus v. United States 321 U.S. 414, 468 (Rutledge, J., dissenting)("Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so.") See also Conde & Greve, *supra* note 14.

\*\*\*\*\* John Willis, *The Federal Housing and Rent Act of 1947*, 47 COLUMBIA L. REV. 1118, 1148 (1947).

\*\*\*\*\* See e.g. *Davies Warehouse Co. v. Brown*, 320 U.S. 713 (1943); *Utah Junk Co. v. Bowles*, 326 U.S. 710 (1945); *Thomas Paper Stock Co. v. Porter*, 328 U.S. 50 (1946); *Collins v. Porter*, 328 U.S. 46 (1946); *Parker v. Fleming*, 329 U.S. 531 (1947).

Clause.”<sup>††††††††††</sup> Judge Nodbye in Minnesota agreed: “This is not a peace time statute. Congress was confronted with a war emergency, and it is generally recognized that broad delegation may be permitted under such circumstances.”<sup>††††††††††</sup> Many judges, like policy makers, were convinced of the perils of inflation and the courts’ role in curbing them.<sup>§§§§§§§§§§</sup> Overall, federal district courts were deferential to OPA. Out of 64 cases,<sup>\*\*\*\*\*</sup> they only ruled against the Office of Price Administration 17 times.<sup>††††††††††</sup>

Many judges upheld the EPCA as a *wartime* measure, either explicitly or implicitly arguing that it would not be constitutional during peacetime. In 1943 Judge Conger of the Southern District of New York noted that the Act was “drastic” and that “perhaps at another time would shock our sense of justice. At another time we might very well feel the Act to be an unlawful interference with property rights. However, this is a war measure. It is a valid exercise of the war power of the Congress as a part of the war time anti-inflation program.”<sup>††††††††††</sup> That

<sup>††††††††††</sup> Henderson v. Kimmel, 47 F. Supp 635, 644 (D. Kan. 1942).

<sup>††††††††††</sup> United States v. C. Thomas Stores, Inc., 49 F. Supp 111 (D. Minn. 1943); United States v. Tire Center, Inc., (D. Del. 1943).

<sup>§§§§§§§§§§</sup> See, e.g., Bowles v. Ward, 65 F. Supp. 880 (W.D. Pa. 1946) (reasoning that courts bear some of the burden of the war against inflation and should not administer the Act “grudgingly”).

<sup>\*\*\*\*\*</sup> [Describe search methodology that identified these cases.]

<sup>††††††††††</sup> Farmers’ Gin Co. v. Hayes, 54 F. Supp. 47 (W.D. Okla. 1943)(holding that Administrator does not have jurisdiction to regulate public utilities); Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944) (district court has jurisdiction over public utilities); Hecht Co v. Bowles, 321 U.S. 321 (1944) (holding that district courts have discretion to order injunctions); Payne v. Griffin, 51 F. Supp. 588 (M.D. Ga. 1943) (holding that that Rent Regulation was unconstitutional); United States v. Pepper Bros., 53 F. Supp 163 (D. Del. 1943) (holding Regulation did not apply retroactively) *rev’d*, 142 F.2d 340 (3d. Cir. 1944); Brown v. Nuway Laundry Co., 52 F. Supp. 498 (W.D. Okla 1943) (denying injunction because regulation’s effect was inequitable) *rev’d sub nom* Bowles v. Nu Way Laundry Co., 144 F.2d 741 (10th Cir. 1944); Bowles v. Sue’s Shop, 53 F. Supp. 824 (W.D. La. 1944) (denying injunction until case heard on merits); Bowles v. Swift & Co., 56 F. Supp. 679 (D. Del 1944)(denying preliminary injunction); Bowles v. W. T. Grant Co., 53 F. Supp. 659 (vacating preliminary injunction); Bowles v. Chas. A. Krause Milling Co., 62 F. Supp. 244 (S.D.N.Y. 1944)(denied plaintiff administrator’s motion to strike answer because administrator had burden to prove maximum price regulation governed sale); Bowles v. American Distilling Co., 62 F. Supp. 20 (S.D.N.Y. 1945)(granted motion to dismiss fraud claim because Administrator does not have capacity to bring common law action for deceit); Bowles v. Albert Glauser, Inc., 61 F. Supp 839 (E.D. Mo. 1945) (denying Administrator’s motion for injunction); Bowles v. Richards, 63 F. Supp 946 (D. Or. 1945); Bowles v. Van Der Loo 71 F. Supp. 242 (D.D.C 1945) (denying motion for damages); Bowles v. Weiss, 66 F. Supp. 366 (W.D. Pa. 1946) (denying Administrator’s motion for injunction)); United States v. Sagner, 71 F. Supp. 52 (D. Or. 1942) (dismissing indictment) *rev’d sub nom* 331 U.S. 701 (1947; Woods v. Golt, 85 F. Supp. 667 (D. Del. 1949) (denied plaintiff’s motion for summary judgement and finding that Administrator’s interpretation of Regulation were inapplicable to facts of case).

