EXPERIENCE in the present war has emphasized the importance to our economy of successful distribution of food.¹ For some time, it has been apparent that serious dislocations in the marketing of farm commodities and products can disrupt the whole system of producing,

¹The importance of successful food distribution in the war has been recognized by all members of the United Nations. The President of the United States and the Prime Minister of Great Britain created a Combined Food Board in June 1942 to achieve a division of the food resources of all the member nations. At the present time, members of this Board are the United States, Great Britain, and Canada. Its over-all function is to consider the supply of and requirements for each commodity and recommend the best division possible in the light of all the circumstances. Recommendations of the Board are concurred in by the member governments.
distributing, and consuming food. When this happens, the health and morale of the people are endangered.

It has been demonstrated, by experience, that one factor which has been responsible for disturbances in the successful marketing of food arises from inadequate prices received by producers for their efforts. There was a tendency, following World War I, for the price structure of American agriculture, in relation to industrial prices, to deteriorate. Awareness of the state of unbalance occasioned by this price disparity, resulting in a fundamental dislocation in the American economic system, and realization of the need for correcting this state of agricultural-industrial disparity, has, in the past decade, prompted the passage by the Congress of several important action programs of agricultural amel-

In this country, the President, on December 5, 1942, signed Exec. Order 9280, 7 Fed. Reg. 10179, vesting in the Secretary of Agriculture "full responsibility for and control over the Nation's food program." Subsequently, by Exec. Order 9322, 8 Fed. Reg. 3807 (1943), as amended by Exec. Order 9334, 8 Fed. Reg. 5423 (1943), the responsibilities of the Secretary of Agriculture, in connection with the Nation's food program, were transferred to the War Food Administrator. Under these Executive Orders, broad grants of authority are made to the War Food Administrator with respect to assigning priorities and making allocations of food. Moreover, certain powers are delegated with respect to non-food materials and facilities necessary in carrying out the food program. Power is also given the War Food Administrator to make allocations for civilian rationing at the consumer level through the Office of Price Administration.

During these war years, demands for American food are unparalleled in our history. It has been necessary to supply nutritious and morale sustaining food to our farflung armed forces, as well as to our civilians who, with an increased purchasing power, are demanding more food than ever before. In addition, we are distributing food to our fighting Allies. Food has been a weapon of victory, and the machinery, both on the national and international scale, set up to achieve its successful production and distribution, has been a vital part of the over-all war machine. "... in a war on so vast a scale as the present conflict, with a large and increasing proportion of our civilian population directly employed in the production of weapons for the armed forces, adequate food supplies for the civilian population are essential to the successful prosecution of the war." United States v. Beit Bros., 50 F. Supp. 590, 593 (D. Conn. 1943).

The Supreme Court, in Nebbia v. New York, 291 U. S. 502 (1934), in speaking of the "economic maladjustment" in the New York milk shed prior to the enactment of State and Federal legislation of the type under consideration, said there was a maladjustment of prices which "threatens harm to the producer, at one end of the series and the consumer at the other." The Court graphically described the situation as follows: "During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve." Id. at 515.
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ioration.3

The marketing agreement and order provisions of the Agricultural Adjustment Act of 1933, as amended, and as reënacted and amended by the Agricultural Marketing Agreement Act of 1937,4 the subject

"Congressional awareness of the disparity between agricultural and industrial prices is shown in the "DECLARATION OF EMERGENCY" contained in § 1 of the Agricultural Adjustment Act of 1933, Act of May 12, 1933, 48 Stat. 31, which was as follows: "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

More recently, laws dealing with price support operations have been enacted to assure the farmer an adequate return for his labor and, particularly during the war years, to assure an all-out production of necessary crops. Laws dealing directly with these price support operations are the basic commodity loan legislation found in § 302 of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U. S. C. § 1302 (1940); § 8 of the Stabilization Act of 1942, 56 Stat. 767, 50 U. S. C. App. § 968 (Supp. 1943), as amended by the Stabilization Extension Act of 1944, Pub. L. No. 383, 78th Cong., 2d Sess. (June 30, 1944) § 204; and the so-called Steagall Amendment, 55 Stat. 498 (1941), as amended by 56 Stat. 768 (1942), 15 U. S. C. § 713a-8 (Supp. 1943), the latter dealing with the non-basic commodities. A principal aim of both the Steagall Amendment and the basic commodity loan provisions of the Stabilization Act is to give assurance to producers that they will receive a fair return for their production of commodities required during the war period and, thus, to encourage the necessary production of such commodities. 5

"References in this article to the "Act" or the "statute", unless otherwise specified, are to sections of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended, 49 Stat. 750 (1935), and as reënacted and amended by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. § 601 et seq. (1940).

In Elm Spring Farm, Inc., et al. v. United States, 127 F. (2d) 920, 927 (C. C. A. 1st, 1942), the Circuit Court of Appeals for the First Circuit stated: "The Act and the Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cutthroat competition among producers striving for the fluid milk market. . . ."

In Queensboro Farms, Inc. v. Wickard, 137 F. (2d) 969, 974 (C. C. A. 2d, 1943), Judge Frank stated that: "The Act was originally enacted in 1933 and was amended in 1935 and again in 1937, 7 U. S. C. A. § 601 et seq. . . . Experience before and since the passage of that legislation has disclosed that the 'milk problem' is exquisitely complicated. The city-dweller or poet who regards the cow as a symbol of bucolic serenity is indeed naive. From the udders of that placid animal flows a bland liquid indispensable to human health but often provoking as much human strife and nastiness as strong alcoholic
of this article, are measures designed to correct the disparity between agricultural-industrial price relationships. Since the passage of this legislation, it has been of tremendous importance in the peace-time economy of this country; and, with the entrance of the United States into the current conflict, programs under the statute have been important in the Nation's war food program.

II. THE HISTORY OF THE ACT

The genesis of this statute is found in the Agricultural Adjustment Act of 1933.\footnote{Act of May 12, 1933, 48 Stat. 31.} Much of this latter act, particularly those provisions dealing with (1) acreage adjustment, (2) commodity loans, and (3) surplus removal operations, complemented by the so-called processing tax, dealt with specified basic agricultural commodities.\footnote{As indicated in note 1 supra, responsibilities of the Secretary of Agriculture under the statute are now vested in the War Food Administrator, and in this article, unless otherwise specified, the various sections of the statute will be mentioned in relation to the War Food Administrator rather than to the Secretary of Agriculture.} However, two parts of the 1933 statute dealt with all farm commodities and products. Section 8(2) authorized the Secretary of Agriculture\footnote{Act of May 9, 1934, 48 Stat. 674, 675, 7 U. S. C. § 608a (4)-(9) (1940).} to enter into marketing agreements with persons engaged in the handling, in the current of interstate commerce, of any agricultural commodity; and Section 8(3) authorized the Secretary of Agriculture to issue licenses regulating the handling of such commodities. Since the marketing agreement and licensing provisions of the statute applied to all farm products, they could be used as a supplement to, or in lieu of, production control measures for basic commodities and also as the sole method of attack on the problem of non-basic farm commodities.

In 1934\footnote{Act of August 24, 1935, 49 Stat. 762, 7 U. S. C. § 608a (7) (1940).} and 1935,\footnote{Act of May 9, 1934, 48 Stat. 674, 675, 7 U. S. C. § 608a (4)-(9) (1940).} enforcement provisions to the 1933 Act were beverages. The milking of animals in order to make use of their lactic secretions for human food was one of the greatest human inventions, but the domestication of milk has not been accompanied by a successful domestication of some of the meaner human impulses in all those engaged in the milk industry. The difficulties described as 'the milk problem' revolve in some considerable measure about the complex relations between the farmers and the 'handlers' who buy milk from the farmers and sell it, in fluid or altered form, directly or indirectly through others, to the ultimate consumers.
passed. The 1935 Act also amended the licensing provision by eliminating the word "license" and substituting therefor the word "order". The 1935 Act also limited the applicability of the orders which it authorized to designated agricultural commodities.

The decision of the Supreme Court of the United States in United States v. Butler, decided January 6, 1936, invalidated the acreage adjustment and processing tax provisions of the Agricultural Adjustment Act. However, the decision did not deal with the other provisions of the Act, including the marketing agreement and order features. Following this decision, opinions of several United States District Courts differed as to whether the whole Act fell with the unlawful provisions.

To clear up the doubt which existed, Congress passed the Agricultural Marketing Agreement Act of 1937, consisting, mainly, of certain provi-

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11By the 1935 amendment to the Act, the applicability of orders was limited to milk, fruits (including pecans and walnuts but not including apples, and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, and naval stores as included in the Naval Stores Act, 42 Stat. 1435 (1923), 7 U. S. C. § 91 et seq. (1940), and standards established thereunder (including refined or partially refined oleoresin). The 1935 amendment also provided that orders might apply to products of certain of the designated commodities. 49 Stat. 754, 7 U. S. C. § 608c (2) (1940).
12297 U. S. 1 (1936).
14Act of June 3, 1937, 50 Stat. 246, as amended, 7 U. S. C. § 601 et seq. (1940). As stated in note 4 supra, all references in this article to the "Act" or to the "statute", unless otherwise indicated, are to this statute. See Sellers, Administrative Procedure and Practice in the Department of Agriculture Under the Agricultural Marketing Agreement Act of 1937 (1939), a mimeographed monograph, for a more detailed discussion of the Act.

Literature in legal periodicals with respect to this Act is scanty, especially since 1937. Following is a list of articles which have appeared from time to time since 1933 (many of the questions raised in these articles have been subsequently adjudicated by courts): Howard, The Supreme Court, the Constitution and the A.A.A. (1937) 25 Ky. L. J. 291; Duane, Marketing Agreements Under the Agricultural Adjustment Act: Their Contents and Constiutionality (1933) 82 U. of Pa. L. Rev. 91; (1935) 33 Mich. L. Rev. 952; Black, At What Stage May a Licensee Seek Equitable Relief Under the Agricultural Adjustment Act? (1935) 12 N. Y. U. L. Q. Rev. 354; (1934) 83 U. of Pa. L. Rev. 86; (1935) 9 Temp. L. Q. 95; Black, Does Due Process of Law Require an Advance Notice and Hearing Before a License is Issued Under the Agricultural Adjustment Act? (1935) 2 U. of Chi. L. Rev. 270; Black, May Price Fixing and Proration Devices Be Utilized by the Secretary of Agri-
sions which appeared in the amended 1933 Act. The 1937 Act does, however, contain new legislation with respect to the arbitration and mediation of milk disputes, and makes certain other important amendments to the statute.

III. Policy and General Provisions of the Act

The declared policy of the 1937 Act is to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will provide farmers currently with a purchasing power equivalent to that which they enjoyed during a designated base period in the past, and to protect the interest of the consumer in approaching and maintaining this level of prices. To effectuate this policy, the Secre-

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Section 3 of the Act, 7 U. S. C. § 671 (1940).

It is hereby declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prwar period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period.

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section." 7 U. S. C. § 602 (1940).

Marketing agreement and order programs may only be undertaken with respect to such handling of a commodity, or product thereof, as is in the current of interstate or foreign commerce or which directly burdens, obstructs or affects interstate or foreign com-
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Agricultural is authorized to determine whether such a purchasing power is being realized by farmers.\(^{17}\) When he finds that their present purchasing power is not equivalent to the statutory standard, the regulatory provisions of the Act are to be effective.\(^{18}\)

There are several methods which may be used, under different circumstances, to carry out the declared policy of the Act:\(^{19}\)

(1) The War Food Administrator\(^{20}\) may enter into marketing agreements\(^{21}\) with persons engaged in handling agricultural commodities or products. A marketing agreement, where employed, makes possible the voluntary achievement of the statutory objectives.\(^{22}\) Marketing agreements are entered into, after notice and opportunity for hearing, with processors, producers, associations of producers and other handlers in such commodity or product thereof. Sections 8b and 8c(1) of the Act, 7 U. S. C. §§ 608b, 608c(1) (1940). For a definition of the term "interstate or foreign commerce", as used in the Act, see § 10(j) of the Act, 7 U. S. C. § 610(j) (1940). See also, United States v. Wrightwood Dairy Company, 315 U. S. 110 (1942).

No action, with respect to a marketing agreement or order program, is authorized by the Act, which has for its purpose the maintenance of prices above the level which it is declared to be the policy of the Congress to establish. Sections 2(1) and (2), 8e, and 8c (18) of the Act, 7 U. S. C. §§ 602, 608e, 608c(18) (1940).

\(^{17}\) "Ibid." Also see, in this connection, § 8e of the Act, relating to the determination of the base period where there are no available statistics in the Department of Agriculture to determine the purchasing power during the base period specified in § 2; and § 8c(18) of the Act, which provides that, whenever the Secretary finds that the prices which will give milk a purchasing power equivalent to its purchasing power during the base period as determined pursuant to §§ 2 and 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. See United States v. Wrightwood Dairy Company, 127 F. (2d) 907 (C. C. A. 7th, 1942), and H. P. Hood & Sons, Inc. v. United States, 307 U. S. 588, 595, 596 (1939), for a discussion of the functions of the Secretary in finding and proclaiming the base periods.

\(^{18}\) Section 8c of the Act, 7 U. S. C. § 608c (1940).

\(^{19}\) See United States v. Borden Company, 308 U. S. 188 (1939), for a discussion by the Supreme Court of the ways of effectuating the declared policy of the Act.

\(^{20}\) See notes 1 and 7 supra.

\(^{21}\) Section 8b of the Act, 7 U. S. C. § 608b (1940).

\(^{22}\) Marketing agreements must also be considered in determining the conditions under which marketing orders may be issued pursuant to the Act. Orders may not, under § 8c(8) of the Act, 7 U. S. C. § 608c(8) (1940), become effective until, among other things, a stipulated percentage of handlers (50 per cent, except that with respect to what is known as California citrus fruits it is 80 per cent) have signed a marketing agreement. On the other hand, if this stipulated percentage of handlers fail or refuse to sign a marketing agreement, an order may, nevertheless, be made effective pursuant to § 8c(9) of the Act, 7 U. S. C. § 608c(9) (1940).
and may be executed with respect to any agricultural commodity or product thereof, differing in this respect from orders which are applicable only to designated commodities.23

(2) On the other hand, mandatory orders applicable to specified commodities or their products may be issued.24 Under the Act, orders may be promulgated only after notice is given and opportunity for hearing is afforded,25 and stipulated findings are made.26 Orders may be made effective notwithstanding the failure or refusal of a stipulated percentage of handlers to sign a marketing agreement containing provisions similar to the order.27

(3) Finally, under the Act, the War Food Administrator may act as mediator or arbitrator28 in disputes between milk cooperative associations and purchasers, distributors, handlers or processors respecting the terms and conditions of sales of milk or its products.

The Act provides for both quasi-legislative and quasi-judicial proceedings.29 The former is that which, under the Act, must occur before

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23Section 8c(2) of the Act specifies the commodities to which orders may now be made applicable. They are milk, fruits (including pecans and walnuts but not including apples, other than apples produced in Washington, Oregon and Idaho, and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops (until September 1, 1943), honey-bees, and naval stores as included in the Naval Stores Act, 42 Stat. 1435 (1923), 7 U. S. C. § 91 et seq. (1940), and standards established thereunder (including refined or partially refined oleoresin). The Act also authorizes the issuance of orders with respect to products of certain of the designated commodities. Sections 8c(2), 8c(6), and 8c(11) of the Act, 7 U. S. C. §§ 608c(2), 608c(6), 608c(11) (1940).

24Section 8c(1) of the Act, 7 U. S. C. § 608c(1) (1940).

25Section 8c(3) of the Act, 7 U. S. C. § 608c(3) (1940).

26Section 8c(4) of the Act, 7 U. S. C. § 608c(4) (1940).

27See note 22 supra.

28Section 3 of the Act, 7 U. S. C. § 671 (1940). Marketing agreements and marketing orders are the main regulatory devices authorized by the statute. The mediation and arbitration procedure has not been used to any great extent. There is also another regulatory feature of the Act which may be mentioned, namely, the establishment by the President of import quotas when there is reason to believe that programs under the Act will be impaired by imports. Sellers, op. cit. supra note 14, at 6.

29Only those hearings relating to the issuance of marketing orders under § 8c of the Act, 7 U. S. C. § 608c (1940), (and, to some extent, of marketing agreements under § 8b of the Act, 7 U. S. C. § 608b (1940) ) and those relating to rulings made pursuant to § 8c(15)(A) of the Act, 7 U. S. C. § 608c(15) (A) (1940), are discussed in the text of this article. For a discussion of certain other proceedings for which the Act provides, see Sellers, op. cit. supra note 14, at 8-63. Although the words “quasi-legislative” and “quasi-judicial” are used to describe the two main types of proceedings authorized by the Act, since this is traditionally the terminology used by writers on administrative law, see Fed-
the issuance of, and serve as a foundation for, the regulatory order or marketing agreement when executed without an order. It is directed toward no particular individual but toward all persons who might be affected by the issuance of the order; and the result of the proceeding, after notice and hearing, is a regulatory order having the force and effect of law. The United States Circuit Court of Appeals for the Seventh Circuit, in United States v. Wrightwood Dairy Company, discussed this so-called "promulgation" hearing in the following terms:

"The realities of the situation are clear. In the case of many proposed agreements, hundreds of people may be present at a hearing and every individual would be equally desirous of insuring the maximum protection to his own interests. If the equivalent of court proceedings were granted to each person, or even to groups, the hearing would be unwieldy and not susceptible to a satisfactory conclusion. Obviously, a more workable balance must be struck between administrative efficiency and the protection of individual rights."

The court further pointed out that the object of the hearing provided for by Section 8c(3) of the Act is not only to afford the individuals the opportunity of airing their objections to the proposed scheme of regulation, but also to give the administrators the chance of obtaining information which might otherwise have been overlooked or not available to them.

In discussing the true nature of the proceeding leading to the issuance of an order, it has been stated:

"However dim the boundaries which segregate the rule-making from the adjudicative functions, 'the hinterland' is clear. Where the proceeding is for the purpose of formulating a rule or standard of general applicability; where, even though individuals or groups of individuals are immediately interested or affected, the action to be taken reaches beyond such individuals and operates more or less directly upon large groups or classes of the public; it is legislative in substance and, normally, in form likewise."

The enforcement of such quasi-legislative orders is sanctioned by criminal and civil penalties and remedies.

The other principal proceeding for which the Act provides is one

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Section 8c of the Act, 7 U. S. C. § 608c(14) (1940).

Section 8a (5)-(8) of the Act, 7 U. S. C. § 608a(5)-(8) (1940).
which may be instituted by individuals affected by a marketing order.\textsuperscript{34} It can begin only after an order has been issued, and the proceeding is directed toward the effect of such an order upon an individual rather than toward the formulation of a general regulation. This proceeding is quasi-judicial and adversary in character, with the War Food Administrator acting as a judge\textsuperscript{35} rather than in an administrative capacity. In the In re \textit{Mutual Orange Distributors}, et al.,\textsuperscript{36} the Assistant to the Secretary of Agriculture said:

"... The purpose of the proceeding is to determine whether an order is 'in accordance with law'; not in the abstract, but with respect to a particular handler and his actual situation under the order."

The proceeding under Section 8c(15)(A) has also been described as follows:

"... Arising out of the complaint or petition of an aggrieved handler, the hearing is held for the purpose of determining the applicability to the petitioner of the challenged order. The proceeding is obviously adversary. The parties are well-defined. The order itself having already been issued, the administrative or quasi-legislative function of the Secretary has been completely exercised before the review proceedings are begun. The proceeding is directed to a determination of the legality of the order. However lacking in finality such a determination may be, it is nevertheless adjudicatory in essence and judicial in scope."

If a handler is dissatisfied with the decision of the War Food Administrator in this quasi-judicial proceeding, he may have a review of the ruling by a court.\textsuperscript{38}

\textsuperscript{34}Section 8c(15)(A) of the Act, 7 U. S. C. § 608c(15) (A) (1940).

\textsuperscript{35}Pursuant to the so-called Schwellenbach Act, approved April 4, 1940, 54 Stat. 81, 5 U. S. C. §§ 516a-516e (1940), the War Food Administrator has delegated to an Assistant to the War Food Administrator the duty of performing the regulatory functions specified in the Act, which includes performance of the quasi-judicial functions, 8 Fed. Reg. 8087 (1943). The "Agriculture Decisions", published monthly, contains decisions made in proceedings of a quasi-judicial character. See the following decisions by the Assistant to the Secretary of Agriculture and the Assistant to the War Food Administrator discussing the quasi-legislative and quasi-judicial proceedings conducted under the Agricultural Marketing Agreement Act of 1937: \textit{In re} Breakstone Bros., Inc., 1 A. D. 26 (1942); \textit{In re} Mutual Orange Distributors, et al., 1 A. D. 207 (1942); \textit{In re} Wawa Dairy Farms, Inc., 2 A. D. 89 (1943); \textit{In re} Dairy Specialties, Inc., & Brook Hill Farms, Inc., 3 A. D. 1, 3 A. D. 83 (1944); \textit{In re} Middletown Milk & Cream Co., Inc., 3 A. D. 84 (1944); \textit{In re} Grandview Dairy, Inc., 3 A. D. 335 (1944); and \textit{In re} Bailey Farm Dairy Co., et al., 3 A. D. 715 (1944).

\textsuperscript{36}1 A. D. 207, 212 (1942).