<sup>††††††††††</sup> Brown v. Liniavskl, 53 F. Supp. 513 (S.D.N.Y. 1943).

same year, in a decision upholding the constitutionality of the Act, Judge Leahy of Delaware observed that “whether a particular statute, or a regulation promulgated thereunder, satisfies constitutional requirements depends upon its reasonableness under circumstances of emergency. Obviously, war may so change circumstances as to make reasonable regulation which could never be justified in peace time.”<sup>§§§§§§§§§§</sup> These judges had concerns about the Act but were willing to uphold it because of the emergency circumstances.

Not every judge was so sanguine. Judge Deaver of the District Court of Georgia made his disdain for OPA decision-makers clear: “It is easy for government agencies, some of which apparently are opposed to any limitation of their powers and are impatient of all constitutional restrictions, to admit the limitations stated in the Constitution and then to ridicule the idea that their powers are affected by them.”<sup>\*\*\*\*\*</sup> Deaver went on to hold the rent provision in the Act was unconstitutional because the Administrator had discretion to fix rents without providing notice, a hearing, or express findings of fact.<sup>††††††††††</sup> Deaver further held that the district court was, in fact, bound to consider the validity of a rent regulation before enforcing a money judgment against a landlord—despite the EPCA granting exclusive jurisdiction to the ECA.

Deaver was writing in 1943, a year before the Supreme Court intervened on this issue in *Yakus v. United States*.<sup>††††††††††</sup> Albert Yakus faced criminal prosecution for selling cuts of beef above the maximum price. He had not challenged the regulation within the prescribed 60 days, and the Supreme Court found that this barred him from raising it as a defense to the criminal charges.<sup>§§§§§§§§§§</sup> The limited window for challenges, combined with the jurisdictional limits,

<sup>§§§§§§§§§§</sup> *United States v. Tire Center, Inc.*, (D. Del. 1943).  
<sup>\*\*\*\*\*</sup> *Payne v. Griffin*, 51 F. Supp. 588 (1943).  
<sup>††††††††††</sup> *Id.* at X.  
<sup>††††††††††</sup> *Yakus v. United States* 321 U.S. 414.  
<sup>§§§§§§§§§§</sup> *Id.* at 670 (“The provisions of § 204 (d), conferring upon the Emergency Court of Appeals and this Court ‘exclusive jurisdiction to determine the validity of any regulation or order,’ coupled with the provision that ‘no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation,’ are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's

ensured that the system of price controls would face minimal judicial disruption. But it also made it possible for a producer to innocently believe he was correctly interpreting a regulation and let the 60-day window lapse, only to find that regulation enforced against him with no further opportunity to challenge its validity because his access to the internal review mechanism and the ECA was time barred. As a small producer, Yakus may have been exceptionally affected by the price ceiling which, while perhaps reasonable for a larger producer, could have put him out of business.\*\*\*\*\*