\textsuperscript{37}\textit{Sellers}, \textit{op. cit. supra} note 14, at 42.

\textsuperscript{38}Section 8c(15)(B) of the Act, 7 U. S. C. § 608c(15)(B) (1940). See cases cited \textit{infra} note 80.
Some provisions of the Act are common to all orders issued under it. For example, each order may provide for the selection of an agency to administer the order, make rules and regulations, investigate and report violations, and recommend amendments. Aside from these common provisions, the statute differentiates between orders relating to milk and its products and orders relating to other specified agricultural commodities and products thereof.

IV. MILK MARKETING PROGRAMS

Milk orders may contain provisions classifying milk according to its use, providing for prices for each use classification, and fixing minimum prices to be paid by handlers to producers. The Act authorizes the establishment of a so-called "equalization pool", the purpose of which is to equalize throughout the market the burden of carrying surplus milk. Producers may be paid on the basis of an "individual handler" or a "market-wide" pool plan, in either case with or without a base rating system. Under stated conditions, prices to be paid by handlers to producers may be fixed without regard to the base period designated by the Act.

While the milk marketing orders are not, in all respects, identical—since each is designed to meet the needs of a particular area—consideration of one of the most prominent milk orders will illustrate some of the regulatory features of the Act. On August 5, 1938, Order 27, regulating the handling of milk in the New York Metropolitan Marketing Area, was issued by the Secretary of Agriculture. The order became effective September 1, 1938. It has subsequently been amended from time to time.
This order is based, as required by Section 8c(4) of the Act, upon evidence introduced at a public hearing held pursuant to Sections 8b and 8c(3) of the Act.45

After the first public hearing was held, a tentative marketing agreement was submitted to the handlers of milk in the marketing area for their signature. Upon the refusal and failure of handlers of more than 50 per cent of the volume of milk produced or marketed within the area to sign the marketing agreement, the order was made effective, pursuant to Section 8c(9) of the Act, upon the determination of the Secretary of Agriculture, with the approval of the President, that the refusal and failure of the handlers to sign the marketing agreement tended to prevent the effectuation of the declared policy of the Act; that the issuance of the order was the only practical means of advancing the interests of the producers of milk for sale in the marketing area; and that the order met with the approval of more than two-thirds of such producers.

The main regulatory provisions of the New York Order are those made pursuant to Sections 8c(5)(A), (B)(ii), and (C) of the Act. These provisions fix the value of milk according to its use by each handler, establish a minimum uniform price for milk to be paid by all handlers to all producers, and establish a producer-settlement fund in the hands of the market administrator through which each handler, by making payments to the fund or withdrawing payments therefrom, in addition to payments made by him directly to producers, pays out the total value of the milk according to the use made of it by each handler.

The total use value of milk to a handler for each delivery period is, under this order, ascertained by multiplying the quantity of milk used

45The Supreme Court, in United States v. Rock Royal Co-operative, Inc., 307 U. S. 533, 576 (1939), described the public hearings preceding the original issuance of the order regulating the handling of milk in New York as follows: "... Public hearings were held at Albany, Malone, Syracuse, Elmira, and New York from May 16 to June 7, 1938, with four days' recess. Nearly three thousand pages of testimony were introduced, eighty-eight documentary exhibits and some twenty briefs by interested parties were filed. On July 23, 1938, the Secretary, in the Federal Register, notified the public of his findings and the terms of the Order and again invited comment. Numerous parties again filed briefs. ..." All together, including the original hearing on the New York order, which lasted from May 16 to June 7, 1938, and including a pending hearing on proposed amendments to the order, there have been 11 hearings in connection with the regulations in the New York milk marketing area. These hearings have covered 69 full days. A total of 16,388 pages of evidence and 656 exhibits has been received at these hearings.
during such period by the handler in each of the classifications by the applicable minimum price for that class and adding together the totals. The value of milk to a handler subject to the order, however, is not necessarily the same as the price paid to his producers. The minimum price which handlers must pay to producers for each delivery period is called the "uniform price" or the "blended price". It is ascertained by dividing the total use value of all milk received from producers by all handlers subject to the order, during a delivery period, by the total quantity of such milk. Payment of the uniform price to all producers supplying the milk is effected through the producer-settlement fund maintained by the market administrator selected to administer the order. Each handler whose total use value of milk for a particular delivery period is greater than his total payments to producers at the "uniform price" is required to pay such difference into the producer-settlement fund. Each handler whose total use value of milk is less than his total payments to producers at the "uniform price" is entitled to withdraw the amount of such difference from the producer-settlement fund. The operation of this equalization plan may be illustrated by the following example in which A, B, and C are taken as the only handlers in a marketing area:

<table>
<thead>
<tr>
<th>Handler</th>
<th>Class I, fluid milk</th>
<th>Class II, cream</th>
<th>Class III, butter</th>
<th>Total Cwt.</th>
<th>Total Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>500</td>
<td>200</td>
<td>300</td>
<td>1,000</td>
<td>$1,600</td>
</tr>
<tr>
<td>B</td>
<td>700</td>
<td>100</td>
<td>200</td>
<td>1,000</td>
<td>1,750</td>
</tr>
<tr>
<td>C</td>
<td>300</td>
<td>300</td>
<td>400</td>
<td>1,000</td>
<td>1,450</td>
</tr>
<tr>
<td>Total</td>
<td>1,500</td>
<td>600</td>
<td>900</td>
<td>3,000</td>
<td>4,800</td>
</tr>
</tbody>
</table>

Uniform Price = \( \frac{4,800 \text{ (Total value)}}{3,000 \text{ cwt. (Total quantity)}} \) = $1.60 cwt.

**PRODUCER-SETTLEMENT FUND**

**[ADJUSTMENT ACCOUNTS OF HANDLERS]**

<table>
<thead>
<tr>
<th>Handler A</th>
<th>Debit</th>
<th>Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$1,600&lt;sup&gt;1&lt;/sup&gt;</td>
<td>$1,600&lt;sup&gt;2&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Handler B</th>
<th>Debit</th>
<th>Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$1,750&lt;sup&gt;1&lt;/sup&gt;</td>
<td>$1,600&lt;sup&gt;2&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Handler C</th>
<th>Debit</th>
<th>Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$1,450&lt;sup&gt;1&lt;/sup&gt;</td>
<td>$1,600&lt;sup&gt;2&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

1. Value of milk according to use.
2. Paid to producers at uniform price.
3. Cash paid to the producer-settlement fund.
4. Cash withdrawn from the producer-settlement fund.
The order provides for numerous classes of milk, depending on its use, and fixes or prescribes a method for establishing a price for each class.\(^4\)

It is important to bear in mind that the Act, in its price-fixing and payment features, is simply a refinement of methods already fairly well developed in the dairy industry for distributing returns to producers.\(^5\)

Since milk is highly perishable in fluid form, it must be marketed immediately. When cities were small, most of the milk used for consumption was distributed by producers to city consumers. As the size of cities increased, it became necessary to go farther to obtain a sufficient supply of milk. Because of the increased distances over which it was necessary to transport milk and the stricter regulations pertaining to its handling, the disadvantages of direct distribution by producers became apparent. Companies were organized for the purpose of purchasing milk from unorganized producers, processing it, and, finally, distributing it to consumers.\(^6\) In most of the big cities the greater portion of the milk business is now in the hands of large distributors.

The development of large distributing enterprises created a new relationship between the producer and his market. Producers, unable to maintain direct control over the prices they received for their milk, began to organize cooperatives which enabled them to bargain collectively in the sale of milk to large distributors. By the time of the passage of the Act under consideration, the milk industry had become fairly well organized with respect to market practices and methods of distributing returns among producers.

Usually, the largest volume of milk is produced for sale as fluid milk within the marketing area, and milk sold for this purpose commands the best price. There is always competition for this market. There is

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\(^6\)Gau nz it and Reed, \textit{op. cit. supra} note 42, Chapter 2, at 36-40.

\(^6\)The public hearings held before the issuance of the order disclosed that the production and distribution of milk for the New York milk market constitutes one of the most complex distributing mechanisms in the United States. About sixty thousand producers produce milk which is delivered twice daily to approximately four hundred milk receiving stations. From there, the milk flows in an infinite variety of channels to emerge finally in a vast number of different products, which in turn pass through the hands of numerous operators before finally reaching the ultimate consumer. Abruzzo, J., in Queensboro Farm Products, Inc. v. Wickard, 47 F. Supp. 206, 208 (E. D. N. Y. 1942).
also milk of the same quality which cannot be used for fluid purposes. This surplus is utilized in the production of butter, cheese, powdered milk, evaporated milk, condensed milk, and other dairy products.

When this country undertook to ship food, including dairy products, abroad following the outbreak of hostilities in Europe, it became evident that larger quantities of milk, butter, cheese, and other products of milk were needed. Also, with an increased purchasing power, more civilians in this country began to consume more milk and its products. Concurrently, with the rise of this record demand for dairy products, submarine attacks on our shipping lanes by the Enemy made cargo space available for all food items extremely scarce. In order to transport the tonnage needed by our Allies and, eventually, our Army overseas, everything possible had to be done to conserve cargo space. One way in which this was accomplished was by increasing the volume of powdered or dried milk\(^5\) shipped for war purposes. Huge quantities of this particular dairy product have been manufactured for overseas shipment by plants constructed\(^6\) for that purpose.

To meet these increased demands for all purposes on the United States

\(^{5}\)The reports issued annually by the Bureau of Agricultural Economics on the production of manufactured dairy products illustrate the sharp increase in the use of powdered milk during the war years. Following is a résumé of the United States production of dry whole milk and of non-fat dry milk solids for human consumption by calendar years from 1935 to the present time:

<table>
<thead>
<tr>
<th>Years</th>
<th>Dry Whole Milk</th>
<th>Non-fat Dry Milk</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Thousand pounds</td>
<td>Thousand pounds</td>
</tr>
<tr>
<td>1935</td>
<td>19,432</td>
<td>187,531(^1)</td>
</tr>
<tr>
<td>1936</td>
<td>18,180</td>
<td>223,827(^2)</td>
</tr>
<tr>
<td>1937</td>
<td>13,676</td>
<td>244,511(^2)</td>
</tr>
<tr>
<td>1938</td>
<td>21,496</td>
<td>289,012</td>
</tr>
<tr>
<td>1939</td>
<td>24,472</td>
<td>267,860</td>
</tr>
<tr>
<td>1940</td>
<td>29,409</td>
<td>321,843</td>
</tr>
<tr>
<td>1941</td>
<td>45,627</td>
<td>366,455</td>
</tr>
<tr>
<td>1942</td>
<td>62,167</td>
<td>565,414</td>
</tr>
<tr>
<td>1943(^a)</td>
<td>137,229</td>
<td>505,394</td>
</tr>
<tr>
<td>1944(^a)</td>
<td>(172,000)</td>
<td>(567,000)</td>
</tr>
</tbody>
</table>

\(^1\)Packed in barrels. \(^2\)Preliminary.

\(^a\)An estimate by the Dairy and Poultry Branch, Office of Marketing Service, WFA.

\(^6\)Twenty-five milk dehydration plants have been constructed to meet the additional powdered milk requirements resulting from acute war needs.
supply of milk, it became necessary to allocate the total supply, thereby assuring sufficient dairy products of all kinds to meet all reasonable demands. Accordingly, the War Food Administrator, on September 7, 1943, issued a war food order,\(^{52}\) which provides for the establishment of milk sales areas, base periods, quotas, and quota periods, and which further provides that no handler may, during any quota period, deliver, within a milk sales area, more milk, milk by-products, or cream than the quantity allowed by his quota for such milk, milk by-products, and cream during any such period. A large number of supplementary orders have been issued prescribing the base periods, quotas, and quota periods for various milk sales areas.\(^{53}\)

Under this scheme of regulation, handlers in the various milk sales areas are permitted to deliver milk, milk products, and cream to their customers in an amount equal to designated percentages of such deliveries in June 1943. This program is designed to assure a reasonably adequate supply of dairy products for civilian consumption and, at the same time, to assure a sufficient supply of milk for the milk dehydration plants and other milk product plants to enable them to produce enough dried milk and other dairy products to meet special war needs.

The allocation program prescribed by the War Food Order is not, of course, predicated upon the Agricultural Marketing Agreement Act of 1937, but upon the authority contained in Title III of the Second War Powers Act, 1942,\(^{54}\) which provides that:

"...Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." (Section 2(a)(2).)

In connection with the administration of this War Food Order program, the milk supply is constantly under review. During the season of

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\(^{52}\)War Food Order 79, 8 Fed. Reg. 12426 (1943). [This order was formerly known as Food Distribution Order 79, but by an order of the Assistant War Food Administrator, issued April 20, 1944, 9 Fed. Reg. 4319, it was provided that Food Production Orders, Food Distribution Orders, Commodity Credit Orders, and Food Directives should thereafter be known as War Food Orders; and those previously issued were redesignated and numbered accordingly.—Ed. note.]

\(^{53}\)One hundred and forty-four supplementary orders have been issued to effectuate the provisions of War Food Order 79. See, for example, War Food Order 79-1, dealing with the milk sales area of Baltimore, Maryland, 8 Fed. Reg. 13364, issued September 30, 1943.

“flush” production last summer, permitted percentages of deliveries of milk and milk products by handlers were increased, and, when the flush production period had passed, were lowered to their former level.

This War Food Order program\textsuperscript{55} was one of two alternatives considered by the Government at the time the need for huge quantities of milk and other dairy products became acute, with the resulting necessity of dividing the available supply so as to meet all reasonable demands. The War Food Administration might have directed the Office of Price Administration to instituterationing\textsuperscript{58} of milk and milk products at the consumer level. On the other hand, the course subsequently adopted, namely, the issuance of a War Food Order in the terms already described, would, it was thought, be an appropriate method of handling the situation. This has proved to be the case. In effect, each handler of milk has been told that he may deliver a total quantity of milk, milk by-products, and cream to his customers; and, thus, it has been left to the individual handler to determine who shall receive his supply of milk. At the same time, the consumer has been left free to obtain as much milk and milk products as he can induce handlers to sell to him, consistent with the obligations of the handlers under the order.

\textsuperscript{55}There are a number of War Food Orders issued pursuant to Title III of the Second War Powers Act, 1942, predicated upon a shortage or threatened shortage of milk or its products: War Food Order 2, 8 Fed. Reg. 253 (1943), as amended (requiring butter to be set aside); War Food Order 8, 8 Fed. Reg. 953 (1943), as amended (restrictions on the production of frozen dairy foods and mix); War Food Order 11, 8 Fed. Reg. 1090 (1943), as amended (restrictions on disposal of milk and certain milk products, designed to effect economies in the marketing of milk); War Food Order 13, 8 Fed. Reg. 1479 (1943), as amended (restrictions with respect to cream); War Food Order 15, 8 Fed. Reg. 1704 (1943), as amended (requiring Cheddar Cheese to be set aside); War Food Order 54, 8 Fed. Reg. 7210 (1943), as amended (requiring dried skimmed milk to be set aside); War Food Order 92, 9 Fed. Reg. 1082 (1944) (restrictions on the production of cheese and cheese foods); War Food Order 93, 9 Fed. Reg. 2076 (1944), as amended (restrictions on the production and sale of dried milk); and War Food Order 95, 9 Fed. Reg. 2841 (1944) (restrictions on the delivery, acceptance, and use of milk sugar).

\textsuperscript{58}Rationing activities are carried on by the Office of Price Administration. Its original authority with respect to the rationing of food stems from War Production Board Directive 1 issued January 24, 1942, 7 Fed. Reg. 562, as supplemented. Exec. Order 9280, paragraph 4, December 5, 1942, 7 Fed. Reg. 10179, provides for the issuance of directives by the Secretary of Agriculture (succeeded, in this respect, by the War Food Administrator) with respect to rationing. Since the issuance of that order, a number of directives have been issued by the Administrator to the Office of Price Administration. See Food Directives 1 and 3-9, 8 Fed. Reg. 827, 3469, 2005, 2530, 2251, 3469, 3471, 7093, and 9600 (1943).
V. MARKETING PROGRAMS WITH RESPECT TO COMMODITIES OTHER THAN MILK

The Agricultural Marketing Agreement Act of 1937 does not, with respect to orders relating to commodities other than milk and its products, provide for the fixing of prices which must be paid to producers. With regard to fruits and vegetables, the statutory objectives are attained by the making of marketing agreements or the issuance of orders limiting or allotting, or providing methods for the limiting or allotting, of the total quantity of any of the specified commodities or products (or of any grade, size, or quality thereof) which may be marketed in interstate or foreign commerce. For example, the Act\(^5\) authorizes, *inter alia*, the inclusion, in orders applicable to fruits, of provisions regulating the quantity which may be marketed by all handlers during any period, and the quantity which each handler may market during any period based upon the quantity which the handler has available for current shipment or, in the discretion of the War Food Administrator, upon the quantity shipped by the handler during a prior representative period.

Historical considerations make clear the principle under which such orders operate. When remunerative markets for farm produce became limited, producers’ cooperative marketing agencies were established which tried, by various means, to limit the amounts of produce moving to market. One of the fundamental difficulties of voluntary action by cooperative associations was that non-participating individuals derived the benefits of such operations without bearing any of the burden. It became clear that benefits and costs had to be prorated equitably among all growers and handlers in the industry by making participation in a marketing program compulsory, if a stated majority desired to engage in such action and if such compulsion were necessary to the welfare of the industry. Orders under the Act which deal with fruits and vegetables supply this requisite element of compulsion.

Fruit and vegetable marketing orders, as in the case of milk marketing orders, are issued only after notice and opportunity for hearing upon a proposed marketing agreement and order have been given to all interested parties. Such orders must also be based upon findings. If the requisite number of handlers refuse or fail to approve of the proposed marketing agreement, and the War Food Administrator finds, with the approval of the President, that the failure of the handlers to sign the marketing agreement tends to prevent the effectuation of the de-

\(^5\)Section 8c(6) of the Act, 7 U. S. C. § 608c(6) (1940).
clared policy of the Act; that the issuance of an order is the only pratical means of advancing the interests of producers; and that the order meets with the approval of the requisite number of producers, he may issue the marketing order. Marketing agreements may also be entered into under the terms of Section 8b of the Act.

The Circuit Court of Appeals for the Ninth Circuit recently described an important fruit marketing order in the following words:\(^{58}\)

"Order No. 53, an ‘Order Regulating the Handling of Lemons Grown in the States of California and Arizona,’ was issued by the Secretary of Agriculture on April 5, 1941, and became effective on April 10, 1941. A public hearing, notice of which was given to appellants and to other interested persons, had been held, and the order was based upon evidence introduced at the hearing. The order regulates the handling of all lemons grown in California and Arizona and in the current of commerce between California, or Arizona, and any point in the United States or Canada outside the state. It establishes a Lemon Administrative Committee, which is charged with administering the order. It empowers the Secretary of Agriculture, upon the recommendation of the Committee, to fix the total quantity of lemons which may be handled during a specified week and to determine bi-weekly a prorate base for each handler who has applied to the Committee therefor. The prorate base is defined as the ratio between the quantity of each handler's lemons which are available for current shipment and the quantity of all handlers' lemons available for current shipment. The formula for determining each handler's weekly allotment is given as the product of the handler's prorate base and the total quantity of lemons fixed by the Secretary for handling during the week. The order indicates the basis upon which the quantity of lemons of a handler available for current shipment should be computed and includes provisions for variations in allotments under certain conditions."

Since the outbreak of the present war, War Food Orders issued under Title III of the Second War Powers Act, 1942,\(^{59}\) have been issued, in some instances, to regulate the handling of fruits and vegetables formerly subject to similar regulations under the Agricultural Marketing Agreement Act of 1937 and orders issued under it. However, it is important to remember that, while the technique of the regulation imposed in the War Food Order is, in some respects, the same as that used in marketing orders on the same subject, both the statutory authority and the rationale of the two types of orders are different. Allocation orders issued pursuant to the war powers are predicated upon a shortage, or a threatened shortage, in terms of total military, civilian, and other demands. On the other hand, the objective of orders issued under the Agricultural

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Marketing Agreement Act of 1937, as has already been stated, is to establish and maintain a designated level of remunerative returns to farmers.

An illustrative situation involving a fruit marketing order issued under the Agricultural Marketing Agreement Act of 1937 and a War Food Order issued pursuant to Title III of the Second War Powers Act, 1942, is found in the regulations relating to Georgia peaches. Formerly, there was a marketing agreement and order program, regulating the shipment of Georgia peaches, effective pursuant to the Agricultural Marketing Agreement Act of 1937, which imposed certain maturity requirements with regard to the shipment of peaches from Georgia, and which provided a method for limiting the grade and size of Georgia peaches which might be shipped in interstate commerce. Since it was estimated in June 1944 that the price for Georgia peaches would be substantially in excess of parity and that the operation of a marketing agreement and order program would not tend to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937, such program was suspended.\(^60\) However, in view of an estimated shipment of peaches from Georgia, during the 1944 season, below the average of shipments from that State, and in view of the prospective shortage in the supply of peaches produced in Georgia for defense and private account, it was necessary, in the public interest and to promote the national defense, to issue a War Food Order\(^61\) regulating the shipment of peaches from that State. The order provides that no person shall ship peaches which fail to meet the requirements of U. S. No. 2 grade with respect to decay, maturity, and worms and worm holes, with certain tolerances and exceptions. Peaches shipped must also be inspected by an authorized representative of the Federal-State Inspection Service. Among other things, this latter regulation was issued to prevent the picking and shipping of immature and decayed peaches. Decayed peaches, mixed with sound peaches, tend to destroy the whole lot, and immature peaches are frequently inedible and thus lost. Both of these conditions, if permitted to exist, would further aggravate the shortage of Georgia peaches. It is thus apparent that while the order issued under the Agricultural Marketing Agreement Act and that issued under Title III of the Second War Powers Act, 1942, have a common technique, they are used to accomplish different purposes.

\(^60\)Section 8c(16) of the Act, 7 U. S. C. § 608c(16) (1940), provides for the termination or suspension of marketing order and agreement programs.

\(^61\)War Food Order 102, issued June 7, 1944, effective June 9, 1944, 9 Fed. Reg. 6205.
VI. Relation of Act to Wartime Price Control Program

By the time of the entrance of this country into the present war, programs under the Act were so wide-spread and thoroughly imbedded in our agricultural economy\textsuperscript{62} that the Congress, in Section 3(d) of the Emergency Price Control Act of 1942, as amended,\textsuperscript{63} by which it created the Office of Price Administration and vested in it broad powers relating to the setting of prices, provided that nothing contained in the Price Control Act should be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license or order theretofore or thereafter issued under the provisions of the Act.\textsuperscript{64}

\textsuperscript{62}From the time of the passage of the Agricultural Adjustment Act in 1933 until its amendment in 1935, 100 licenses were issued. Of these, 66 licenses regulated the handling of milk in various marketing areas, and 34 regulated the handling of other commodities. During this period, 61 marketing agreements were made, 18 dealing with milk and 43 relating to other commodities. The first marketing order was issued October 11, 1935. Since that time, 69 Orders (29 dealing with milk and 40 relating to other commodities) have been issued; and 41 marketing agreements (7 relating to milk and 33 dealing with other commodities) have been made. As of October 25, 1944, there were 46 of these programs in effect, 25 regulating milk and 21 dealing with other commodities. Among the commodities regulated by these programs are milk, oranges, grapefruit, peas, cauliflower, onions, fresh prunes, tangerines, pears, plums, peaches, tomatoes, grapes, lemons, potatoes, walnuts, and hops. In the following cities milk marketing orders with marketing agreements are in effect: Ft. Wayne, Indiana; Duluth, Minnesota; and Superior, Wisconsin. In the following areas, marketing orders and marketing agreements with respect to commodities other than milk are in effect: California, Colorado, Utah, Oregon, Washington, Florida, Mississippi, Arizona, and Idaho. In the following cities, milk marketing orders have been issued upon the failure and refusal of the requisite percentage of handlers to sign a marketing order in similar terms: St. Louis, Missouri; Boston, Massachusetts; Dubuque, Iowa; Kansas City, Missouri; La Porte, Indiana; New York, New York; Toledo, Ohio; Lowell and Lawrence, Massachusetts; Omaha and Council Bluffs, Nebraska; Chicago, Illinois; New Orleans, Louisiana; Washington, D. C.; Louisville, Kentucky; Fall River, Massachusetts; Sioux City, Iowa; Philadelphia, Pennsylvania; Cincinnati, Ohio; St. Joseph County, Indiana; Wichita, Kansas; and Clinton, Iowa. In the following areas, orders with respect to commodities other than milk have been made effective upon the failure and refusal of the requisite percentage of handlers to sign a marketing agreement in similar terms: Oregon, California, Michigan, Wisconsin, Minnesota, North Dakota and Arizona. In Topeka, Kansas, there is a milk marketing agreement without an order in effect.


\textsuperscript{64}The objective of the Congress in the passage of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. § 901 et seq. (Supp. 1943), as amended, was, among
VII. Judicial Consideration of the Act

The Act and regulatory orders have been before the courts in a number of proceedings. As is usual in the beginning of important regulatory statutes, the first attacks against the legislation and orders were directed to the constitutional validity of the program. The Supreme Court, in United States v. Rock Royal Co-operative, Inc., and H. P. Hood & Sons, Inc. v. United States, sustained the Act as a constitutional exercise of Governmental power, and upheld the orders regulating other things, to stabilize the cost of living (see § 1(a) of the Emergency Price Control Act of 1942), by authorizing the fixing of maximum prices (see §§ 2(a) and 3 of the Emergency Price Control Act of 1942, as amended). The objective of marketing agreement and order programs under the Agricultural Marketing Agreement Act of 1937 is to establish and maintain such orderly marketing conditions for agricultural commodities as will provide a stipulated minimum return to farmers. The objectives of the Agricultural Marketing Agreement Act of 1937, as amended, are thus different from and broader than the purposes of the Congress in passing the price control legislation. Under the latter, maximum prices are fixed to avoid unwarranted rises in the cost of living; under the former, provision is made for minimum returns to producers by establishing uniform marketing conditions in each area based on the historical experiences of the particular area. In operation, the two statutes thus preserve, in a manner consistent with the wartime stabilization program, the benefits which accrue to producers under the marketing agreement and order programs. The situation is not unique. Compare the responsibilities of the Wage and Hour Division of the Department of Labor in prescribing minimum wages under the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U. S. C. § 201 et seq. (1940), with those of the War Labor Board in fixing maximum wages, Exec. Orders 9017, 7 Fed. Reg. 237 (1942), 9250, 7 Fed. Reg. 7870 (1942), and 9328, 8 Fed. Reg. 4681 (1943), and the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. § 1501 et seq. (Supp. 1943). See the discussion by the Assistant to the War Food Administrator in In re Bailey Farm Dairy Co., et al., 3 A. D. 715, 728 (1944).

By a Memorandum of Understanding between the Department of Agriculture and the Office of Price Administration, approved by the Director of Economic Stabilization, an interagency procedure was established for exchange of information by the two agencies with regard to their respective functions. Both producers and handlers of milk have been aided by subsidies. Producers, in addition to receiving the returns provided by marketing agreement and order programs established in accordance with the standards of the Agricultural Marketing Agreement Act, have been materially aided by direct subsidy payments based on abnormal feed costs and drought conditions. Milk handlers have been assured adequate returns for their endeavors by the fixing of appropriate wholesale and retail maximum price levels by the Office of Price Administration and, in some cases, by the payment of subsidies by the War Food Administration. The integration of operations under the Agricultural Marketing Agreement Act of 1937 with the over-all stabilization operations of the Government has enabled marketing agreement and order programs to be used with substantial effectiveness in the Nation's war food program.

307 U. S. 533 (1939).
the handling of milk in the New York Metropolitan Marketing Area
and the Greater Boston Marketing Area. In the Wrightwood case,\textsuperscript{67} the
Court had occasion to consider the Act and the order regulating the
handling of milk in the Chicago Marketing Area. In that case, a suit
for an injunction to compel delinquent handlers to comply with the
terms of the order, the defendants contended that their operations were
not subject to regulation under the Act and order because their business
was entirely intrastate. The Supreme Court rejected this contention
and stated:

"... We conclude that the national power to regulate the price of milk
moving interstate into the Chicago, Illinois, marketing area, extends to such
control over intrastate transactions there as is necessary and appropriate to
make the regulation of the interstate commerce effective; and that it includes
authority to make like regulations for the marketing of intrastate milk whose
sale and competition with the interstate milk affects its price structure so as
in turn to affect adversely the Congressional regulation."\textsuperscript{68}

The Court also decided that Congress had exercised this power by the
Act.

In Stark et al. v. Wickard,\textsuperscript{69} decided February 28, 1944, the Supreme
Court also considered the Act and the Boston milk order in deciding
whether a producer who sells to handlers subject to the order has a
legal cause of action to obtain a review of the order on the ground
that certain of its provisions are unauthorized by the Act. The Boston
milk order contains provisions under which the market administrator
makes deductions from the funds coming into his hands to make pay-
ments to cooperative associations handling producers' milk within the
Boston area. The Supreme Court, in the Rock Royal case, supra, had
held that handlers had no standing to question the use of this fund for
such payments to cooperatives because handlers had no financial interest
in the fund or its use. In the Stark case, the Government contended that
the producers had no standing to question the use of the fund in ques-
tion for this purpose, since neither the Act nor the Boston milk order
regulates the activities of producers but merely prescribes a minimum
price which handlers must pay them for their milk. However, the Su-
preme Court rejected this contention and held that producers, under
the facts in the case before it, did have standing to challenge such use
of the fund. The ultimate question involved in this litigation has not
yet been finally decided by the courts, that is, whether the provisions

\textsuperscript{67}United States v. Wrightwood Dairy Company, 315 U. S. 110 (1942).

\textsuperscript{68}Id. at 121.

\textsuperscript{69}321 U. S. 288 (1944).
of the order authorizing such payments to qualified producer cooperative associations are authorized by the Act.

The Supreme Court has also had occasion to consider the Act in other cases.\textsuperscript{70}

The largest number of cases involving this Act and orders issued under it have been instituted by the Government under Section 8a(6) of the Act, which vests United States District Courts with jurisdiction to enforce, and to prevent and restrain any person from violating, any order, regulation, or agreement made or issued under the Act. In cases of this character, the Government usually seeks mandatory and prohibitory injunctions. For example, if a handler has failed, as required by the order, to file reports concerning his operations or to make payments into the producer-settlement fund, or to make payments to the market administrator or other administrative body with respect to his prorata share of the administrative expenses of administering the order,\textsuperscript{71} the Government normally will ask the court to issue an injunction compelling the defendant-handler to perform all of these acts required by the order, and to prohibit him from operating in the future in violation of the order.\textsuperscript{72}

\textsuperscript{70}See United States v. Borden Company, 308 U. S. 188 (1939), and Parker v. Brown, 317 U. S. 341 (1943), where the Act and programs under it were incidentally involved in litigation.

\textsuperscript{71}Section 10(b)(2), 7 U. S. C. § 610(b)(2) (1940), requires the inclusion, in each order issued under the Act, of a provision that each handler subject to the order shall pay to the agency established to administer the order his pro rata share of such expenses as are necessary for the maintenance of the agency to administer the order.

\textsuperscript{72}United States v. Rock Royal co-operative, Inc., 307 U. S. 533 (1939) (failure to comply with any of the provisions of the order); H. P. Hood & Sons, Inc. v. United States, 307 U. S. 588 (1939) (failure to comply with any of the provisions of the order); United States v. Adler's Creamery, Inc., 107 F. (2d) 987, 110 F. (2d) 482 (C. C. A. 2d, 1939, 1940), cert. denied, 311 U. S. 657 (1940) (failure to make any of the payments required under the order); United States v. Wrightwood Dairy Company, 315 U. S. 110 (1942) and 127 F. (2d) 907 (C. C. A. 7th, 1942) (failure to comply with any of the provisions of the order); United States v. Whiting Milk Company, 21 F. Supp. 321 (D. Mass. 1937), aff'd, 307 U. S. 588 (1939) (failure to make payments to the producer-settlement fund, failure to pay to the market administrator pro rata share of administrative expenses, and failure to pay to the market administrator sums withheld from producers for marketing services); United States v. Andrews, 26 F. Supp. 123 (D. Mass. 1939) (failure to make payments to producer-settlement fund, failure to pay to the market administrator pro rata share of administrative expenses, and failure to pay to the market administrator sums withheld from producers for marketing services); United States v. Kreckting, 26 F. Supp. 266 (S. D. Ohio 1939) (failure to comply with any of the provisions of the order); United States v. Wittenberg, 21 F. Supp. 713 (S. D. Tex. 1938), aff'd, 100 F. (2d) 520 (C. C. A. 5th,
Since, in cases of this character, the Government does not sue primarily for a money judgment but for an injunction, civil contempt proceedings have been instituted in some cases when defendants refused to comply with the terms of injunctions. In a case of this type, an injunction was issued by the United States District Court for the District of Massachusetts and affirmed by the Circuit Court of Appeals for the First Circuit, requiring defendant-handlers to comply with the terms of the Boston Milk Order. Thereafter, the treasurer and sole stockholder of one of the corporate defendants was fined for contempt because of his acts in preventing compliance with the terms of the court’s injunction. After a long series of proceedings in the District Court for the District of Massachusetts, the Circuit Court of Appeals for the First Circuit and the Supreme Court of the United States, a compensatory fine was imposed on this defendant and he was ordered committed to jail until such time as he paid the amount imposed. The fine was based upon the amount of money owed by the corporate defendant controlled by the contemnor, and amounted to over $40,000.

Since the Act and the orders do not regulate producers as such, handlers, who are subject to regulation, have at times entered into contractual arrangements in attempts to secure the status of a “producer” and thereby escape regulation. In *Elm Spring Farm, Inc., et al. v. United States,* the officers and stockholders of a corporation engaged in handling milk formed a cooperative association in furtherance of a scheme to show that they were producers. An exceedingly complicated series of contracts were made between the corporation and various producers of milk—the object of all these transactions being to make the cooperative the “producer”. The Circuit Court of Appeals for the First Circuit refused to permit the corporate-handler to acquire the status of a pro-

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1938) (to enforce compliance with the provisions of a fruit marketing order); United States *et al.* v. David Buttrick Company *et al.*, 28 F. Supp. 878 (D. Mass. 1939) (failure to comply with any of the provisions of the order); and Chapman *v.* United States, 139 F. (2d) 327 (C. C. A. 8th, 1943) (failure to make payments to the producer-settlement fund, failure to pay to the market administrator pro rata share of administrative expenses, and failure to pay to the market administrator sums withheld from producers for marketing services).


ducer by this device and thereby avoid making payments into the producer-settlement fund as required by the Boston order. The court stated that "If Cooperative had had the straightforward purpose of becoming a producer of milk it would hardly have negotiated the rather weird series of agreements. . . ."75 The court further stated that:

"Cooperative might have become a producer by acquiring a farm and milk cows and going into the business of operating a dairy farm with the attendant risks of loss. 'It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers.' Gray v. Powell, 1941, 314 U. S. 402, 414, 62 S. Ct. 326, 86 L. Ed. —."76

In the recent *La Verne case,*77 the United States Circuit Court of Appeals for the Ninth Circuit considered the question of whether a handler, in an enforcement proceeding under Section 8a(6), is precluded from introducing evidence to controvert the constitutionality of an order issued under the Act, insofar as the applicability of the order to the handler is concerned, where the handler had not first exhausted his administrative remedy and secured a judicial review as provided by Section 8c(15) of the Act. The court decided that "A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action." The court continued by saying that: "The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act."

The principle followed by the court in the *La Verne case,* supra, has also been applied by other courts. In *United States v. Ridgeland Creamery Company,*78 decided October 26, 1942, the United States District Court for the Western District of Wisconsin held that where the defendant-handler did not challenge the market administrator's computations of amounts owed by the handler to the producer-settlement fund

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75 F. (2d) 920, 926 (C. C. A. 1st, 1942).
76 Id. at 927.
78 F. Supp. 145 (W. D. Wis. 1942).
by petitioning, under Section 8c(15)(A) of the Act, for review of the market administrator's determinations, the Government was entitled to a court order directing the defendant-handler to pay the amount shown to be due. The court refused to permit the defendant to introduce evidence, in the proceeding under Section 8a(6) of the Act, to show that the computations as to the amount it owed were incorrect. It said:

"Where, as here, Congress has created a special administrative procedure providing for a review by the Secretary of Agriculture of the United States of actions and determinations of the Market Administrator, and which, as here, meet all requirements of due process, that remedy is exclusive, and this court has no jurisdiction to review the actions and determinations of the Market Administrator, except in proceedings under Section 8c(15)(B) of the Agricultural Marketing Agreement Act of 1937."  

Another large group of cases has arisen under Section 8c(15) of the Act. Section 8c(15)(A) provides that any handler subject to an order may file a written petition stating that any such order or any provisions of such order, or any obligation imposed in connection therewith, is not in accordance with the law. The handler must be given an opportunity for a hearing upon his petition and, after the hearing, the War Food Administrator must make a ruling, which is final if in accordance with the law. Section 8c(15)(B) of the Act vests the District Courts of the United States, for the district in which a handler is an inhabitant or has his principal place of business, with jurisdiction to review such rulings by the War Food Administrator. If the court decides that the ruling is not in accordance with law, it may remand the proceedings to the War Food Administrator with directions either (1) to make such rulings as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted under Section 8c(15) does not prevent the Government from obtaining relief pursuant to Section 8a(6). However, the criminal penalty provided by Section 8c(15) may not be imposed for such violations as occur between the time of the filing of the petition and the date of the War Food Administrator's ruling under Section 8c(15)(A), if the the court, in the criminal proceeding, finds that the petition was filed and prosecuted by the defendant in good faith and not for delay.

The nature of judicial proceedings under Section 8c(15) of the Act has been made clear by courts in numerous decisions. 80 All of the

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80 Vogt's Dairies, Inc. v. Wickard, 45 F. Supp. 94 (S. D. N. Y. 1942); Fairview Creamery, Inc. v. Wickard, 42 F. Supp. 757 (D. Me. 1942); New England Dairies, Inc. v. Wickard,

89 Id. at 149.
reasons which have impelled courts to support the doctrine of exhaustion of administrative remedies, the doctrine of primary jurisdiction, and the doctrine of administrative finality have been reiterated in decisions discussing the functions of the War Food Administrator and the courts under Section 8c(15). Thus, the court, in the La Verne case, *supra*, emphasized the fact that the subject matter of litigation under Section 8c(15)(A) calls for technical knowledge pertaining to complex marketing problems in connection with milk and fruits and vegetables, possessed by the War Food Administrator.  

The courts have been equally clear in stating the scope of review of rulings of the War Food Administrator by the courts under Section 8c(15)(B). In numerous decisions,  it has been stated that the court is limited to determining whether the ruling of the War Food Administrator is in accordance with law. The courts have taken the position that the statute does not authorize a trial *de novo* but simply provides for a review of the War Food Administrator's ruling as made on the basis of the evidence before him. Moreover, it has been held that, if the War Food Administrator's findings of fact are supported by substantial evidence, they will not be disturbed by the court even though, upon a consideration of all evidence, the court itself might reach a different conclusion. In *M. H. Renken Dairy Company v. Wickard*,  the court said:

"This action is brought to review the ruling made by the Secretary of Agriculture upon a petition filed by the plaintiff pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937. . . .

* * *

"The plaintiff, as petitioner, in this case had a full and fair hearing on its petition. There was clear and substantial evidence in support of the Secretary's


""Technical details of the milk business are left to the Secretary and his aides." Mr. Justice Reed writing for the majority of the Court in Stark *et al.* v. Wickard, 321 U. S. 288, 310 (1944).

See cases cited *supra* note 80.

findings, and the court will not disturb the Secretary's findings or rulings, and substitute its judgment for that of the Secretary, an administrative official, even if upon an examination of all the evidence the court might have in the first instance reached a different conclusion, which in this case it would not. . . .”

Litigation has also involved Section 8c(14) of the Act, which authorizes the imposition of criminal sanctions against any handler subject to an order issued under the Act who violates any provision of the order. These penalties may not be imposed with respect to violations occurring between the date of the filing of a petition and the ruling by the War Food Administration under Section 8c(15)(A) of the Act, if the petition is filed and prosecuted by the defendant in good faith and not for delay.

Experience has proved this provision to be effective. It has usually been invoked in connection with the enforcement of fruit and vegetable marketing orders. With the opening of a shipping season in an area regulated by an order which prohibits the movement, in interstate commerce from the area, of a commodity, unless it meets certain grade and size regulations, enforcement crews have been dispatched to the locality. They have, upon learning of violations, filed criminal informations with local Federal courts. This action has generally tended to prevent those who would be inclined to ship the commodity of the unsanctioned grade and size from carrying on activities in violation of the order.

The statute has been involved in proceedings instituted by persons seeking to enjoin enforcement of marketing orders. These suits have been filed under the general equity jurisdiction of Federal courts and not under any specific provisions of the Act. It has been held, for example, that, under some circumstances, producers of milk may not maintain such actions, while under different circumstances they may.84 This statute has also been involved in antitrust prosecutions.85

Violations of reporting provisions of orders issued under the Act have been the basis for prosecutions under Section 35(A) of the Criminal Code,86 which prohibits the making of false reports concerning any mat-


ter within the jurisdiction of any department or agency of the United States.

Conduct of all this litigation has been attended with a notable degree of success due, largely, to the effective presentation to the courts of the philosophy imbedded in the statute and to the recognition, by the courts, of the validity of this philosophy as a legitimate basis for regulation in the economic realm.
PROBLEMS ARISING UNDER THE RENEGOTIATION ACT

Albert Francis Reardon†

T HIS article is concerned primarily with the legal aspects of various phases of the renegotiation statutes and their relation to Federal taxation of profits, whether such profits are excess or merely excessive; i.e., subject to the Excess Profits tax law or renegotiation proceedings. Therefore no attempt will be made to find other than a legal solution to the economic, social, or political problems which will arise in the event the statutes and procedures of the present system of renegotiating the profits on Government contracts are retained and extended for the purpose of Federal profit taxation. However, with the rising tide of litigation in the district courts of the country revealing many interesting questions regarding the constitutionality of these statutes, some attention will be given the problems faced by those members of the Bar and laymen who are interested in the intricacies of administration or the methods now being used to test the constitutionality of the Acts. While much has been printed1 about the operation of the Acts and procedure thereunder, comparatively scant notice has been given attacks upon the constitutionality of the Acts by aggrieved parties. It is believed that a resumé of the history and operation of the Acts and the consideration of the thesis herein, together with a study of the constitutional questions involved, will be a helpful synthesis.