This potential injustice raised the ire of at least one federal judge. After the end of the war, Judge McColloch of Oregon issued several fiery opinions condemning the exclusive jurisdiction of the ECA during peacetime††††††††††—though he was no fan of the agency during the war, either.†††††††††† Writing just after the Japanese surrender, McColloch did not mince his words:

In my judgment, there is serious doubt of the constitutionality of the provision in the Price Control Act that the validity of a price control order or regulation may not be considered in any court other than the Emergency Court of Appeals. The provision was upheld by the Supreme Court as a wartime measure, but now that peace has returned, the subject may properly be reexamined. Even as a wartime measure *the provision was one of the most extreme in the history of the American judiciary.*§§§§§§§§§§

McColloch objected to the difficulty and expense of bringing claims to Washington D.C., though it is not clear if he was aware that the ECA judges travelled.\*\*\*\*\* But even if that particular concern was moot, McColloch noted that most litigants were, effectively, unable to access to the ECA. Of the thousands or tens of thousands of orders issued by OPA, only a small fraction reached the court. McColloch cited the small number of cases as evidence that, contrary regulation or order as a defense to a criminal prosecution for its violation.”)

\*\*\*\*\* See Conde and Greve, *supra* note 14, at 841.

†††††††††† See Bowles v. West Side Lumber Co., 72 F. Supp. 218 (1945); Bowles v. Richards, 63 F. Supp. 946 (1945); United States v. Sagner, 71 F. Supp. 52 (1947); Bowles v. Levy, 66 F. Supp. 97 (1946).

†††††††††† [Add cite to the 1942 case.]

§§§§§§§§§§ Bowles v. West Side Lumber Co., *supra* note 49, at X (emphasis added).

\*\*\*\*\* *Id.*

to its stated purpose of increasing consistency across the country, the exclusive jurisdiction of the ECA actually led to greater variation. OPA orders were issued locally from regional offices, so without robust oversight from the federal courts there was no external way to verify that these orders were consistent.\*\*\*\*\*

While many judges shared the administration’s perspective, a few judges with contrary opinions could have disrupted the system of price controls in some areas of the country. Even if temporary, these disruptions could have had national effects. Even judges who upheld and enforced the Act had some misgivings about its constitutionality after the war. And the few who openly opposed the Act could have introduced inconsistency into how it was applied in different parts of the country—though, as McColloch pointed out, it is not entirely clear that funneling cases through the ECA resolved that problem for the producers and landlords regulated by the Act. Nevertheless, McColloch and other federal judges who were skeptical of validity of some OPA orders did not have the opportunity to overturn those orders; that authority was reserved for a small number of men hand-picked by the Chief Justice of the Supreme Court. Granting the ECA exclusive jurisdiction arguably promoted consistency, but it also concentrated decision-making power into a few, friendly hands. The judges of the ECA were in agreement that this was the only workable way to proceed due to the complexity of the price regulation scheme.\*\*\*\*\*

### *Formation of the ECA*

\*\*\*\*\* Bowles v. Richards, *supra* note 49, at X (“the Emergency Court of Appeals received appeals in ninety-three cases during the fiscal year 1944-1945, while twenty-eight thousand cases were filed in the Federal District Courts alone by OPA. What appreciable effect could ninety-three decisions by the Emergency Court have towards obtaining uniformity in twenty-eight thousand cases?”)

\*\*\*\*\* Francis Byron, *The Court Goes to the People*, THE PHIL. REC., Sept. 25, 1944

The EPCA tasked the Chief Justice with nominating members of the federal bench to the ECA.<sup>§§§§§§§§§§§§§§§§</sup> Harlan Fiske Stone, who Roosevelt had elevated from Associate to Chief Justice in July 1941, had been a reliable supporter of New Deal legislation and a firm believer in judicial restraint.<sup>\*\*\*\*\*</sup> Stone's deference to the other branches perhaps led him to join in the most infamous Supreme Court opinion of the twentieth century and support the internment of Japanese Americans.<sup>††††††††††††††††</sup> It also certainly informed his decision of who to ask to serve on the ECA. Stone initially tapped Fred M. Vinson of the D.C. Court of Appeals to be Chief Judge. Albert B. Maris of the Third Circuit and Calvert Magruder of the First Circuit filled the remaining two seats. There was remarkably little turnover among the judges on the court. With the exception of Vinson, who left the judiciary after a year,<sup>\*\*\*\*\*</sup> each judge remained on the ECA until his death or its dissolution.