I. Development of the System

In United States v. Callahan Walker Construction Company,2 the United States Supreme Court gave judicial sanction to the procedure of "equitable adjustment" of an agreed price in a Government contract, holding any adjustment was primarily a question of fact for determination by the contracting officer, if conditions had changed after the contract was entered into necessitating a renovation of price under the terms

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317 U. S. 56, rehearing denied, 710 (1942).
of the contract. This procedure had been followed for some years past under Government construction contracts, which included an escalator clause designed to afford a method by which the contract price could be raised or lowered in amount, dependent upon an increase in cost to the contractor or the elimination of some feature of construction that operates to reduce the cost. Such agreements are *bilateral* and are entered into on the premise that changes may be made.

Under this procedure the War and Navy Departments and the Maritime Commission, prior to the time the decision was rendered, had an effective policy of mutual repricing between themselves and their suppliers on war contracts for defense articles. The result of this procedure was the voluntary refund of large sums of money to the Government. The practice had originated under the Second War Powers Act and was found necessary because of the haste with which contracts had to be negotiated and the presence of a mutual uncertainty regarding both costs and profits. But it is to be noted that these procedures were the product of good will of both the Government procurement officers and the contractors.

With the increase of contracting after the events of December 7, 1941, the system of voluntary refunds gradually deteriorated and the country was faced with the spectre of the war profiteer. It also became increasingly apparent that more than a few contractors were either squandering their profits or in other ways attempting to dispose of them in such manner as to avoid or reduce their tax liability under the revenue laws then in effect.

On February 16, 1942, while the House of Representatives was considering the sixth in a series of several Supplemental National Defense Appropriation Acts, providing for enormous sums for Government contracting, the United States Supreme Court rendered its decision in *United States v. Bethlehem Steel Corporation*, et al. In that case the Government had sued in equity for an accounting and the recovery of payments made to the defendants under various contracts entered into for the construction of ships in 1917 and 1918. In affirming the ruling of the district court denying recovery to the Government, the Court said:

> "The profits claimed here arise under contracts deliberately let by the Fleet Corporation under authority delegated by the President in accordance with an  

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4 H. R. 6868, 77th Cong., 2d Sess. (1942); see 88 Cong. Rec. 3136, 3139 (1942).

315 U. S. 289 (1942). The particular importance of this decision lies in the fact that it is the latest indication of the probable attitude of the Supreme Court in a case involving the constitutionality of the renegotiation statutes.
Problems Arising Under Negotiation Act

act of Congress. Neither Congress nor the President restricted the freedom of the Fleet Corporation to grant measures of profit common at the time. And the Fleet Corporation's chosen policy was to operate in a field where profits for services are demanded and expected. The futility of subjecting this choice of policy to judicial review is demonstrated by this case, coming to this Court as it does more than twenty years after the ships were completed. In any event, we believe the question of whether or not this policy was wise is outside our province to decide. Under our form of government we do not have the power to nullify it, as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high. The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress."

It seemed clear that the Supreme Court must have been aware of the legislative problem then before Congress—that of curbing excessive profits on war contracts—when this dictum was included in the decision:

"... But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not this Court, the power to make them."

Pursuant to this expression by the Supreme Court, the House of Representatives accepted a hastily written amendment to the Supply Bill then before it, purporting to relieve the intolerable situation presented by the Bethlehem case. Thus the Sixth Supplemental National Defense Appropriation Act became the vehicle by which the statutory concept of renegotiation of contracts was borne upon the national scene. The original amendment merely provided that none of the money appropriated should be available to make final payment and settle contracts until the contractor had filed a certificate of costs with a satisfactory renegotiation agreement. The amendment was expanded in the Senate before the bill was enacted. This was the basic renegotiation statute, and according to the author of the amendment, Representative Francis Case of South Dakota, it was an attempt to avoid overpayment of appropriated moneys and to provide an opportunity for the Government to pay for war goods on the basis of determined costs.

Thus the War and Navy Departments and the Maritime Commission

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315 U. S. 308 (1942).
7Id. at 309.
656 Stat. 245 (1942), 50 U. S. C. App. § 1191 (Supp. 1943); see note 4, supra.
8Hearings before Committee on Ways and Means on H. R. 2324, 2698, and 3015, 78th Cong., 1st Sess. (1943) 971.
had a method to replace, or at least supplement, the system of voluntary refunds thrust upon them. The legislation was administratively construed to have given the Departments, enumerated therein, a mandate not only to prevent excessive pricing on all war contracts and subcontracts under their respective jurisdictions *in futuro*, but also to recapture profits arising from any excessive pricing on past contracts; provided that none of these contracts were excepted by the terms of the Act. The Departments developed an "overall" system bringing all past profits of a contractor undergoing renegotiation under scrutiny. In determining the excessiveness of the contractor's profits on his war contracts, such contracts as had not been completed by April 28, 1942, the effective date of the law, were examined. From the first, operation of the law depended upon "gap-filling" regulations made by the administrative agencies involved. The manner in which these Departments proceeded, especially in regard to recapture of profits, appeared to be retroactive taxation of past profits. This point will be more clearly developed when the methods of renegotiation are reviewed.

A power thus delegated by the Congress as an incident to procurement of war supplies eventually was fashioned by administrative construction into an obligation of the Departments concerned to police war profits. Further, we shall see that Congress subsequently approved the construction put on these Acts by the agencies, when enacting amendments to the original renegotiation statute.

But to return to the actual sequence of events, we find that vociferous protests of contractors and others affected by the administration of the statute did not fall upon deaf ears. Within a few months the Chairman of the Senate Committee on Finance proposed to substitute for the renegotiation law an entirely new method of dealing with the problem of profits. He proposed a flat six per cent limitation on profits *after taxes* [i.e., after taxes are ascertained], and, as a consequence, hearings were ordered and the entire problem once more analyzed and reviewed.10

Officials of the War and Navy Departments, the Maritime Commission, and other interested parties expressed themselves on the functions and operation of the statute. Deficiencies of the statute and its administration were conceded, as it was pointed out that the legislation was of novel impression. The Departments steadfastly maintained objections to the substitution of a flat profit limitation *after taxes*, claiming that such procedure would result in tax litigation and postpone recovery of

10 *Hearings before Committee on Finance on Section 403 of Public Law 528, 77th Cong., 2d Sess. (1942) 60.*
excessive profits, which was precisely what Congress was endeavoring to avoid. For the most part, representatives of the Departments merely reiterated previous comments at prior hearings, but their testimony strongly stressed the necessity of costs and profits by maintaining production efficiency incentives.\textsuperscript{11}

A number of amendments were proposed by the Departments to facilitate administration of the statute. Some of these were attempts to clarify existing provisions; others were intended to permit a shift from recapture of profits to pricing control as the predominant feature of administration.\textsuperscript{12} Many of these proposals were incorporated into Section 801 of the Revenue Act of 1942.\textsuperscript{13} However, the significance of the refusal by Congress to adopt the amendment proposed by the Departments, which would have made repricing the main feature of future administration of the statute, was not lost, the Departments inaugurating a more rigorous policing of past profits with the passage of that Act. Congress had indicated that the predominant object of the law relating to past profits was to be recapture, not repricing.

Although it had been demonstrated that profit control was a function of taxation, Congress, in amending the basic legislation, enlarged the scope of the law by the Military Appropriation Act of 1944.\textsuperscript{14} The Treasury Department, the Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation, and the Rubber Reserve Corporation (the last four being subsidiaries of the Reconstruction Finance Corporation) were then brought under the Act.

On July 14, 1943, less than a fortnight later, the President approved Public Law 149, 78th Congress, 1st Session.\textsuperscript{15} By that enactment Congress created certain exceptions within the renegotiation law respecting subcontractors, and attempted to define more clearly those subcontracts which were to be subject to renegotiation. But as yet, Congress has not adverted to the procedures being established by the various agencies. It may reasonably be assumed that Congress acquiesced in the several administrative interpretations promulgated and effected by the Departments and agencies involved.

During the summer and autumn of 1943, when the Ways and Means Committee of the House of Representatives shouldered the task of pre-

\textsuperscript{11}Id. at 7, 19-20, 92-93.
\textsuperscript{12}Id. at 51-53, 147-149.
\textsuperscript{13}56 Stat. 982 (1942), 50 U. S. C. App. § 1191 (Supp. 1943), see note 8 supra.
paring a revenue bill for 1944, a veritable parade of Department heads, administrators, Treasury officials, contractors and businessmen affected by the administration of the law, and private advisors, testified for either the repeal or retention of the statute. But there were also many who criticized the operation of the law. These latter individuals urged the retention of the law with certain refinements of procedures, and declared the measure as it then stood to be far better than no legislation at all.\textsuperscript{16}

By this time the procedure of renegotiation was in full swing; many contracts had been renegotiated; others were being processed. The manner in which this operation is performed upon the profits of a war contractor will be reviewed in order to comprehend the changes wrought in both the statute and the developed procedure by the enactment of the Revenue Act of 1943.\textsuperscript{17}

\section*{II. Method of Renegotiation}

Negotiation has been described, rather than defined, as "an orderly procedure which involves discussions between buyer and seller to evaluate correctly, from an analysis of all determinable factors, the object of sale, with a view of setting a price agreeable to the buyer, that will fairly compensate the seller for his services in producing the item."\textsuperscript{18} The elements of the procedure of renegotiation dealt with herein are the collection, analysis, and inquiry by the Government into the financial and operational data of the contractor. This precedes any recovery of excessive profits from the contractor and is the method by which those profits are determined. It is precisely these elements which must be retained if the principle of renegotiation is to survive after the present emergency.

The term "renegotiation" is probably the result of semantics. A better word might be "re-examination". In the strict sense of the word, renegotiation means a bilateral, mutual discussion; whereas the statute

\textsuperscript{16}Extensive hearings on the renegotiation of war contracts were conducted from June 10 through 30, 1943, pursuant to H. Res. 30, 78th Cong., 1st Sess. (1943); see Hearings before Committee on Naval Affairs pursuant to H. Res. 30, 78th Cong., 1st Sess. (1943). The purpose of the resolution was the authorizing and directing of an investigation of the progress of the war effort by House Naval Affairs Committee. The testimony heard by this body was substantially reiterated before the House Ways and Means Committee later; see note 9 supra.


\textsuperscript{18}Blough, Renegotiation Standards and Practices (1943) 10 Law & Contemp. Prob. 276, 277.
contemplates a unilateral procedure unless and until the administrator decides that excessive profits actually exist. It may be that "renegotiation" as enacted was intended to mean "repricing", but the legislative history of the statute and its administration demonstrates a constant trend toward enforcement of the "recapture" features, rather than those of "repricing". At least, recapture is the point of controversy between the administrators and contractors.

In the statute prior to the enactment of the Revenue Act of 1943, the nearest expression of definition is: "... the terms 'renegotiate' and 'renegotiation' include the refricing by the Secretary of the Department of the contract price. ..." 19 Significant is the change in the latest Act, which reads: "The terms 'renegotiate' and 'renegotiation' include a determination by agreement or order under this section of the amount of any excessive profits". 20 Such definitive language indicates some limitation by law on the wide latitude formerly vested in the administrators in connection with "refixing of price" procedure under the prior Acts.

The guide first placed in the statute to determine whether a contract was in need of renegotiation is found in these words: "The Secretary of each Department is authorized and directed, to proceed with renegotiation, "whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, ..." 21

The next writing of the statute produced this standard:

"Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate or eliminate excessive profits on some or all of such contracts or subcontracts as a group without separately renegotiating the contract price of each contract or subcontract." 22

This provision had for its object a simplification of the entire procedure, and was a recognition by the legislators of the "overall" technique of administration developed by the agencies. But in the last edition of

the statute we find that "Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits," the Board shall initiate renegotiation proceedings. And there is further provision for the delegation of the powers of the Board in this respect to the Secretaries of the Departments who are represented on the Board. While this last expression of the legislative will of Congress is an apparent illusion so far as any limitation on the "opinion" of the Secretaries is concerned, certain features of the Revenue Act of 1943, yet to be considered, will reveal that limitations placed on the Board have narrowed the sphere of determination of the Secretaries themselves.

Thus we see that statutory renegotiation really means a refricing of the contract price, and we may also observe that proceedings are not instituted until there is a determination, by the Secretary whose Department is involved, or by the Board, that "excessive profits" have been received or have accrued under a war contract, or series of war contracts.

The study of the evolution of the "excessive profits" theory as found in the statutory provisions, as enacted, will illustrate the point that there has been a definite chronology between the action of the Congress on the one hand, and the doings of the agencies and Departments on the other.

In the first enactment, the Secretary was given an investigative power to determine the facts in a given case upon which to base his opinion. He could exercise the same powers with respect to a contract or subcontract in excess of $100,000 "that an agency designated by the President to exercise the powers conferred by Title VIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable." We find the power more succinctly stated in the Revenue Act of 1942. Therein, "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." Thus Congress has directed the administrators of the statutes to refix the contract price, whenever there were excessive profits. But the lawgivers prescribed no definite method of arriving at the "excessiveness" of those profits!

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That method was to be the product of the administrative enterprise and ingenuity. Congress, having enacted the policy of the law, left to the administrative bodies the task of “writing in the details”. The chronology now becomes apparent. For, since the enactment of the basic law on April 28, 1942, the Departments and agencies have forged ahead. They experimented with and fashioned methods, while Congress essayed no legislative comment until the passage of the Revenue Act of 1943, over a Presidential veto, on February 24 and 25, 1944.27

In that Act, Congress recognized the procedures initiated and evolved by the agencies, and wrote them into the law. In proof of this statement, we now recur to the original legislation and a review of certain actions of the Departments empowered thereunder to renegotiate contracts. It will be remembered that the heads of several Departments were included in the scope of the basic Act, and more were brought under its provisions by subsequent enactments.

To properly administer the provisions of the basic Act, the Secretaries of the Departments authorized therein to renegotiate, delegated their authority, directly or through subordinates, to the Price Adjustment Boards erected in each agency. These Boards operated in close harmony with each other according to the scheme for the control of actual renegotiation as set out in the Act. In time a Joint Price Adjustment Board was created by the concerted action of the Secretaries, to which they individually delegated authority and discretion to determine policies and plans for all the constituent Departments. The Joint Board thus created was composed of the Chairmen of the Price Adjustment Boards of the War, Navy, and Treasury Departments, the Maritime Commission, and the Reconstruction Finance Corporation, together with a representative of the War Production Board. This jointure provided a formal procedure to replace the close liaison formerly maintained between the several Price Adjustment Boards and the Secretaries in such matters.28

After this Board was established a “Joint Statement” relative to “purposes, principles, policies, and interpretations” under the Act, was published and issued by the War, Navy, and Treasury Departments, and the Maritime Commission, under date of March 31, 1943.29

28For a more complete discussion of the organization and machinery for the processing of renegotiation cases see Boyd, Administration Machinery and Procedures for Renegotiation (1943) 10 Law & Contemp. Prob. 309.
29Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission (March 31, 1943).
"The 'Joint Statement' declares the price adjustment boards are guided by the following broad principles: '(a) That the stimulation of quantity production is of primary importance.' '(b) That reasonable profits in every case should be determined with reference to the particular performance factors present without limitations or restriction by any fixed formula with respect to rate of profit or otherwise.' '(c) That the profits of the contractor will be determined on his war business as a whole for a fiscal period, rather than on specific contracts separately. . . .' '(d) That as volume increases, the margin of profit should decrease. . . .' '(e) That in determining what margin of profit is fair, consideration should be given to the corresponding profits in pre-war base years of the particular contractor and for the industry, especially in cases where the war profits are substantially like pre-war products. . . .' '(f) That the reasonableness of profits should be determined before provision for federal income and excess profits taxes.' '(g) That a contractor's right to a reasonable profit and his need for working capital be distinguished. A contractor should not be allowed to earn excessive profits merely because he lacks adequate working capital in relation to a greatly increased volume of business."\(^\text{30}\)

The "Joint Statement" further states:

"In determining the margin of profit to which a contractor is entitled, consideration is given to the manner in which the contractor's operations compare with those of other contractors with respect to the applicable factors; among such factors to be taken into consideration when applicable are the following:

"(a) Price reductions and comparative prices.

"(b) Efficiency in reducing costs.

"(c) Economy in the use of raw materials.

"(d) Efficiency in the use of facilities and in the conservation of manpower.

"(e) Character and extent of subcontracting.

"(f) Quality of production.

"(g) Complexity of manufacturing technique.

"(h) Rate of delivery and turnover.

"(i) Inventive and developmental contribution with respect to important war products.

"(j) Cooperation with the Government and with other contractors in developing and supplying technical assistance to alternative or competitive sources of supply and the effect thereof on the contractor's future peace-time business."\(^\text{31}\)

This statement of principles was an administrative interpretation calculated to render more definite the meaning of the term "excessive profits" so as to be reasonably capable of uniform application in the administration of the statute. It is a clear, concise statement of the considerations upon which a determination as to "excessiveness" of profits is to be based, and was produced by those charged with the administration of the statute.


\(^\text{31}\)\textit{Id.} at 363.
To show the acquiescence of a Congress composed of members who were under terrific pressures from "back home" to restrain the agencies in their determination of excessive profits, even to the extent of abolishing the statute, there is here quoted a portion of Title VII, Sec. 701 (b) of the Revenue Act of 1943:

"(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

"(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

"(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peace-time products;

"(iii) amount and source of public and private capital employed and net worth;

"(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

"(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;

"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

As further proof of the approving intention of Congress, the idea of a Joint Board is written in the Act in these words:

"Sec. 403 (d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of Navy and shall be appointed by the Secretary of Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employee of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while
away from their official station on duties of the Board. They shall elect a Chairman from among their members. The Board shall have a seal which shall be judicially noticed.\textsuperscript{32}

It would indeed be difficult to produce more competent evidence on such major points as these, that Congress has depended upon the agencies concerned to develop procedures, and in turn has enacted these processes into law.

From the terms of the "Joint Statement", we can easily visualize the extent to which administrative action consequent upon such an interpretation has proceeded. It is now evident that the goal is the recapture of profits; repricing is secondary. Congressional assent to this program is further indicated by a splitting of the "repricing" features of the process and their being put in a separate part of the Act.\textsuperscript{33}

In addition to the statutory mandate to "renegotiate" against such a background of administrative principles just stated, broad powers of delegation were bestowed upon the Secretaries of the Departments included in the Act, pursuant to and "in accordance with regulations prescribed by the President for the protection of the interests of the Government. . . .\textsuperscript{34} In this connection we may note in passing that the War Shipping Administration was included under the terms of the Act by an Executive Order of September 1, 1942.\textsuperscript{35}

Thus we perceive that under the Acts, generally, authority was given the heads of the various agencies named therein (or added by Executive Order), whenever in their opinion excessive profits have been, or are likely to be, realized from contracts with their own or some other agency included under the Acts, to so determine and then renegotiate those contracts. This authority, established by the Acts of Congress, is extended to the renegotiation of the contract price of certain subcontracts not excepted by the Acts. Provisions were also made for the withholding and recovery of payments made, for the insertion of renegotiation clauses in contracts yet to be executed, for the exclusion of certain costs as an element of what constitutes "excessive profits", and other pertinent matters. Pursuant to authority contained in the Acts, such powers as could be delegated to subordinates by the heads of their respective agen-

\textsuperscript{32}See note 23 supra.
cies were effected, as were many redelegations within the Departments, and the administrative machinery was completed. The administrative burden placed on the Departments was heavy. The basic Act necessitated the ferreting out of contractors with contracts which, singly or accumulatively, exceeded a dollar value of $100,000. It also required the commencement of proceedings within one year following the close of that fiscal year of the contractor within which completion or other termination of his contract occurred. Congress recognized this problem in the Revenue Act of 1942, and included a direction that certain contractors might file statements with the Departments; and thus set in motion a statutory limitation of one year for the beginning of renegotiation proceedings. A similar filing is mandatory under the Revenue Act of 1943.

III. Process of Renegotiation

Having observed the recognition accorded organizational features of the renegotiation system, we next turn to a consideration of the "collection, analysis, and inquiry" hub about which the entire administration of the statute revolves. It is this process that is determinative of the "excessive profits" to be recovered, for by it such profits are identified.

The procedures of the various agencies differ in minor respects, although all follow the same general pattern. For that reason, the following description of what happens during the course of a renegotiation will not be exhaustive and must be a composite.

It has been customary for the Price Adjustment Boards to apprise the contractor whose contracts are to be renegotiated of that fact by letter, inviting him to attend a conference or preliminary discussion of the matter. The contractor is usually supplied with schedules to be completed by him. These are designed to reflect the condition of his business for the preceding six-year period (formerly the period was 1936-1942). He is also requested to prepare a statement of net sales for the latest period available. As to the necessity for securing such information, we must recall that renegotiation, when effected, is retroactive to April 28, 1942, and applies to all contracts not finally closed by that date.

At this first meeting the negotiator explains the objects of the renegotiation statute and its underlying philosophy and policies. Should the

8However, see §§ 701 (d) and 802 of the Revenue Act of 1943 for other limitations.
data requisite for a proper determination of the "excessive" profits be incomplete, the negotiator so informs the contractor and indicates what additional information is needed. The value of submitting the required information is also stressed.

After the conference, the negotiator prepares the minutes of the meeting. A cost analysis is made by another officer or employee and reported to the field or Departmental office, as the case may require, in accordance with a prescribed form. If the case involves intricate matters, other meetings may follow the first. Physical surveys of the plant facilities of the contractor may be made and further inquiry regarding the non-war business of the contractor for the years originally reported by him. The decision of the negotiator, based on the general principles outlined in the "Joint Statement", is made as to the amount of excessive profits received by the particular contractor on his war contracts, before taxes (i.e., before taxes are ascertained.) This decision is tendered the contractor in the form of an agreement, and he may either agree or disagree with the finding of the negotiator and the terms of the agreement. If he agrees, the document is signed by the contractor, which may be either the Price Adjustment Board of the particular agency or some other group to whom has been delegated the Board's power finally to approve such agreements. Should the agreement prove satisfactory to the reviewing authority that is to approve its terms, the contractor is given a clearance. The renegotiation is then complete except for the future performance of the contractor in repayment of the excessive profit. He may have agreed to return a lump sum or to make quarterly payments; or he may have agreed to repricing on future contracts. The important fact is that the document has been signed by both parties. It is a mutual agreement.

A noteworthy fact relative to the method of payment is the increased tax that will be paid if the installment payment is used. Under both the Current Tax Payment Act of 1943,\(^5\) and Section 3806 of the Internal Revenue Code\(^6\) (as amended by Section 701 (c) of the Revenue Act of 1943),\(^7\) the tax liability of the contractor is not discharged unless and until repayment has actually been made.\(^8\) Also consideration should

\(^8\) Watts, Renegotiation and Federal Taxation (1943) 10 Law & Contemp. Prob. 341.

In some few instances a \textit{contretemps} is occasioned by the refusal of the contractor to accede to the request of the negotiator either in the matter of supplying information or signing the renegotiation agreement. To remedy such a situation the Acts provide that the services of the Bureau of Internal Revenue shall be available to examine the records and audit the books of such a recalcitrant contractor. It was also provided in the Acts that the Secretary of each Department shall have a right to demand statements of actual costs of production and such other financial information as he may require of any contractor subject to renegotiation, under penalty of law for non-compliance. Government officials were empowered by the Second War Powers Act of 1942, Title XIII,\footnote{56 Stat. 185 (1942) 50 U. S. C. App. § 643 (Supp. 1943).} to inspect and audit the books, and to require the attendance of any necessary person at hearings concerning the business of any contractor with whom a defense contract has been placed at any time after the declaration of emergency, September 8, 1939,\footnote{Proc. No. 2352, 54 Stat. 2643 (1940), 4 Fed. Reg. 3851 (1939).} or prior to the termination of the war. The Price Adjustment Boards were also empowered to subpoena witnesses and, in the event of any person's refusing to attend and testify at hearings, to request direct court action to enforce obedience to the subpoena. All these remedies are at hand to enable the Price Adjustment Board or negotiator to get a full and complete description of the contractor's business on which to base a decision.\footnote{These powers are all, substantially, in the Revenue Act of 1943.}

Where the contractor will not admit the fairness of the determination of excessiveness of profits, or refuses to sign the renegotiation agreement presented to him, the case ascends to the next higher authority. Another attempt is made to reach a satisfactory settlement and, this failing, the matter is directed to the attention of the particular Secretary or one to whom has been delegated his authority to act in such matters. That person can conduct further supplemental audits and investigations as he may require to form a basis for final determination. He may effect a reduction in price on outstanding contracts, or recapture sums by withholding amounts due the contractor on either prime contracts or subcontracts. He can direct the prime contractor to withhold payments to a subcontractor, in which event the prime contractor is specially
protected from suit by the terms of the statute. Truly it can be said that dire consequences attend upon a refusal to comply with the final unilateral determination of the Secretary or his representative, the negotiator.

The finality of the Secretaries' determinations was not limited by amendments in the Revenue Act of 1942. Indeed the provisions of the original Section 403 (c) were fortified by another bulwark in the form of an amendment, as follows:

"(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such part or future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceedings." (Italics supplied.)

We may conclude from the enactment of such provisions as these, that Congress has expressed its intention of precluding from judicial review the determination of the Secretary and has recognized the futility of subjecting such a case to judicial review, as characterized so eloquently by Justice Black in his opinion in the Bethlehem case.

Although a more formal and complete procedure has now been adopted and written into the law by legislation, both Congressional and administrative, the actual proceedings will in most cases, closely approximate those described herein. These procedures are still available for the use of Departments. However, they are now subject to review by the Board set up in the latest Act, which Act includes the right of an appeal de novo from a final determination of that Board to the Tax Court of the United States; or judicial review in any appropriate court if "repricing" be the issue.

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IV. Results

The Renegotiation Act, administered in accordance with the foregoing procedural outline, has proved itself a remarkable success in recovering profits that are "excessive". Some time ago, the Under-Secretary of War, Mr. Patterson, estimated that almost six billion dollars had been saved by war procurement agencies because of the statute and its administration by the Departments and agencies involved. While the Under-Secretary said the amount estimated to have been recovered could hardly be termed a total net saving, since a part of it would eventually have been returned to the Government through excess profits taxes, he added: "But nearly $2,000,000,000 of it is an actual net saving."50

Testimony before the House Ways and Means Committee in the conduct of hearings on H. R. 368751 emphasized the taxation problem created by the operation of the statute. The contractor consensus was that while renegotiation was not a tax procedure, in reality, it increased the tax burden on the contractor for the reason that it recouped profits already accrued on the books of the contractor, or sums that were intended as a profit under past, present, or future contracts. More actual money was taken from the coffers of the contractor than he would have had to return under the provisions governing excess profits taxation. Businessmen went so far as to advocate a 100 per cent excess profits tax as a substitute for the renegotiation statutes and procedures, claiming that if a tax were to be placed on profits, such tax should be included as a tax law, and be subject to the restrictions placed on all tax laws by the statutes and the judiciary. There was also much discussion of the effect renegotiation was having on state tax laws.

V. Theory of Retention

The trend in income taxation today is toward the simplification of procedure. "The Current Tax Payment Act of 1943"52 was enacted as a method of collecting taxes currently; and Congress, after considering legislation to relieve the great majority of citizens from filing individual tax returns, has now enacted the "Individual Income Tax Act of 1944".53 These successive measures do not indicate a lightening of the tax burden

51 78th Cong., 1st Sess. (1943). This was the Committee print of the bill which eventually was enacted as the Revenue Act of 1943.
on individual taxpayers, but the converse, as evidenced by the greater withholding tax, effective January 1, 1945, provided for in the latter Act. The lesson of these two laws is that Congress is attempting to arrive at a measure of taxable income upon which heavier taxes may be imposed.

We have ascertained that while renegotiation is not a tax law, the operation of the statute has increased the Federal revenue. Aside from the voluntary return of large sums by corporations and individual citizens who do not wish to be known as war profiteers now or in the post-war period, the obvious reason for such an increase is the particular procedure of renegotiation used to determine "excessive" profits, which profits are the measure of the amount to be recovered. This is the procedure retained under the theory here explored.

If the American system of private industry, private capital, and private enterprise is to survive after this emergency has passed, the excess profits tax, which is a war income tax on business profits, requires the serious consideration of the Congress with a view to its modification or repeal. And in such consideration, the Congress will probably endeavor to equalize the tax burden of the individual and businesses. It may be that Congress will decide to increase the tax on the income of the individual, and if so, it does not seem reasonable to suppose that an attendant exemption will be granted those companies and corporations which have profited by the war and from an increased post-war business.

To cope with this difficulty, there is here advanced the theory that a special income tax, measured by the profits or a percentage of the profits accrued from Government contracts, might be placed on Government contractors. Such a tax could be incorporated in an amendment or substituted for the excess profits tax.

To begin with, the final results of renegotiation procedure and the excess profits tax as of today are approximately the same. Both take away profits that have accrued and in about the same amount; the former by a simple but more rigorous method, the latter by a complex and not so effective method. But when we contemplate the possible forms of taxing profits, excessive or excess, within the framework of the Constitution, we find that we have ready a practical procedure, which has not been successfully challenged as unconstitutional; a procedure that can be and is being used to determine the true profit of a contractor, individual or corporate, based upon production cost and selling price.
Problems Arising Under Negotiation Act

It is altogether possible that the procedures of renegotiation may first be used to determine the profit of Government contractors upon which a special income tax will be imposed. Later, the same system could be utilized to determine the profit of private corporations and businesses upon which a special income tax may be imposed in lieu of, or in addition to, the present excess profits tax. Indeed the methods of renegotiation might better be adopted for tax purposes in determining the taxable excess profits of a corporation, than the present complicated system of excess profits tax. Both may be integrated into a single statutory scheme. Certainly an approach has already been made.

Problems resulting from the conflict of renegotiation and other provisions of the Internal Revenue Code with relation to excess profits tax and withholding tax have been solved through a process of development, involving amendments to the excess profits tax law and other provisions of the Code, and the issuance of bulletins by the Bureau of Internal Revenue. Renegotiation has been mentioned in other Acts, either by name or implication.

New questions will constantly call for attention until the entire law is made whole. A study of the situations already presented and disposed of seems to have developed three principles of settlement: (a) whether renegotiation of a contract occurs before or after the contractor's Federal tax returns for the year in question have been filed, the result of renegotiation should be substantially the same; (b) the contractor will not be required to pay tax on income which has been subject to renegotiation; and (c) administration of renegotiation should be dovetailed in order that the contractor will not simultaneously be paying money to one agency and claiming a refund from another, based upon his payment to the former. In this manner the excess profits tax, which is imposed

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44Revenue Act of 1943.
45Ibid.
48Watts, loc. cit. supra note 42.
on corporate income and measured by a graduated scale of percentages of profits, has already been expanded to some extent by the operation of renegotiation of war contracts.

The imposition of a tax on special income derived from certain designated sources, such as profits from contracts, is not new. In a manner strikingly similar to the composite of renegotiation procedures and the income theory supporting the excess profits tax proposed herein, we find a precedent in the method employed to levy a special tax on the sale of silver. In the case of United States v. Hudson, Mr. Justice Van Devanter, speaking for the whole Court, stated:

"The taxing provision does not impose a tax in respect of all transfers, but only in respect of such as yield a profit over cost and allowed expenses. If there be no profit there is no tax. If there be a profit the tax is to be 50% of it. . . . Because of this, counsel for the Government contend that the tax is a special income tax; and we think the contention sound.

"It is not material that such profit is taxed, along with other gains, under the general income tax law, for Congress has the power to impose an increased or additional tax, if necessary therefor. . . ." (Italics supplied.)

When, in the light of this decision, we consider that the uniformity required by the Constitution as to income and excess profits taxation is geographical, it appears reasonable to take the position that definite possibilities exist for the use of the method developed in renegotiation for profit taxation, regardless of whether such profits be "excessive" or "excess".

With relation to the power of Congress to enact such a tax law after this emergency has ceased, there is here quoted a portion of the opinion of Mr. Chief Justice Marshall in the case of McCulloch v. Maryland:

"We admit, as all must admit, that the powers of government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (Italics supplied.)

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60299 U. S. 498 (1937).
61Id. at 500.
62Id. at 316 (U. S. 1819).
63Id. at 421.
There has now been demonstrated the existence of a practical system for the determination of excessive profits on Government contracts, which system may be applied to tax profits, whether such profits be "excess" or "excessive"; and the distinct possibility of the enactment of a law that will impose a tax on those profits in the nature of a special income tax. At this time it is not proposed to do more than suggest the application of that system to private contracts, or to miscellaneous sales, or to any other businesses, with the sole exception of major Government contracts. The reason for this is twofold: the constitutionality of the statute and its procedure has not yet been determined; and the system as now constituted is so involved with the excess profits tax and other sections of the Internal Revenue Code that we must wait upon a declaration of policy, by the elected representatives of the people, as to whether they will choose to utilize the method now in use or will supplant it with a combination of the renegotiation and excess profits tax systems in the post-war period.

VI. CONSTITUTIONAL ASPECTS

Any consideration of renegotiation would be incomplete without some discussion of the merits of the statute and its procedures under our Organic Law. No decision has yet been rendered by the United States Supreme Court in this matter, and hence, the treatment herein must be largely academic.64

In its inception, renegotiation was intended as an aid to more economical procurement of war goods through the medium of Government contracts. The constitutional basis for renegotiation, as presented by those who desire to retain the system, is that Congress does have the power to contract for the needs of the Government through its procurement agencies, although such capacity is not vested in that body by the express terms of the Constitution. Reference is made to the "necessary and proper" clause of the Constitution to establish this function as a matter of necessity.65 It seems reasonable to believe that the Fed-

64 All arguments presented here are of such character and are objective rather than the opinions of the writer, unless otherwise indicated.

65 U. S. Const. Art. I, § 8, cl. 18: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

". . . Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from aggregate powers of the government. He instances the right to sue and make contracts. . . ." Mr. Justice Strong in Legal Tender Cases, 12 Wall. 457, 535 (U. S. 1872).
eral Government, being one of the parties to a contract, then has the right to prescribe the conditions upon which it will contract. The foregoing is admitted by all concerned to be almost axiomatic.

However, controversy has been occasioned because some believe that the exercise of this prerogative by the Congress so as to modify the conditions of uncompleted contracts by subsequent agreements, as well as enactment by the Congress to provide and maintain a procedure to effect such a policy through administrative agencies, are measures of doubtful validity under the Constitution. For that is the gist of both the statute and procedure termed "renegotiation".

This attitude has been an open secret, and testified to by many prominent persons in the various hearings on this subject before Congressional committees. The rather astonishing feature is the expressed desire of some who favor the enactment of a more stringent tax law, especially with respect to the excess profits tax, in order to produce the same result as renegotiation. Their reasoning is based on the contention that the renegotiation procedures and statute are an abortive use of the taxing power of Congress, running counter to the prohibition laid on the exercise of those powers by the Federal Government in the Fifth Amendment to the Constitution, and therefore are unconstitutional.

Those favoring retention of the statute and procedures thereunder take the position that renegotiation is not taxation but merely an extension of the right of the Government, in a period of emergency, to insure the payment of only a fair price for goods purchased for war needs. These partisans claim that the law is not and cannot be construed as a tax law, even though the statute is retroactively applied in accordance with its own terms. The similarity of procedures thereunder to those of the Bureau of Internal Revenue in determining taxable profits, and the direct appeal afforded the contractor to the Tax Court of the United States from a unilateral determination, do not make the statute a tax law. What creates an additional burden on the contractor is the statutory imposition of a duty to return from his war profits, past, present, or future, the amount determined by negotiators to be "excessive profit". As an incident to the operation of the declared policy of Congress to

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recoup "excessive" profits, it would not seem that such refund can be labelled as "taxation" of the contractor.

There is yet another school of thought as to the unconstitutionality of the statute. They look upon the statute as a necessary evil in wartime, supported by the war powers of the Government, as expressed in the Constitution, for the duration of the emergency—but no further. Nevertheless, they contend the statute is an abrogation or impairment of contract by the Government in that it is retroactive in its application and is really a taking of property without due process of law.

Those who seek to vindicate the statute and its operation agree in part with these views, but point out that the retroactivity of the statute is found to have congressional assent in the latest Act, at least in part.68

Further, argue the adherents of the legislation, it is not necessarily true that the operation of the Act constitutes a taking of property without due process or that it is an abrogation of contract by the Government. Conceding that certain provisions of the negotiated contract may be annulled by a subsequent renegotiation agreement, such action is said to be proper as within the paramount power of the Congress to wage war, coupled with the powers vested in the Congress by the "necessary and proper" clause of the Constitution.69 Indicative of this argument there is urged a portion of the decision denying the Government the right to cancel contracts for War Risk Insurance after World War I. Speaking for the unanimous Court, Mr. Justice Brandeis said:

"The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of contract with it are protected by the Fifth Amendment. . . . When the United States enters into contract relations, its rights and duties are governed generally by the laws applicable to contracts between private individuals. That the contracts of War Risk Insurance were valid when made is not questioned. As Congress has the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless indeed the action falls within the federal police power or some other paramount power." (Italics supplied.)70


Concerning the "just compensation" requirement of the Fifth Amendment, the supporters of the legislation say that no one is being deprived of a fair profit for his efforts, and they refer to the hearings on the renegotiation features of the Revenue Act of 1943. Therein, the Under-Secretary of War, Mr. Patterson, after a lengthy colloquy with the Chairman of the Committee conducting the hearings on the statute, issued this challenge:

"I want a contractor to come in and show the committee, on figures, a case of renegotiation by our Department where he could convince you that he was left with an insufficient profit.

"I think if the committee could study the figures they would be convinced that there was not a single case, and we have checked a great many, where we left the contractor with less than a fair profit..."71

This gage was taken up but, as evidenced by subsequent enactments of the law, the challenge was not met to the satisfaction of the legislators.

But what has happened is that contractors have taken the matter to the district courts of the country; and this even before hearings on the latest statute were completed. Press reports of a year ago related the filing of suits for either declaratory judgments to construe provisions of the Act, or interlocutory injunctions to restrain the heads of various Departments from enforcing the withholding and non-payment provisions of the Act; both types of actions founded on the claim that the provisions or practices of renegotiation are unconstitutional.72 Thus the question of constitutionality of the Act should be decided in the near future.

An examination of the dockets of the District Court of the United States for the District of Columbia reveals that several actions have been filed in that court by manufacturers, manufacturers’ agents and subcontractors’ agents.73 One of the more advanced of these cases at

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71Hearings before Committee on Ways and Means on H. R. 2324, 2698, and 3015, 78th Cong., 1st Sess. (1942) 827.
the time this article is being written is Lincoln Electric Company v. Frank Knox and James V. Forrestal. The original complaint for an injunction, equitable and other relief, was filed November 3, 1943. The suit was brought by a Cleveland corporation engaged in the manufacture and sale of electrical equipment, eight per cent of whose business for the year in which renegotiation of its contracts was made being directly with the Government and the remainder with business enterprises. The suit was the answer to a communication from the head of the Navy Department that “excessive profits” of $3,000,000 must be refunded by November 5, 1943, or the Government would withhold, and would instruct customers of the corporation to withhold, sums due from both to the plaintiff. Subsequent to the filing of the complaint, the Government withdrew its threat and withheld only sums due the plaintiff from the United States. Also, after the complaint was filed, Congress amended the Act and included the right of appeal to the Tax Court of the United States from the determination of the Secretary of the Navy. The Government filed its answer on January 20, 1944, denying unconstitutionality and setting up various other defenses. Later, the Government filed a motion for summary judgment, taking the position that the Court lacked jurisdiction because the suit was in legal effect against the United States, which had not consented to the suit; and that the plaintiff had available to it adequate legal and administrative remedies. In a memorandum opinion, in the District Court of the United States for the District of Columbia (a Three-Judge Statutory court presiding), filed August 2, 1944, Chief Justice Groner (of the Court of Appeals), and Justices Bailey and Goldsborough (of the District Court), after reviewing the history of the case, stated:

"... In our opinion the case should be tried on the merits and plaintiff given the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing. If the Renegotiation Act is in all respects valid, obviously, plaintiff has no case. If, on the other hand, it is invalid, and the Government, as we have indicated, is not an essential party, then, clearly, plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some other manner obviously inadequate and incomplete.

74Civil Action No. 21866, filed in the District Court of the United States for the District of Columbia (Nov. 3, 1943).
"There is another pending case in this court involving this identical question, which is set for hearing October 2, 1944. The instant case is accordingly set down for hearing on Monday, October 9, 1944, at 10:30 o'clock A.M., on the merits and the motion for summary judgment is denied, and an appropriate order will be entered accordingly."75

Since this opinion was rendered, the filing of motions on points and authorities, with respect to the jurisdictional question and other features of the case, has extended the time for final argument and decision. The important note is to those who expressed fears that no appeal could be carried to the courts from a unilateral determination of the Secretaries. Either these persons reached the wrong conclusion from a reading of the statute, or perhaps they underestimated the ingenuity of the members of the Bar.

Limitations of space will not permit presentation of other than a general outline of the argument found in complaints and other papers already filed.

The method of proceeding is similar in all the cases examined. Subsequent to a unilateral determination by the head of a particular Department, the plaintiffs have filed a complaint. The original papers usually request the District Court to apply to the Chief Justice of the United States Court of Appeals for the District of Columbia to designate a three-judge statutory court, under the provisions of Title 28, U. S. C., Sec. 380a,76 claiming that such court has jurisdiction for the granting of an interlocutory injunction, or other equitable relief; (1) because of the parties involved, or (2) because the plaintiff has no adequate remedy at law or will suffer irreparable damages to his business as a result of threatened Government action. Some of the complaints ask for a ruling under the Federal Declaratory Judgments Act, some others for a writ of prohibition or an order in the nature of mandamus.77 The action of the Government is alleged to be unconstitutional for a variety of reasons. In fact, a reading of the various complaints leaves the reader with the impression that there are few, if any, grounds that are not alleged to question the validity of the Act or the procedures thereunder. In addition to the allegations that the statute is invalid as repugnant to the provisions of the Fifth and Tenth Amendments, or is an invalid use of the taxing power vested in Congress, some of the suits are lodged on the premise that even though the Act be found constitutional, it cannot be applied in the particular case because judicial sanction would then

75Ibid.
77See note 73 supra.
be given to retroactive legislation. Several of the cases filed indicate the plaintiff’s belief that contracts entered into prior to April 28, 1942, the effective date of the Act, were completed, although final payment had not been made by the Government.