The initial ECA appointees were known New Dealers. After his brief stint as Chief Judge, Vinson left the judiciary to serve as Director of the Office of Economic Stabilization, a position he held for two years before President Truman appointed him Secretary of the Treasury. Before serving on the ECA, Vinson had a varied career in government. He was elected to the House of Representatives in 1924 and again in 1930, where he served until 1937 when President Franklin Roosevelt appointed him to the Court of Appeals. Calvert Magruder had direct experience with New Deal agencies. He served as Counsel for the National Labor Relations Board from 1934 to 1935 and General Counsel for the Wage and Hour division of the Department of Labor from 1938 to 1939. In a summary of his career printed in 1947, the American Bar Association Journal noted that he also contributed to the Wagner Act and wrote

<sup>§§§§§§§§§§§§§§§§</sup> Emergency Price Control Act, *supra* note 18, § 204(c), 56 Stat. 23.

<sup>\*\*\*\*\*</sup> *See, e.g.,* United States v Butler, 297 U.S. 1 (Stone, J., dissenting). Justices Stone, Brandeis, and Cardozo formed a reliable voting bloc in favor of New Deal legislation. *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

<sup>††††††††††††††††</sup> Korematsu v. United States, 323 U.S. 214 (1944).

<sup>\*\*\*\*\*</sup> Vinson replaced Stone as Chief Justice of the Supreme Court in 1946.

several regulations and interpretations for the Wage and Hour division. “And when not teaching, he had been identified with measures which many of the Bar regarded as the most extreme examples of New Deal legislation.”<sup>§§§§§§§§§§§§§§§§</sup> Judge Maris, who replaced Vinson as Chief Judge in 1943, did not have a background specifically working within government agencies, but he was active in Democratic politics. Three other jurists were later appointed to the court. James Bolitha Laws of the District Court for the District of Columbia joined in 1943. Walter C. Lindley of the Eastern District of Illinois, and later the Seventh Circuit, joined in 1944. Thomas Francis McAllister of the Court of Appeals for the Sixth Circuit joined in 1945. All three had worked in private practice before becoming judges.

Once the court was filled, OPA lawyers wasted no time using their influence to shape its rules. Just days after the judges were appointed, OPA General Council David Ginsburg contacted them with a draft version of the rules of procedure. OPA also prepared a version of the legislative history of the EPCA for the court. The judges met on their own to draft and debate rules of procedure, but Ginsburg and his associate Nathan Nathanson reviewed the rules with Chief Judge Vinson.<sup>\*\*\*\*\*</sup> While they were preparing the rules, Vinson hurried to hire a clerk for the court, anticipating a “flood of protests.”<sup>††††††††††††††††††††</sup> The flood, however, never materialized. Both Maris and Magruder attributed the low caseload to patriotism and a shared belief in the value of price controls.<sup>\*\*\*\*\*</sup> They believed that both the bureaucrats in OPA

<sup>§§§§§§§§§§§§§§§§</sup> Calvert Magruder: Senior Circuit Judge—First Circuit, 33 AMERICAN BAR ASSOCIATION J., 671 (1947).

<sup>\*\*\*\*\*</sup> Vinson Archive, University of Kentucky Archive, 11464.107-1, at 3-5.

<sup>††††††††††††††††††††</sup> Letter from Judge Vinson to Paul Kelley, Apr. 25, 1942, Vinson Archive, University of Kentucky Archive, 11464.107-5, at 7.

<sup>\*\*\*\*\*</sup> Calvert Magruder, University of Wisconsin Law School address, May 8, 1959, Magruder Papers, Harvard Law School Archive, 42-24 (noting that the small number of cases “may be attributed to a sense of responsibility on the part of the so-called ‘bureaucrats’ administering the statutory price control program and to a recognition by the American people of the necessity, in time of war, for them to submit to such a regime”); Byron, *supra* note 36 (quoting Maris as saying that “[t]he impression I gather in traveling over the country is nearly everyone accepts price control as vitally necessary during wartimes. This is borne out by the fact that since the Court was founded, two years ago, only 160 cases have been filed”).

and everyday citizens were moved to avoid court battles over such an important element of the war effort. However, cost and bureaucratic hurdles probably played a role in discouraging additional cases.

### *Caseload*

Though the ECA’s docket began as more of a trickle than a flood, the court decided nearly 350 cases over its two decades. Most of these opinions were handed down after the war formally ended. Many of these post-war decisions dealt with lingering wartime disputes, and some were a result of a slight expansion of the court’s jurisdiction after the war. 109 decisions were issued during the war itself. These cases addressed disputes over everything from rent to pickles.<sup>§§§§§§§§§§§§§§§§</sup> Though the aggregate economic value of the cases before the ECA was large,<sup>\*\*\*\*\*</sup> many of the disputes involved small sums of money. In 1959, Magruder reflected: “[i]t is said that the Lord is solicitous of the merest sparrow that falls from the heavens. Somehow, it has always seemed to me to be a majestic feature on the part of Uncle Sam to send three high-priced federal judges down to Alabama to consider whether the new privy was a ‘major capital improvement.’”<sup>††††††††††††††††</sup> As Magruder noted, the judges traveled to each location where a dispute arose. The Philadelphia Record dubbed the members of the ECA the “flying judges” because of how frequently they traveled.<sup>††††††††††††</sup> This spared parties the expense and hassle of travel to Washington. It also lessened the burden on average landlords and businessmen of removing these proceedings from district courts.

<sup>§§§§§§§§§§§§§§§§</sup> Allied Foods v. Bowles, 151 F.2d 449 (1945).  
<sup>\*\*\*\*\*</sup> Byron, *supra* note 36 (“As Judge Maris pointed out, they could not estimate how much money was involved in the price or rent regulation hearings they have heard except ‘it would amount to many millions or billions of dollars.’”)  
<sup>††††††††††††††††</sup> University of Wisconsin Law School address, 8 May 1959, on the Emergency Court of Appeals, Magruder Papers, Harvard Law School Archive 41-24 at 14.  
<sup>††††††††††††††††</sup> Byron, *supra* note 36.



*Raising the Stakes: ECA and the Meatpacking Industry*

The “flying judges” occupied a unique role as the public face of wartime judicial oversight. No industry illustrates the delicate position of the ECA better than meatpacking. It was no accident that *Yakus* was the most prominent ECA case to reach the Supreme Court. Meat processors were in constant conflict with the Price Administrator because of the way OPA regulated the industry. Due to pressure from the farm industry, prices for live animals were not regulated. Instead, OPA fixed prices of carcasses, cuts of meat, and animal by-products. Before the war, it was common for some of these products to be sold at a loss, but the industry was profitable overall because of valuable by-products, such as lard. OPA took into account profits across multiple products and by-products, rather than considering each product in isolation. This approach led to a proliferation of challenges; meat was the single most contentious commodity before the ECA.