However, we must assume the statute to be within the limits of the Constitution, as it has not been declared otherwise. Until the question of the constitutionality of the statute and its procedures is settled by decision of the United States Supreme Court, all argument is speculative. The writer has merely indicated in the course of the inquiry some of the more controversial and salient areas of opinion that are being expressed today.

But problems of modern administrative law must also be considered, for they are in issue in most of the cases filed by those aggrieved by the operations of the administration agencies. An opinion may be ventured as to whether certain aspects of the law and its administration are consonant with the principles of administrative law and of the statutory law here under consideration.

It has been consistently held that a statute delegating power to an administrative agency to effect a policy declared by Congress must contain an intelligible and adequate guide to avoid government by executive or administrative fiat.

We have herein witnessed the development of a hazy standard, “the existence of ‘excessive’ profits”, by administrative action given final approval as a developed standard by a statement of principle in the Revenue Act of 1943. Such adoption by Congress would strongly indicate such a guide was intended, for the policy of Congress in the prior enactments amending the basic Act was to permit the development of a definite standard through administrative interpretation.

It may safely be contended that Congress has now adopted a guide or standard for action sufficiently clear and definite to meet the requirements for constitutional delegation of power by Congress as reflected

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78Ibid.
79Maurer, Cases on Constitutional Law (1941) 27 et seq. and the cases cited therein and discussed.
80See note 73 supra.
81Schechter Poultry Corp. et al. v. United States, 295 U. S. 495 (1935). There is no intention, on the writer’s part, to discuss here the distinction of the administrative and constitutional law problems as separate entities, but rather to accentuate the interdependence and interrelation of such problems.
in the opinions and decisions of the United States Supreme Court. Certainly, this opinion is well grounded in authority and is more than just arguable. Too, this rough standard fashioned for use by those administering the statute, though not developed to a legal nicety when first legislated, has been accepted in agreements by corporations and individuals who have contracted to abide by the interpretation of this guide by officers of the Government of the United States. From such actions, it may now be concluded that Congress has enacted legislation containing a standard sufficiently certain, definite and clear for the guidance and direction of the administrative agencies empowered to recover excessive profits: first, by cognizance of the administrative interpretation and tacit assent thereto; second, by infusion into the statute of language bearing the import of the administrative interpretation contained in the "Joint Statement", as well as other features of administration so evolved.

Finality of the decisions of the various Boards established by the Act, and the validity of the quasi-judicial function so performed by those Boards, or by the Secretaries in their unilateral determinations, are now in litigation. It is not at all certain that the courts will upset the administrative findings of fact, especially if it appears that the contractor received a "fair" hearing under the law and did, in point of fact, retain profits which constituted a fair return for his goods and services, after renegotiation.

Congress has remedied several defects by inserting provisions in the statute creating a central Board of Review, making available to aggrieved contractors an appeal de novo to the Tax Court of the United States from the decision of that Board, and prescribing judicial review when repricing alone is the issue.

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63Buttfield v. Stranahan, 192 U. S. 470 (1904); McKinley et al. v. United States, 249 U. S. 397 (1919); J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394 (1928); Panama Refining Co. et al. v. Ryan et al., 293 U. S. 388 (1935), and the annotations concerning the case: Notes 79 L. Ed. 474-582; Schechter Poultry Corp. et al. v. United States, 295 U. S. 495 (1935); and United States v. Darby, 312 U. S. 100 (1941).
65 See notes 82 and 83 supra.
66 Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission (March 31, 1943), and the Revenue Act of 1943.
67 See discussion on pages 157-168 of the text supra.
68 Morgan v. United States, 298 U. S. 468 (1936); 304 U. S. 1 (1938).
It seems entirely plausible that the system of renegotiation as now constructed may be strong enough to withstand attacks on the issue of constitutionality, now and after the present emergency. Those who controvert renegotiation and challenge the constitutional basis therefor may find the United States Supreme Court still of the opinion expressed in the *Bethlehem case*.

Likewise, they may discover the Court unwilling to depart from the accepted canon of statutory construction which permits the Justices to avoid the issue of constitutionality if some other ground is available upon which to base a decision.

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IMPLIED REVOCATION OF WILLS REVIVED IN THE
DISTRICT OF COLUMBIA

VICTOR S. MERSCH†

SECTION 1626 of the District of Columbia Code of March 3, 1901, prescribing the manner of revoking a will, was substantially a reenactment of the statute as it stood in 1801, when it was identical with the Sixth Section of the Statute of Frauds, enacted in 1676. This code section came before the Court of Appeals of the District of Columbia for consideration first in McGowan v. Elroy, decided November 7, 1906. The appellee had raised the question of the effect upon an existing will of a later transfer of land devised, by a deed which was itself subsequently determined to be void. The court held that the point was not then before them for decision; but in the practice of courts of that day, and as a guide to the parties in their subsequent proceedings, the court considered the question, and cited early English cases to show "that a conveyance of the title, subsequently declared void, does not operate as a revocation of a previous will." Then they added:

"... The question is an unimportant one, however, in view of the provision of our Code, which declares the manner in which wills shall be revoked, and concludes with the words, 'any former law or usage to the contrary notwithstanding,' Code sec. 1626. ..."

Bridget A. Morris, being then a married woman, wrote her will on

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28 App. D. C. 188. For consideration of the rule that alienation operated as a revocation, see I PAGE, WILLS (3d ed. 1941) §§ 487-506.


*Ibid.
May 11, 1904. She later obtained a divorce, remarried, and had a child by the second marriage. This will and these circumstances were considered upon her death in 1909 and administration was granted on her estate. But in 1921 probate of her said will was granted, and this action was affirmed on appeal, notwithstanding a challenge predicated upon the earlier grant of administration. The Court of Appeals ruled that, as there had been no caveat below, the question of revocation by circumstances "really is not before us, and therefore would not be considered ordinarily." But they continued:

"... It appearing, however, that the will disposes of both realty and personalty, that the time for filing a caveat has not expired, that the question has been fully presented by counsel on either side, and that this is a proceeding of an equitable character, we will dispose of the question now and save further expense.

"Section 1626 of the Code specifies with particularity the manner in which a will may be revoked, and concludes with the words 'any former law or usage to the contrary notwithstanding.' In McGowan v. Elroy, 28 App. D. C. 188, one of the questions was whether a conveyance of land previously devised by will operated as a revocation of the will, notwithstanding the cancellation of the deed for fraud and undue influence. The court said:

"'The question is an unimportant one, however, in view of the provisions of our Code, which declares the manner in which wills shall be revoked, and concludes with the words, "any former law or usage to the contrary notwithstanding."'

"'This ruling, made more than 15 years ago, accorded to the quoted words of the Code their plain and ordinary meaning, and a different conclusion now would require very cogent reasons. ...'"

That language was accepted by the local bench and bar, and by careful commentators elsewhere, as precluding revocation of any will by operation of law in this jurisdiction from 1922 until this Year of Our Lord 1945.

But in Pascucci v. Alsop, decided January 29, 1945, the United States Court of Appeals for the District of Columbia had for decision the question whether the will of a man was revoked by his later marriage and birth of a child posthumously, and the court held the will revoked by these circumstances. They say the dictum in Morris v. Foster over-

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7Id. at 324-325.
8Graunke and Beuscher, The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator (1930) 5 Wis. L. Rev. 387, 404 n. 83; and Durfee, Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator (1942) 40 Mich. L. Rev. 406, 408 n. 17.
looked the pertinent rule of statutory construction.9 Deciding only the effect upon a prior will of one (type) set of circumstances, this decision re-opens for this jurisdiction the entire field of revocation of wills by operation of law.

Mechem and Atkinson state succinctly the familiar fact: "In spite of the positive language of the Statute of Frauds that no will should be revoked save in the manners specified therein, 'any former law or usage to the contrary notwithstanding,' courts refused to abandon the doctrine that had developed, prior to the passage of the act, declaring a will revoked by certain changes in the circumstances of the testator, particularly those having to do with domestic relations."10 But, as these authors then also say: "Modern changes in family law have largely swept away the bases for these so-called common law rules."11 Accordingly, as Page points out, courts in some jurisdictions have held, even in the absence of legislation, that they have power to decide what subsequent changes in testator's domestic relations or surrounding circumstances shall be held to revoke his prior will, and that they are not confined to an application of the doctrine of implied revocation as it was applied prior to the year 1676.12 Other courts have declined to expand the doctrine beyond its original limits.13 Beyond this fundamental divergence of authority, the decisions in the various states afford little aid as guides for this jurisdiction, since most states have statutes on the subject, few of which are precisely alike.14

*They refer to the rule that, when legislation in the language of a prior English statute is first enacted, it is to be interpreted as including the statute's established construction. They seem to say that the original 1676 interpretation still inferences in the words of the adopted act, regardless how often it be reenacted, or what changes intervene meanwhile. They say: "... it is 'law or usage' prior to 1676 ... which was affected by the words of the statute in ... the District of Columbia." Does this sentence dispose of Chapman v. Dismer, 14 App. D. C. 446 (1898) in the same way that the decision discards Morris v. Foster, cited supra note 6?


10Mechem and Atkinson, op. cit. supra note 10, at 325.


12I Page, op. cit. supra note 2 § 508.

13Durfee, supra note 8 at 406; Bordwell, The Statute Law of Wills (1929) 14 Iowa L. Rev. 283, 290.
Pending the enactment of legislation, or pending the ultimate determination by the Court of Appeals of each separate problem which may arise under the principle of implied revocation of wills, the prospects for uniformity of decision here are, moreover, indefinite, due to the fact that the probate court is but a division of the District Court of the United States for the District of Columbia, which is composed of twelve justices. Except for the hearing of contested matters, specially assigned for trial, there are no scheduled sessions of the probate court. Pleadings in all uncontested matters, whether submitted \textit{ex parte} or upon notice, are required by court rule to be presented to the Register of Wills to be examined, and transmitted with an appropriate recommendation, to the justice assigned to enter probate court orders for the current month.

Problems under the principle of implied revocation of wills likely will arise in many cases involving no contest. The local bar has not dealt with the subject for twenty years. Decisions elsewhere are diverse. Hence, it devolves upon the Register of Wills to ascertain what rulings on the subject may be anticipated from any of the justices, with the best chance of winning substantially uniform adherence by the other members of the court as they, in turn, take over the probate court assignment. A beginning on this task may be made by indicating some possible solutions for typical problems. This should occasion critical comment and corrections, and possibly—by illustrating the degree of present uncertainty,—hasten the day of legislation. Such is the purpose of this paper.

1. The will of an unmarried man is held revoked by operation of

\footnotesize{\textsuperscript{38}D. C. Code (1940) §§ 11-301, 11-501.}
\footnotesize{\textsuperscript{39}Rule 33. Ex parte Orders and Decrees.}
\footnotesize{\textsuperscript{40}"How presented. All ex parte matters and all orders on consent or waiver of notice prepared for the signature of the presiding Justice of the Probate Court shall be presented between the hours of 9 a.m. and 11 a.m. on any business day to the Register of Wills, or to a deputy to be designated by him, who shall review such matters and make such suggestions to the court relative thereto as the premises may require."—from the Rules of the District Court of the United States for the District of Columbia, adopted June 26, 1941, said rule was originally adopted December 7, 1914.}
\footnotesize{\textsuperscript{41}Morris v. Foster, 278 Fed. 321, 322 (App. D. C. 1922), cited \textit{supra} note 6, indicates that the will of Bridget Morris was considered by one justice of the court in 1909, with one result, and by another justice in 1922, with a contrary decision. This is not a usual situation, yet there is nothing to preclude one member of the court from adhering to a different view of any problem than that entertained by his brethren as they hold probate court, and the principle of implied revocation of a will seems likely to afford more frequent occasion for diversity of opinion.}
law upon his subsequent marriage and the birth of a child, even if the
cchild is born posthumously, and the will is not revived by the death
of the child before that of the testator. The will of a married man
whose wife dies, is revoked by his later re-marriage and the birth of
issue. The same result follows a valid common law marriage and
birth of a child. But the will of a man is not revoked by the post-
humous birth of a child of a bigamous marriage.

The rule applied in Pascucci v. Alsop was subject at common law to
the exception that, if the testator, when executing his will "... con-
templated marriage and made provision for the issue of the marriage,
if any, either in his will or in some other manner, the will was not
revoked by subsequent marriage and birth of issue. The provision had
to be made for the issue; provision for the wife alone would not do." 23

2. (a) By the "law or usage" of the English courts of 1676 the mar-
riage of a woman revoked her prior will. But this was judge-made law
predicated upon the disability of the femme covert of that day to
devise. Married women today are under no such disability. American
courts, even in the absence of specific statute respecting implied revoca-
tion, have held against revocation by marriage of a woman—the rule
failing because the reason for it no longer exists. It was so held in this
District prior to the Code of 1901. 24

(b) There was no common law revocation of the will of a man by
subsequent marriage alone, for the reason that such revocation would
not benefit his widow, because, as Rood expresses it, "... the wife
received from the estate of her husband only her dower if he died intestate,
and of that he could by no means deprive her." 25 Under our statutes,
the widow has an intestate share in personalty, as well as her dower
in realty, and in some situations she is the heir of her husband—and
she can obtain these interests by electing against her husband's will, or

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18 Doe d. Lancashire v. Lancashire, 5 T. R. 49, 101 Eng. Rep. 28 (K. B. 1792); Pas-
cucci v. Alsop, decided Jan. 29, 1945 by the United States Court of Appeals for the Distri-
cut of Columbia, cited supra note 1.

21 Williams, Executors (8th ed. 1879) 200; Graunke and Beuscher, supra note 8 at 396.

22 Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295 (1886).

23 Shorten v. Judd, 60 Kan. 73, 55 Pac. 286 (1898); In re Matteote's Estate, 59 Colo. 366,
151 Pac. 448 (1915) semble.


25 Rollison, op. cit. supra note 10 § 152; Rood, Wills (2d ed. 1926) § 376.

26 Chapman v. Dimer, 14 App. D. C. 446 (1898) cited supra note 12; In re Walter's
Estate, 60 Nev. 172, 186, 102 P. (2d) 968, 974 (1940) passim.

27 Rood, op. cit. supra note 23 § 378. Compare the situation involving primogeniture,
they come to her without election if he ignores her.26 It would seem, therefore, that marriage alone should not be held a revocation of the will of a man.27

3. The will of a married man was at common law held not revoked by subsequent birth of issue—as this was a circumstance he was presumed to have expected, and in contemplation of which his will would have been made. Page may be right when he says that this presumption "is probably false far more frequently than it is true."28 Certainly in these days the old presumption is less likely to be universally true than in the days when the rule was formulated. Some American courts, without benefit of statute, have reached the contrary result, and hold the will of a married man revoked by the subsequent birth of issue.29 The legal situation of the testator himself is in this case not different than it was at common law. But his reality now goes among all his children, and not merely to the eldest son, hence, there will be benefit generally among his heirs, if revocation is decreed. And the public policy expressed elsewhere in statutes which give a child's share to all children born after the will, or to all children not mentioned in the will, may exist here awaiting expression. As between adherence to the presumption that a married man's will was made in contemplation of future issue (for which however he makes no provision), and, on the other hand, achieving the desirable social result of awarding his estate to his afterborn child, through a revocation of his will implied in law, it seems likely that the latter outcome will be realized by the court through construction, if it is not provided by Congress through legislation.30 And there is today the same reason to hold the will of a married woman revoked by the subsequent birth of issue, as the will of a man similarly situated.31

27Herzog v. Trust Co. of Easton et al., 67 Fla. 54, 60 So. 426 (1914); contra, Sherrer v. Brown, 21 Colo. 481, 42 Pac. 668 (1895), approved by Graunke and Beusche, supra note 8 at 406; I Page, op. cit. supra note 2 § 511.
28I Page, op. cit. supra note 2 § 514.
30Matthews, Pretermitted Heirs: An Analysis of Statutes (1929) 29 Col. L. Rev. 748, see cases cited supra note 29.
4. Since marriage alone revoked the will of a woman at common law, there was then no occasion to consider the effect of her marriage and birth of issue. Today this combination of circumstances would appear to require revocation in her case as in the case of a man—assuming, here, that neither of these two circumstances alone would revoke her will.

5. The "law or usage" respecting implied revocation prior to the Statute of Frauds was based upon the theory that certain changes of circumstances are so fundamental that society must hold the testator to have intended to work a revocation of his prior will. To emphasize that the original theories of a presumption, which might be rebutted, had crystalized into an irrebuttable presumption, the expression came into use, respecting the will of an unmarried man, that it was made upon the "tacit condition" that it would be void if he later married and had a child. The woman's will was said to be revoked upon marriage because she then lost the power to revoke it, and there could be no "will" that was irrevocable. But beneath these refinements was the essential initial theory that some circumstances implied irresistibly an intent to revoke. Shall such intent be so implied, or shall a "tacit condition" be attached to the will of a married man or woman, after an absolute divorce? Is getting out of the marital status today as fundamental a change of legal circumstance as getting into it was for a woman under the "law or usage" prevailing prior to the Statute of Frauds? Has all implied revocation become in truth merely a matter of change of circumstance or does it, in some situations, at least, grow out of an implied intent found to exist in law, whether or not it exists in fact? American courts, in the absence of any specific statutes, hold that absolute divorce does not alone work an implied revocation; and

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Marston v. Roe d. Fox, 8 A. & E. 14, 112 Eng. Rep. 742 (K. B. 1838); Atkinson, Wills (1937) 403; Rollison, op. cit. supra note 10 § 152; Graunke and Beuscher, supra note 8 at 393.


The will of a woman at common law became no more irrevocable upon her marriage than the will of a testator who became insane. But her alteration of circumstances was voluntary, while his was "the visitation of God" Her will was revoked by operation of law; his was not. An intent to revoke could be implied to her, but not to him. See Warner v. Beach, 4 Gray 162 (Mass. 1855). That the terminology has use, however, compare Ford v. Greenwalt, et al., 292 Ill. 121, 126 N. E. 555 (1920); 34 Harv. L. Rev. 95, with Wood v. Corbin, 296 Ill. 129, 129 N. E. 553 (1921), 35 Harv. L. Rev. 95.

In re Jones' Estate, 211 Pa. 364, 371, 60 Atl. 915, 917 (1905). Divorce alone was held a revocation, failure to ask alimony being treated as a property settlement, In re McGraw's Estate, 228 Mich. 1, 199 N. W. 686 (1924), (1925) 9 Minn. L. Rev. 169. I Page,
that divorce with a provision for alimony does not do so; but that divorce accompanied by a property settlement will work such revocation. Page says that courts are not justified in adding divorce "as a new class of revocation by operation of law." And Evans says: "There is no American case which holds that divorce alone suffices as a revocation either of the entire will, or of the provision for the wife, save those based directly upon a statute." Obviously, a will in favor of children should not be disturbed, by operation of law, by reason of the divorce of their parents. And if a woman may be held to intend a will to benefit one whom she has learned tricked her into a bigamous marriage, perhaps a man who obtains a legal separation from his wife after she has given him cause for divorce, need not necessarily be held to have intended to deprive her, after his death, of the use of funds provided for her by a will executed in their days of consortium, if he takes no action toward revoking it. The diverse circumstances of the divorce cases preclude grouping them into a class justifying an irrebuttable presumption of intent, or a "tacit condition" demanding implied revocation on divorce.

6. Shall the will of a married man be deemed revoked by the dissolution of his marriage through divorce, and his subsequent second marriage, though no issue are born of the second union? Shall the result be affected by the fact whether or not there were children of his first marriage? The answer should depend upon the result following divorce. That result is then not altered by the second marriage. And the will of a married woman should be considered in the same light, in like circumstances.

7. Marriage and the adoption of a child should be held to cause a revocation by circumstances of a prior will, either of a man or of a woman, to accord with the result in Pascucci v. Also, and in harmony with the purport of the adoption statute.11


*Charlton v. Miller, 27 Oh. St. 298 (1875).

In re Battis, 143 Wis. 234, 126 N. W. 9 (1910) cited supra note 12; Pardoe v. Grubiss, 34 Oh. App. 474, 171 N. E. 375 (1929); Gartin v. Gartin, 296 Ill. App. 330, 16 N. E. 2(d) 184 (1938), 52 Harv. L. Rev. 332; Rollison, op. cit. supra note 10 § 153; Atkinson, op. cit. supra 32 at 405.

*PAGE, op. cit. supra note 2 § 522.

Evans, Testamentary Revocation by Divorce (1935) 24 Ky. L. J. 1.

In re Carson’s Estate, 184 Cal. 437, 194 Pac. 5 (1920).

Compare Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853 (1901); with Fulton Trust Co. v. Trowbridge, 126 Conn. 369, 11 A. 2(d) 393 (1940), and Boyd’s Estate, 270 Pa. 504, 113
8. Shall the loss of a child to others, through adoption, revoke the will of either of the natural parents of the child, from whom they are by statute "cut off"?42 The loss of a wife, through death, does not revoke testator's will.43 The legal severance caused by an absolute divorce does not alone revoke the will of either party. And the secrecy of the adoption proceeding, so painstakingly prescribed in the statute,44 would be violated by the will itself, whether held revoked or not. But there may be less likelihood of the paper being preserved, if revocation by operation of law promises to make it ineffectual. In aid of the purpose of the adoption act, revocation should be decreed, provided the court is willing to consider revocation by circumstance as outside the statute on revocation, and open to expansion in proper cases by judicial action, in the same way that the doctrine started.