Most meatpackers found little success at the ECA, but one company was able to obtain some relief through dogged persistence. Armour & Company was one of the largest meat packers in the United States and a significant economic force in Chicago. By the end of the war, it was one of the largest U.S. companies. With the resources to mount an expensive legal challenge, Armour & Co. spent years litigating the price ceiling on beef carcasses, which was below the cost of production. The case first came before the ECA in 1943. At that point, the ECA remanded the case to the Administrator to consider whether the price ceiling would impede the production of beef, which was an essential wartime good. The Court noted that the finding that beef producers were, overall, making a profit was insufficient to justify compelling

§§§§§§§§§§§§§§§§ Jacob Hyman & Nathaniel Nathanson, *Judicial Review of Price Control: The Battle of the Meat Regulations*, 42 ILL. L. REV. 584, 634 (1947). United States v. John J. Felin & Company, 334 U.S. 624 (1948).  
\*\*\*\*\*  
\*\*\*\*\* Armour & Co., Encyclopedia of Chicago,  
<http://www.encyclopedia.chicagohistory.org/pages/2554.html>.







the Administrator is...not to be subjected retrospectively in the calm of the judicial study to a hypercritical appraisal of the reasonableness of each of the steps by which, under the stress of the emergency, his acts were decided upon.”\*\*\*\*\* However, as noted above, the court required the Administrator to give sufficient reasons when denying a protest.\*\*\*\*\* Such a requirement would not materially impede the price control regime, but it did require OPA to make its decisions more transparent. The court also occasionally required more process. In *Smith v. Bowles*, which is the case that caused Magruder to sardonically note that he travelled to Alabama to evaluate a privy, the ECA faulted the Price Administrator for not granting the complainant a *de novo* hearing.\*\*\*\*\*

Despite the ideological alignment of ECA judges with OPA, the court did not grant the agency a blank check. Of the 109 decisions issued before the Japanese formally surrendered on September 2, 1945, the government entirely prevailed in only 86 of them. In the other two dozen, the court provided relief or ordered the Administrator to reconsider the case. As the war progressed and victory became more assured, the ECA was more likely to decide cases in favor of producers and landlords. In its first 29 cases decided in 1942 and 1943, it found against OPA only twice, or in about 8% of cases. In 1944, that percentage increased to 26% and in 1945 it was about 22%.\*\*\*\*\* These numbers mean little on their own, but they hint that producers and landlords had a meaningful opportunity for relief if they could reach the ECA.

In response to the Smith Committee’s blistering report, the Price Administrator invoked OPA’s record in front of the court as evidence that the agency was on solid legal ground and

\*\*\*\*\* *Safeway Stores Inc. v. Bowles*, 45 F.2d 836, 845 (1944).  
\*\*\*\*\* *Armour & Co. of Delaware v. Brown*, 137 F.2d 233, 241 (1943).  
\*\*\*\*\* *Smith v. Bowles*, *supra* note 10, at 64.  
\*\*\*\*\* These findings are based on an analysis of all reported ECA cases.

that the ECA provided proper judicial oversight.\*\*\*\*\* Perhaps counter-intuitively, the Administrator relied on OPA’s history of winning disputes to illustrate that the agency was functioning with appropriate controls. But it is the fact that the agency occasionally lost that inspires more confidence in the system.

*Conclusion*

If the New Deal was the birth of the modern administrative state, World War II was its coming of age. Regulatory patterns and practices became entrenched during the war and shaped norms thereafter. The ECA left a legacy in today’s specialized courts\*\*\*\*\* and contemporary ideas about balancing individual protections and efficiency at scale. Judicial relief is often slow and imperfect, and the ECA was no exception. The ECA struck a balance of wartime pragmatism that recognized the extraordinary congressional delegation of authority while providing a meaningful, if limited, venue for review. Nevertheless, as has been described elsewhere, the wartime performance of administrative agencies did not inspire confidence,\*\*\*\*\* and the ECA contributed to this dissatisfaction.

\*\*\*\*\* *OPA Challenges House Criticisms*, N.Y. TIMES, Dec. 30, 1943.  
\*\*\*\*\* The Temporary Court of Emergency Appeals, based on the ECA, was created in 1971 to hear price control disputes arising out the Economic Stabilization Act of 1970. Other similar specialized courts followed, including the FISA court. See Rochelle Cooper Dreyfuss, *Specialized Adjudication*, BYU L. Rv. 377 1990: 377-441.  
\*\*\*\*\* Schiller, *supra* note 2, at 185.