9. The birth of an illegitimate child to an unmarried woman45 should be held to revoke her prior will to accord with the most nearly comparable situation, involved in Pascucci v. Alsop.46 Since marriage and birth of issue revokes the prior will of an unmarried man, his will should be held revoked also if followed by the birth of a child and thereafter his marriage to its mother and his acknowledgment of the child, to conform to the general intent of the statute on ante-nuptial children.47

Pascucci v. Alsop decides only that the will of an unmarried man having no children by a prior marriage is revoked by his later marriage and the birth of issue, posthumously. Can anything be said surely as to what the opinion portends? There seems to be three distinct

Atl. 691 (1921); see Evans, Revocation by the Adoption of A Child (1933) 22 Ky. L. J. 600; Atkinson says: "From a technical standpoint the cases could generally have been decided either way; the majority view is no doubt influenced by a judicial policy of favoring the institution of adoption." Atkinson, loc. cit. supra note 37. See D. C. Code (1940) §§ 16-201—16-207, procedure for adoption in the District of Columbia.

#D. C. Code (1940) § 16-205.


#D. C. Code (1940) §§ 16-201—16-207.


#Compare Milburn v. Milburn, 60 Iowa 411, 14 N. W. 204 (1882), with In re Patterson's Estate, 282 Pa. 396, 128 Atl. 100 (1925); see (1929) 38 Yale L. J.; Atkinson well says: "There is no reason in holding the will revoked, if the child for whose benefit the revocation would be declared cannot inherit". Atkinson, op. cit. supra note 32 at 404.

#D. C. Code (1940) § 18-106; In re Del Genovese, 56 Misc. 418, 107 N. Y. Supp. 1033 (Surr. Ct. 1907). Where the birth of the child preceded the will and legitimation followed, it was held there was no revocation, McCulloch's Appeal, 113 Pa. St. 247, 6 Atl. 253 (1886).
questions: First—Is our interpretation of the statute thrown back, in all situations, to the “law or usage” prior to 1676, thus discarding Chapman v. Dismer, and leaving the will of a woman to be revoked by her marriage? Second—Do we interpret the statute by considering the “law or usage” prior to 1676, but taking into account also the intermediate statutory changes, such as the married women’s acts, adopted prior to the re-enactment of the statute in our Code of 1901? Third—If we are not limited to the “law or usage” existing prior to 1676, but may take cognizance of intermediate statutory changes, (as was done in Chapman v. Dismer), can the court act on statutory changes since 1901, such as the adoption act of 1937, and proceeded along some such path as this paper presents? If so, may not the court decree revocation, also, through any change of circumstances which, to the court, seems to be sufficiently relevant and vital? The doctrine of implied revocation has been resuscitated, but its bounds are undefined.

The testator, in executing his will, is obliged at his peril, to conform to the words of the statute, but the statute affords some assurance that his property shall not be dispensed according to prejured testimony as to his supposed desires. The case of Cole v. Mordaunt is credited with having occasioned the Sixth Section of the Statute of Frauds, prescribing methods of revocation, and, thereby, protecting the testator from “revocation” he never initiated. Implied revocation by change of circumstance was saved to him by the courts originally upon the presumption that the testator, so situated, would so desire. After this doctrine became established, it was protected against a rebuttal based upon parol testimony by declaring it to be irrebuttable, and finally by considering it as the “tacit condition” upon which the testator executed his will. Each of these steps respecting the execution and the revocation of wills tended toward affording the testator certainty in what he might expect. Today men and women are entitled again to a statute to afford them some certainty—and to protect them against any implied revoca-

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48 See note 9 supra.

49 D. C. Code (1940) § 16-201; see also D. C. Code (1940) § 20-713 regarding distribution of estates of absentee and absconders, adopted April 8, 1935.

50 Before Lord Nottingham in the Court of Delegates, 22d May, 28 Charles II [1676], see 4 Ves. 186, 196, 211, 31 Eng. Rep. 96, 100, 107 (Ch. 1798).

51 “Frauds and perjuries had occurred not merely in setting up wills, but also in attempting to prove revocation by word of mouth.” Note (1919) 17 Mich. L. Rev. 332; accord, Atkinson, op. cit. supra note 32 at 17; Reppy and Tompkins (1928) History of Wills 9, 38; Cole v. Mordaunt, referred to in Mathews v. Warner, 4 Ves. 186, 31 Eng. Rep. 96 (Ch. 1798).
tions of which they may have had no premonition. Such statute should say what changes of circumstances will revoke a will; it should prohibit expressly any other implied revocation, and, excepting only the situations involving children born out of wedlock, it should apply alike to men and to women.

Righteously legalistic in every other detail, *Pascucci v. Alsop* indicates by just one footnote the consciousness of the court of the social implications involved in their decision. They say: "There are now statutes in all the States and Territories which, in one form or another, provide for revocation by operation of law where the testator's domestic situation undergoes a change." Does not this suggest the need of a statute on the subject for the District of Columbia? That necessity is accentuated by the uncertainty which exists following the decision in this case. In reliance upon intimations by the court twice previously, the people of the community have for more than a score of years acted upon the belief that the doctrine of implied revocation of wills no longer existed in the District of Columbia. The court has utilized its first opportunity to correct that misapprehension. But the scope and application of the doctrine for the future are not clear. Legislation is imperatively needed to afford certainty in this field of law, which is of immediate concern to so many people of all classes.

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FEDERAL LEGISLATION

REVISION OF FEDERAL CRIMINAL LAWS

WHILE the proposed Rules of Criminal Procedure for the District Courts of the United States have been widely publicized less attention has been given to the fact that Title 18 of the United States Code has been in the process of revision and that a revised code of substantive criminal law is likely to become effective concurrently with the Rules of Criminal Procedure. This would be the first comprehensive revision of the criminal code since 1909. It is proposed that the revision be enacted into positive law—a status now held only by the Internal Revenue Code.

HISTORY OF THE CRIMINAL CODE

One of the acts of the first Congress under the Constitution was the Crimes Act of 1790. The act was small and defined only the more general and heinous crimes against the United States, such as treason, misprison of felony, forgery, and bribery. The language defining many of the offenses, and the punishment to be assessed in some cases, have survived to this day.

Until the Civil War and the Reconstruction gave great impetus to federal criminal legislation there was a slow development of the body of federal criminal law. By 1860 various laws defining criminal acts were scattered through the 12 volumes of the Statutes at Large. Not until 1866 was a concerted attempt made to reconcile the conflicting provisions of one act with those of another.

In that year a commission was authorized by Congress to prepare the Revised Statutes of the United States. The work of the commission eventually resulted in the enactment of the Revised Statutes of 1875. Title 70 of the Revised Statutes was designated "Crimes". The work of the commission on this title has influenced the form of the criminal section of each subsequent revision or codification of our statutes to the present day. The title was divided into nine chapters and subdivided into 227 sections.

4 1 Stat. 112 (1790).
5 The Revised Statutes of the United States were first enacted June 22, 1874. Numerous errors were soon discovered and the Act of February 18, 1875, 18 Stat. 316, was enacted to serve as a correcting appendix. By Act of March 9, 1878, 20 Stat. 27, a further edition of the Revised Statutes was authorized.
The next enactment of a complete revision of the criminal code was in 1909.6 This was the work of a commission authorized by Congress in 18977 to revise and codify the criminal and penal laws of the United States. While the work of the commission was prolonged by a subsequent authorization to examine the entire field of federal statutory law8 only the criminal code was ever enacted into law.

The same analysis used in the Crimes title of the Revised Statutes was used in the Criminal Code of 1909. The changes in federal criminal legislation between 1878 and 1909, however, induced the commission to divide the Criminal Code into 15 chapters and 345 sections instead of the 9 chapters and 227 sections in the Crimes title of the Revised Statutes. No great changes were made in the law as a result of the adoption of the 1909 Code. Just 21 sections contained completely new matter, and of these only 10 created new offenses.9

The United States Code of 1926 embraced the Criminal Code of 1909 as Title 18. Thus, more than thirty-five years, embracing two wars and a great depression, have elapsed since the last complete revision of our criminal code. The activities of the Federal Government have multiplied during this period, and Federal activity in the field of criminal law has expanded at a rate commensurate with its expansion in other fields.

Meanwhile, the House Committee on the Revision of the Law had concluded, in the words of its chairman, that the time had arrived "... when the Code itself should become, after careful title by title revision, the absolute and positive law of the United States."10 The Committee asked for, and on June 28, 1943, received the permission of Congress to prepare a revision and codification of Title 18, Crimes and Criminal Procedure, and Title 28, the Judicial Code and Judiciary.11 The first of these is now ready for Congressional consideration.12

**Compilation of Code**

The first step toward codification is generally compilation. The dis-

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730 Stat. 58 (1897).
831 Stat. 1181 (1901).
990 Cong. Rec., Nov. 14, 1944, at 8276.
10Ibid.
12H. R. 5450, 78th Cong., 2d Sess. (1944). The bill to enact the revision into law was introduced late in the 78th Congress. Hearings were held and a report, not released as this is being written, was prepared. It is understood that the bill will be reintroduced, and action on it sought, in the 79th Congress.
tinction between the two is that a compilation is a systematic arrangement rather than an alteration and reenactment of existing statutory law. The compilation is an orderly arrangement of a law which is found elsewhere; the code is, itself, the law. Since the United States Code is only *prima facie* evidence of the law it is more properly designated a compilation than a code. The proposal to enact Title 18 into positive law is a step toward the enactment of a true code of federal laws.

Ever since a large number of errors were found in the first enactment of the Revised Statutes\textsuperscript{13} Congress has been reluctant to give to any codification the status of positive law. However, members of the various congressional committees that have been charged with the responsibility of supervising the preparation of a code have worked for years to secure the enactment of the code into positive law.\textsuperscript{14}

Enactment of the complete code into positive law, as was envisaged in the legislation authorizing the Committee to proceed toward a revision of the Crimes and Judiciary titles, will serve two purposes. First, the task of tracing statutes applicable to a particular subject through the Statutes at Large will be eliminated for most purposes; and, secondly, Congress by enacting future legislation around the framework of the Code will be in a better position to consider its acts in the light of the whole body of existing statutory law.\textsuperscript{15}

**Features of the Revision**

The proposal to enact the new revision into a true code greatly increases the significance of every change made in the revision. These changes are numerous. Most of them, it is true, pertain to matters of style and mechanics, for innovation is not the primary function of code making.\textsuperscript{16}

Most important of the mechanical changes is that made in the classi-
fication of crimes. The broad functional classification first set up in the Revised Statutes, then extended in the Criminal Code of 1909, and retained in the 1926 United States Code, has been changed. An entirely different principle is used in place of the functional classification. Sixty chapters, classified according to common law crimes, or in the case of statutory crimes, according to subject matter, are arranged in alphabetical order in the revision. The chapters are assigned odd numbers so as to leave the even numbers for new crimes that may subsequently be added in their proper alphabetical position. Similar arrangements in State codes have proven to be the most convenient form for the use of the bench, the bar, and the general public.

On a casual reading of the revision one is immediately impressed with the great simplicity of the language of the revision than that of the existing code. This can best be illustrated by quotation. A typical penal provision of the present code reads:

"For each evasion or violation of, or failure to comply with, any provision of sections 391-393 of this title, any person, firm, corporation, or association, upon conviction thereof, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both."17

The comparable provision of the revision, after making a change in the quantum of the punishment, reads:

"Whoever violates this section shall be fined not more than $500 or imprisoned not more than six months or both."18

Changes such as these give weight to the words of the Chairman of the House Committee on the Revision of the Laws, who has said:

"We further believe that we have established a new standard in statutory draftsmanship which will make easier the task of future legislative drafting and revisions, as well as bring us nearer to our avowed goal of making laws understandable."19

Much of the archaic and redundant language of the law is due to the fear of lawyers and jurists that changes from the proven forms of expression might have some unexpected effects upon the substance of the law. There is evidence that this conservatism was largely responsible for the failure to enact the present code into positive law in 1926.

However, established principles of statutory construction do not justify so conservative an attitude toward changes in the style of statutes on codification.

16H. R. 5450, 78th Cong., 2d Sess. (1944) § 42.
1890 Cong. Rec., Nov. 14, 1944, at 8277.
"Even a change in the language or phraseology of a statute included in a codification or revision will not, as a general rule, alter the law, unless the change be so material or radical as to indicate an intention on the part of the legislature to modify the law, or unless the intention to change clearly appears from the language of the revised statute, and especially when considered in connection with the subject matter and the legislative history. . . .

"In fact, the court will presume that the legal effect of a consolidation and restatement is the same as that of the old statutes. . . . In the words of Chancellor Kent, as quoted in Mackey v. Miller, 126 Fed. 161, "... the change in phraseology in the language of a revised act shall not be deemed a change of the law as it stood before the revision, unless such phraseology evidently purported an intention in the Legislature to work a change." Such an intent may be indicated by radically different language, by additions to, as well as omissions from the former language." (Citations omitted)

Thus, it would seem, the main objection to the enactment of a code into positive law is not well founded, especially when the new revision is based upon a previous effort which, though only prima facie evidence of the law, has won universal acceptance.

An important part of the administration and enforcement of criminal laws is the matter of punishment. The revision of the criminal code affords a convenient opportunity to look at our criminal laws as a whole and to provide for punishments which will be more nearly consistent with the relative gravity of the various offenses. Incongruous situations inevitably arise when the criminal laws of 78 Congresses, often passed without consideration of the penalties provided in existing laws covering similar crimes, are placed side by side in a code.

For example, the crime of an assault upon an ambassador or other public minister, in violation of the law of nations, was defined in the Crimes Act of 1790 and the punishment was fixed at imprisonment for not more than three years, and a fine to be levied at the discretion of the court. This punishment has since remained unchanged. In 1934 Congress defined the crime of an assault upon certain officers of the government and affixed the penalty of a fine of not more than $5,000 or imprisonment for not more than three years, or both. If a deadly or dangerous weapon were used in the assault the punishment affixed was a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. There was no reason, except for the difference in the time of enactment, why a greater punishment should be inflicted upon one who assaulted an officer than upon one who assaulted an

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\(^{20}\)CRAWFORD, THE CONSTRUCTION OF STATUTES (1940) § 324.


ambassador or minister. Consequently, in the revision the punishment for the two offenses was equalized.23

Since the changes in punishment made in the revision are distinctly legislative in character, they should be carefully checked by Congress for the purpose of improving the consistency of the sanctions which may be imposed by our federal criminal courts. The combined work of the revisers and of Congress should achieve a result that will be of great benefit to our criminal courts and to our law enforcement officers.

Another result of the long history of federal criminal legislation has been the multiplication of statutes covering similar offenses. The elimination of this duplication is one of the primary duties of code revisers. The combination of eight sections of the United States Code24 concerning the forgery or counterfeiting of the bonds and obligations of certain lending agencies of the government into section 493 of the revision, the elimination of the specific crime of conspiracy by revenue officers or agents to defraud the United States25 because it was included in the larger offense of conspiracy to commit an offense against or to defraud the United States,26 and the joining of the section concerning assault upon an officer or employee of the Bureau of Animal Industry with the section covering an assault upon certain officers or employees into one section of the proposed revision27 are examples of this feature of the revision. Little objection could be raised to this, the traditional work of revisers.

The revisers also had as an objective the bringing together into Title 18 of all the penal provisions of the statutes now in force. It was not possible to accomplish this completely, since the penal provisions of

many regulatory statutes are so intimately connected with the substance of the controlling statute that a divorce is impossible. Some measure of the extent to which penal provisions have been tacked on to substantive legislation may be afforded by the schedule of laws repealed which is attached to the bill to enact the revision into law. Sections from 31 of the 50 titles of the United States Code will be repealed upon the enactment of the revision into law.

Part II of the revision is devoted to criminal procedure. Since Congress has provided that the Supreme Court may prescribe the rules of procedure in criminal cases,28 and since the Supreme Court has acted under this power to revise the Rules of Criminal Procedure29 the primary need was to revise the code to accommodate the new procedural rules. To accomplish this purpose the Supreme Court Advisory Committee on the Rules of Criminal Procedure was consulted, and two members of the Advisory Committee30 acted as special consultants in the preparation of the revision. Consequently, the part devoted to criminal procedure is coordinated with the work done on the Supreme Court Rules.

Since the New Rules of Criminal Procedure will modify or supersede many sections of Part II, leaving only a skeleton of former procedural statutes, the revisers have inserted cross reference catch lines to the Rules in the proper order among the remaining statutory provisions and have provided for the repeal of those statutes which are inconsistent with the provisions of the rules. The effective date of the bill is proposed to be the same as that for the New Rules of Criminal Procedure. Simultaneous adoption of the two undoubtedly will result in less confusion than would the adoption of procedural and substantive revisions at separate times.

CONCLUSION

Codes of statutory law are a late development in common law systems. The prestige of case law, the rule of stare decisis, and the often unacknowledged function of the judge as a lawmaker have worked against the adoption of codes. The greatly increased activity of legislative

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2965 Sup. Ct. No. 5 xi, Jan. 15, 1945.
30Mr. George F. Longsdorf, of Oakland, California, and Mr. Alexander Holtzoff, of Washington, D. C.
bodies during the nineteenth and twentieth centuries, however, pro-
duced so great a body of statutory law that some form of compilation
or codification became a necessity. Compilations\textsuperscript{31} were generally adopt-
ed in American jurisdictions to serve as a guide to lawyers and the
courts through the forests of statutory enactments.

Although the United States Code, as well as the compilation now
under consideration, is an invaluable aid to the legal profession, the
superior status of the laws of Congress, as printed in the Statutes at
Large, necessitates a great amount of research that would be unnecessary
if the Code were to be enacted into positive law. The submission of
the proposed revision of Title 18, Crimes and Criminal Procedure, to
Congress for adoption as positive law is doubly significant since it is the
first title to be submitted to Congress under a project which is intended
to eventually result in a true codification of all federal statutory law.\textsuperscript{32}

Apart from the desirability of the adoption of the revision as positive
law, it has several outstanding features which will commend the work
of the revisers to the legal profession. The Hon. Justin Miller, Associate
Justice, United States Court of Appeals for the District of Columbia,
and member of the advisory committee which aided in the preparation
of the revision indicated his view of the nature of these accomplishments
in his statement to the Committee on Revision of the Laws:

"As a judge I was concerned with simplification and clarification of language,
the removal of ambiguities, uncertainties, duplication, redundancy, and conflict.
To the achievement of this objective the editorial board was conscientiously
and effectively alert. Remembering my days of practice, I was seeking com-
pleteness and comprehensiveness; together with chapter and section arrange-
ment which would disclose—not conceal—all vital provisions.

"With respect to chapter titling and arrangement and the arrangement of
sections, I feel that a very substantial improvement has been worked out. No
more is necessary to prove this point than to read in comparison the old chapter
titles and those in the revision. When the judge and the practitioner make the
more intense investigation which their work requires, the point will be doubly
proved.

"With respect to completeness and comprehensiveness, . . . I am convinced
that it would be difficult to secure a better integration of material in this respect
than has been here achieved."\textsuperscript{33}

\textsuperscript{31}The term compilation is here used to include those so-called codes which are only \textit{prima facie} evidence of the law.

\textsuperscript{32}The enactment of the Internal Revenue Code in 1939 was secured because of the special
need for such a code. It was a project within itself and was not regarded as a part of
a plan which would eventually embrace all parts of the code.

\textsuperscript{33}Hearings before Committee on Revision of the Laws on H. R. 5450, 78th Cong., 2d
The work of revision and codification of laws is an unspectacular part of the legislative process. It is vital, however, to the development of a usable body of statutory law. The work of the committee and of the revisers on Title 18 is a worthy contribution to the administration of justice in our federal courts.

MAURICE E. WRIGHT
NOTES

MARTIAL LAW IN HAWAII

A FEW hours after the attack by the Japanese Air Force on the island of Oahu, on December 7, 1941, Poindexter, Governor of the Territory of Hawaii, issued a proclamation declaring a “defense period” pursuant to the Hawaii Defense Act, passed by the territorial legislature on October 3, 1941. At 3:30 P.M. on the same day, the Governor, pursuant to Section 67 of the Hawaiian Organic Act, issued a proclamation placing the Territory of Hawaii under martial law, and suspending the privilege of the writ of habeas corpus until further notice. The same proclamation called on the commanding general of the Hawaiian Department to exercise, as military governor, all the powers normally exercised by the civil governor. The proclamation went on:

“And I do hereby authorize and request the Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities thereon, and such other and further powers as the emergency may require.”

Lieutenant General Short, commander of the Hawaiian Department assumed the office of military governor on the same afternoon, and was

3Honolulu Advertiser, Dec. 9, 1941, p. 2, col. 8.
4Whenever there exists (1) any state of affairs or circumstances arising out of an invasion, attack, insurrection, rebellion, or lawless violence, or any danger or threat thereof, or (2) any state of affairs or circumstances making it advisable to protect the Territory and its inhabitants, of the existence of any of which the Governor shall be the sole judge, the Governor, by proclamation, may declare a defense period to exist. A defense period may be declared for any one or more counties, or a part of a county, and when once declared shall continue until the Governor, by proclamation, shall declare the defense period at end.” Special Session Laws of Hawaii, 1941, Act 24, § 45.05, 5a.
5“’That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory, to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.” 31 Stat. 153 (1900), 48. U. S. C. § 532 (1940).
6Honolulu Advertiser, Dec. 9, 1941, p. 9, col. 3.
7Ibid.
succeeded in the position by Lieutenant General Emmons on December 17, who approved the orders and actions of his predecessor.

The martial law instituted by the military governor amounted to a complete supersedence of the civil by the military rule. By General Orders No. 4, issued on December 7, General Short set up military commissions and provost courts with power to try and determine cases involving offenses committed by civilians against the laws of the United States or of the Territory, or the regulations or orders of the military. Major offenses were to be tried before the military commissions, wherein the procedure was to reflect substantially that of a special court-martial, while lesser offenses were to be brought before the provost courts, wherein a summary court-martial procedure was to be followed. No appeal from either body was allowed, but the sentence of the military commission had to have approval of the military governor before being executed. The defendant, in neither tribunal, had the rights or privileges of the accused in a regular court-martial, which rights are not negligible.6

On the next day, the Territorial Courts were closed by order of the Commanding General. In addition, the military governor issued general orders controlling the conduct of the people in many ways, such as the sale and possession of liquor, gasoline, firearms, radio sets, photographic materials, running of automobiles, and the conduct of enemy aliens. By General Orders No. 57, issued on January 7, 1942,7 the local courts were given authority to exercise some of the powers formerly exercised by them under the civil government; however, among the restrictions still prevailing were prohibitions against exercising jurisdiction over criminal cases, and the impaneling of grand or petit juries. This restriction on the civil courts existed until March 1943, when by proclamation, with the approval of the President, Governor Stainback ordered himself, as Governor, and the other civilian officers and agencies of the federal, territorial, and local governments, to resume almost all their usual duties.8 However, the civil courts were still forbidden to entertain (1) criminal prosecution against members of the armed forces, (2) civil suits against members of the services for any act in line of duty, and (3) criminal prosecutions for violations of military orders.

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7Supplemental to Gen. Orders No. 29, issued on Dec. 16, 1941; see Kahanamoku v. Duncan (No. 10,763) and Steer v. White (No. 10,774) (C. C. A. 9th, Nov. 1, 1944) Advanced Sheets 6.
8Proclamation of Feb. 8, 1943, id. at 10.
Suits of this type remained under the sole jurisdiction of the military courts.

Such a complete surrender of the executive, legislative, and judicial powers of the civil government of the Territory of Hawaii to the military rule of the commanding general, and especially the dispensation of justice through military commissions and provost courts evoked doubts as to whether martial law included in its dominion such a drastic displacement of the ordinary judicial functions of the civil government. To understand and resolve these misgivings, it is first necessary to understand the nature and history of martial law in the United States, and then to determine the manner in which such law is applicable to the Territory of Hawaii.

The common law concept of martial law in England, from which evolved the present day rule in the United States, never attained the point where its content could be accurately determined. However, "... picking one's way through this maze, one comes upon a clear view of the essential truth, that martial law, so far as now consistent with the English Constitution, is simply an application of the common-law principle that measures necessary to preserve the realm and resist the enemy are justified." In the United States, according to Attorney General Cushing, just before the Civil War the situation was more confused. Since the landmark opinion of Judge Davis in Ex parte Milligan, there have been few occasions to invoke martial law; and hence relatively little litigation on the subject has arisen.

Martial law as understood here is distinguishable from other types of military rule. Ex parte Milligan gives the following definitions:

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be

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9Anthony, supra note 6 at 371.
10Ops. Att'y Gen. 365, 368 (1857).
12See note 10 supra.
134 Wall. 2, 107 (U. S. 1866).

"Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or public calamity."15

If this is true, then logically, it must be true in some factual circumstances, if exigency demands, that the functions of the civil government be entirely superseded by the military in order that the public safety be adequately protected. This seems to be borne out by Supreme Court decisions.18

What rights guaranteed every citizen of the United States by the Federal Constitution, can be alleged to be infringed if he is brought to trial before a military rather than a civil court? Article III, Section 1, states that "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."17 Section 2 provides, "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."18 The Fifth Amendment states, "No person shall be held

14See Mr. Chief Justice Chase, concurring in Ex parte Milligan, 4 Wall. 2, 141 (U. S. 1866); accord, Hammond v. Squier, 51 F. Supp. 227, 230 (W. D. Wash. 1943).
16Sterling v. Constantin et al., 287 U. S. 378 (1932); Ex parte Milligan, 4 Wall. 2 (U. S. 1866).
18Id. § 2.
to answer for a capital, or otherwise infamous crime, unless on a presenta-
tion or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger . . . nor be deprived of life, liberty, or property, without due process of law. . . .”19 The Sixth Amendment says: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”20 This right to trial by jury in a civil court is not an absolute right, but is limited to those cases triable by a jury under the common law as it existed at the time the Constitution was adopted, and at common law, trials of civilians by military courts excluded the presence of a jury.21

No mention is made in the Federal Constitution of martial law, or when it may be declared; but the right to declare and exercise martial law is one of the right of sovereignty and is as essential as the right to declare and carry on war.22 Article I, Section 923 of the Constitution prohibits the suspension of the privilege of the writ of habeas corpus unless public safety requires such a measure be taken in time of rebellion or invasion; this is not to be confused with the power to declare and carry on war, which is granted to the Federal Government in Article 1, Sect. 8,24 and which, according to Hirabayashi v. United States “. . . is not restricted to the winning of victories in the field and the repulse of enemy forces,” but “. . . embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.”25

The outstanding case on the subject of martial law in the United States is that of Ex parte Milligan.26 Lambdin P. Milligan, a Copperhead, living in Indiana at the time of the Civil War, was arrested in October, 1864, by military authorities for disloyal practices and for actual conspiracy to overthrow the government. At the time of the arrest, Indiana was not actually under or threatened with attack, although it had been invaded previously by the Confederates with the hope

19U. S. Const. Amend. V.
20U. S. Const. Amend. VI.
21Ex parte Quirin, 317 U. S. 1, 39 (1942).
22Luther v. Borden, 7 How. 1, 48 (U. S. 1849).
24Id. § 8.
25320 U. S. 81, 93 (1943).
264 Wall. 2 (U. S. 1866).
that the insurgent Copperhead movement would rise. Milligan was tried by a military commission in Indianapolis, found guilty, and sentenced to be hanged. This sentence was commuted, on appeal to President Johnson, to life imprisonment at hard labor. Milligan petitioned the federal Circuit Court in Indianapolis for a writ of habeas corpus, and the petition was certified to the United States Supreme Court when the circuit court disagreed on the granting of the writ. The Supreme Court unanimously agreed that, pursuant to a statute passed by Congress in March 1863, the writ was not to be suspended in cases involving political offenses, if the prisoner was not indicted by a grand jury. This was the sole point necessary to decide the case. Mr. Justice Davis, however, went on in dictum, with four justices dissenting:

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration... there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."28

Unless this criterion of necessity, i.e., an actual invasion deposing the civil government and closing the courts, were fulfilled, the bare majority held that, not even Congress could declare martial law and submit civilians to military jurisdiction.

That this inflexible test is no longer adaptable to the present-day manner of warfare is not to be seriously doubted. The supplanting of the plodding infantry and the cavalry by the four-hundred-mile-an-hour bomber, heavily laden with destruction, has greatly expanded those areas throughout the world which can rightly be termed "theatres of military operations". Especially is this true of Hawaii, 2,200 miles from the mainland and the focal point of our military effort in the Pacific.

Mere annexation of a territory to the United States does not ipso facto extend all the provisions of the Constitution and laws of the United States to the annexed territory. This principle was applied, in the

28Ex parte Milligan, 4 Wall. 2, 127 (U. S. 1866).
annexation of Hawaii, in the case of *Hawaii v. Mankichi*,\(^{30}\) which held that the Newlands resolution\(^{31}\) did not extend to the Islands the requirements of the Fifth and Sixth Amendments of the Constitution that required presentment or indictment by a grand jury and trial by a petit jury. Two years after the annexation, Congress passed the Hawaiian Organic Act,\(^{32}\) formally incorporating Hawaii into the Union\(^{33}\) and providing that in case of rebellion, invasion, or imminent danger thereof, the Governor might suspend the privilege of the writ of habeas corpus and place the Territory under martial law.\(^{34}\) Obviously, the latter section sets a different criterion for the establishment of martial law than was laid down in *Ex parte Milligan*,\(^{35}\) wherein mere imminence of invasion was declared insufficient to authorize the supersedence of the civil by the military government.

The validity of suspending the privilege of habeas corpus in the Islands was questioned soon after December 7, 1941. Dr. Hans Zimmerman, suspected of disloyal conduct to the government of the United States, was detained by the military authorities and applied for a writ of habeas corpus on February 19, 1942.\(^{36}\) On appeal to the Circuit Court of Appeals, the refusal of the District Court in Hawaii to issue the writ was upheld, the court declaring that the grave emergency existing in the Islands justified the suspension of the writ by the Governor, pursuant to the Federal Constitution\(^{37}\) and the Hawaiian Organic Act.\(^{38}\)

The question whether the term martial law, as that term is used in Section 67 of the Organic Act, included trials of civilians by military courts, was placed squarely before the District Court for the Territory of Hawaii in two cases, as yet unreported: *Duke Kahanamoku v. Duncan*,\(^{39}\) and *Steer v. White*.\(^{40}\)

In the latter case, White, a citizen of the United States, was arrested August 20, 1942, on charges of embezzlement from his employer, was convicted by a provost court without a jury and sentenced to five years imprisonment. In April 1944, White filed a petition for a writ of

\(^{30}\) U. S. 197 (1903).
\(^{33}\) *Id.* at 48 U. S. C. § 495 (1940).
\(^{40}\) 4 Wall. 2 (U. S. 1866).6.
\(^{35}\) *Ex parte Zimmerman*, 132 F. 2d 442 (C. C. A. 9th, 1942).
\(^{37}\) See note 2 supra.
\(^{38}\) No. 10763 C. C. A. 9th, Nov. 1, 1944.
\(^{40}\) No. 10774 C. C. A. 9th, Nov. 1, 1944.
habeas corpus alleging lack of jurisdiction in the provost court and claiming he had been deprived of rights guaranteed by the Fifth and Sixth Amendments. The District Court released the petitioner on the grounds that the provost court had no authority to try the offense.

In the *Duncan case*, Lloyd Duncan, a citizen of the United States, employed in the Navy Department at Pearl Harbor, was convicted, in March 1944, by a provost court on charges of assaulting two Marine sentries on duty at an entrance to the base. Duncan immediately petitioned the District Court for a writ of habeas corpus, which was granted, and the petitioner was released on the grounds that martial law did not prevail in the Islands at that time, and hence the provost court had no authority to try the petitioner. On appeal to the Circuit Court of Appeals for the Ninth Circuit, the decision in each case was reversed. The court declared it was unnecessary to decide whether the privilege of the writ was validly suspended, because it found that the defendants were lawfully imprisoned; but it left no doubt that it disagreed that the lower court had power to entertain the petitions.

In adjudging White to have been under the jurisdiction of the military court, the court declared that martial law was a rather indefinite concept, incapable of exact definition, but that it included every measure, not inconsistent with the Federal Constitution, which was necessary to resist the enemy and to preserve the existence of the state.

The court also discussed the fact that Section 67 of the Organic Act was very similar to Article 31 of the Constitution of the Hawaiian Republic, which had been construed in *In re Kalaniananaole,*41 to allow military courts to try an offense—misprision of treason—normally triable only by the civil courts, although the declaration of martial law allowed the civil courts to conduct ordinary business. Since Congress transplanted Section 31 almost verbatim into Section 67 of the Organic Act, the court inferred that Congress intended that military courts should try some issues under the normal jurisdiction of civil courts in case martial law was proclaimed.

The presence of large numbers of alien Japanese, and citizens of Japanese ancestry; the great debacle at Pearl Harbor rendering impotent a large part of the Pacific Fleet; the presence of Japanese submarines and the ever-present danger of further carrier raids, rendered it necessary, in the judgment of the court, that, the normal functions of the civil government should yield to the military.

The factual situation existing in the Islands at the time of Duncan's

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41 10 Hawaii 29 (1895).
conviction by the provost court was considerably different from that in August 1942. On March 10, 1943, the Commanding General issued General Orders No. 2, intended to revise the judicial framework to conform to the changed situation. Although nearly all functions were returned to the civil officers, these orders provided in part that military jurisdiction would continue over any case involving a violation by a civilian of the rules, regulations, proclamations, or orders of the military authorities, or of the laws of war. This amounted to a state of "qualified martial law."\(^{42}\) Paragraph 8.01 of General Orders No. 2 prohibited any assault, or assault and battery, on any member of the armed forces, with intent to hinder him in the discharge of his duty. It was under this section that Duncan was convicted.

The court recognized the changed circumstances in the Islands in March 1944, but declared that imminent danger of invasion was still present at that time.\(^{43}\) The particular offense of which Duncan was convicted was one not punishable by Hawaiian civil law, and its definition as a crime was outside the scope of military law because it affected parties who were neither members of the services nor connected therewith.\(^{44}\)

As we have seen, jurisdiction over almost every type of civil and criminal action had been returned to the civil courts.\(^{45}\) Furthermore, express authority to define and punish Duncan's offense as an adjunct of martial law was lacking.\(^{46}\) The war power of the United States was sufficiently broad, said the court, to extend to every measure substantially necessary to successfully prosecute the conflict, and the military is given broad discretionary power in the choice of what is necessary. In the absence of proof that, the definition and punishment of the offense of attacking a member of the armed forces in Hawaii was not a reasonable measure, the court stated that the implied authority of Congress to resort to martial law justified the military commander in designating and punishing offenses under paragraph 8.01.\(^{47}\)

\(^{43}\)Both Lieutenant General Richardson, Commanding General of the Territory, and Admiral Nimitz, Commander in Chief of the Pacific Fleet and the Pacific Ocean Areas, testified that in the early spring of 1944, there were still excellent grounds for belief that Japan would attempt another carrier raid or submarine attack on the Islands; see the Duncan and White cases, decided C. C. A. 9th, Nov. 1, 1944, advanced sheets 21-23.
\(^{44}\)Gen. Orders No. 2, effective March 10, 1943.
At the time of White’s conviction in August 1942, the military authorities maintained complete control over the civilian population of the Territory, pursuant to the declaration of December 7, 1941, modified in January 1942, to allow civil courts jurisdiction over probate matters and other issues not demanding the presence of a jury. In March 1943, the military control of civilian affairs was almost completely abrogated by proclamation of the Governor. When Duncan was convicted the express power to control civilian affairs had been resumed by the civil authorities; the Duncan opinion, therefore, represents more of a departure from the traditional doctrine of the Milligan case than does the White decision. The jurisdiction of the military authorities over civilians, after March 1943, rested on the implied authority of Congress to resort to martial law if necessity required it. If the necessity was reasonable in the eyes of the military leaders whose duty it was to defend the Islands and the Nation, it was not proper for the judicial branch of the government to set themselves up as final arbiters of the question, in the absence of proof that the necessity was purely fictitious, hence arbitrary and capricious. Successful waging of a war necessarily results in harnessing the nation’s resources to the supreme effort. The right of which both defendants were deprived was not of the highest order—life itself—but merely of personal liberty, not an unreasonable deprivation in view of the grave peril facing the Islands.

The implication contained in both cases indicates a decided and inevitable step forward in the development of martial law in the United States. In comparing the modern English viewpoint on martial law with our own concept laid down in Ex parte Milligan; one authority recently said: “... where kindred people who once held the same doctrines as ourselves have been driven to adopt new views of war power, that experience is most persuasive in weighing the authority to be conceded to our own government in like emergencies.” The executive branch of the British government has almost unlimited powers in times of national emergency, sufficient even to suspend acts of Parliament.

40 Gen. Orders No. 57, Jan. 27, 1942, see note 7 supra.
41 See discussion on page 204 of the text supra.
44 Hirabayashi v. United States, 320 U. S. 81, 93 (1943).
It is not to be doubted that the inflexible criterion laid down in Ex parte *Milligan*, that martial law is constitutional only if there is actual invasion and the civil courts are closed, is no longer adaptable to modern methods of warfare; and strict adherence to that doctrine is incommensurate with the public safety. A hit and run attack such as the one on Pearl Harbor will result in just as much suffering and havoc as the actual physical presence of enemy troops. No part of the world is now safe from potential bombing—certainly not Hawaii, the central bastion, and for a considerable period of time after December 7, 1941, the only base of naval operations for the United States Fleet in the Pacific Ocean. Congressional statutes are presumed to be constitutional and, if possible, are to be interpreted in such a manner that they will be found valid. The declaration by Congress in Section 67 of the Organic Act authorizing proclamation of martial law by the executive authority of the Islands, in case of invasion as well as imminent danger thereof, was similar to that in other statutes incorporating island territories into the Union, *e.g.*, Puerto Rico, the Virgin Islands, and the Philippines. In construing the Constitution, the “practical construction put upon it by Congress” is of considerable weight. Viewed in the light of what actually happened at Pearl Harbor, the belief by Congress that martial law was justified in the Territory of Hawaii, in case of imminent danger as well as actual invasion showed a considerable amount of foresight by that body—surely more than was shown by the bare majority of the Court in Ex parte *Milligan*.  

**BARTHOLOMEW B. COYNE**

**INJURIOUS FALSEHOOD—AN EXPANDING TORT**

An interesting legal problem occasionally arises as to the actionability of the situation where a person, voluntarily and unprompted, publishes non-defamatory but false statements directed at another’s property—statements which deceive the public and culminate in economic loss to the owner of the property. The question is whether the party sustaining the loss has a cause of action in view of the fact that:

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*Downes* v. Bidwell, 182 U. S. 244, 249 (1901).

*On* February 12, 1945, the Supreme Court of the United States granted *certiorari* in both the *Kahanamoku* v. *Duncan* Case (No. 791), and the *Steer* v. *White* case (No. 792), (1945) 13 U. S. L. Week 3320.—Editor’s Note.
The plaintiff and the defendant are not competitors in the usual sense of the term; (b) the defendant is not intentionally seeking to injure the plaintiff; (c) the public, not the injured party, is deceived by the misrepresentations; and (d) the false words are not personally defamatory.

The courts of New York have considered the nature of this expanding tort of injurious falsehood in two recent cases. One case denies the cause of action while the other admits it. Both opinions are interesting and valuable, since, when taken together, they define the tort and indicate what allegations the pleadings must contain to state a cause of action.

The cases arose from the following facts: the American Tobacco Company, on its weekly coast-to-coast radio program, "Your Hit Parade", with an estimated audience of fifteen million people, represents that the ten songs ranked each week on this program are determined according to an extensive and accurate survey of the changing musical tastes of the country. In the successful action the plaintiff, a song publisher, alleging that its songs were given undeservedly low ratings, or were unjustifiably omitted from the "Hit Parade", charged the tobacco company with gross negligence in selecting the songs recklessly and wantonly, with fraudulent conduct in deceiving music dealers, band leaders, artists, entertainers, and the public at large regarding the relative popularity of the songs, resulting in persuading these third persons against dealing with the plaintiff, and with unfair competition. The song publisher then asked for relief in the form of damages for the alleged tort and an order enjoining defendant from claiming that the songs played on its program were authentically ranked. The defendant challenged the legal sufficiency of the complaint and, in addition, contended that equity will not restrain a trade libel. The New York Supreme Court held that the plaintiff's allegations did state a cause of action.

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(c) Ibid. Paralleling the Advance Music Corp. cases, with similar facts, and between essentially similar parties, was Remick Music Corp. v. American Tobacco Co., 57 F. Supp. 475 (S. D. N. Y. 1944), wherein the federal court, sympathizing with the plaintiff's grievances, reluctantly dismissed the complaint. In that instance, the federal court, in accordance with the rule of Erie R. R. v. Tompkins, 304 U. S. 64 (1938), paid deference to the earlier decision of the state court and dismissed the complaint. It should be noted that this case was decided between the first and second Advance Music Corp. cases.
Judge Walter, speaking for the court, said:

"In short, defendants not casually or inadvertently, but deliberately and as a regular course of business and for their own personal gain, make statements and do acts which are untrue and deceptive and which are disparaging to plaintiff's property, and the nature of such representations and acts and the circumstances under which they are made and performed are such as to lead defendants to foresee that the conduct of third persons might be determined thereby; and such representations and acts are of such nature as to be likely to cause, and, in fact, have caused damage to the plaintiff.

"Defendants were under no duty to speak or act at all with respect to the popularity of songs, but by undertaking to act and speak with reference thereto they placed themselves under the obligation of speaking and acting honestly and with reasonable care."4

This case grew out of a controversy between the same parties—wherein the same court, speaking through a different judge, decided that no cause of action was stated because of: (a) the failure to show a duty on the part of the defendant to refrain from uttering negligent words; (b) the failure to allege intent to deceive the plaintiff and the latter's reliance upon defendant's misrepresentations; (c) the failure to allege special damages, preventing recovery for slander or libel of property; and (d) the inability to demonstrate that the parties are competitors, precluding an injunction restraining unfair competition. It is obvious that the court tested the foregoing pleadings in the light of recognized common law tort actions. Finding none of the old pegs on which the case could comfortably be hung, the court refused to admit a cause of action. In the second case the judge, perceiving that a real wrong had been done, took a more realistic view of the pleadings and, in accord with the old maxim that the law shall suffer no wrong without a remedy, concluded that a cause of action did exist. While a comparison of the two cases shows that niceties in pleading are quite important, it is apparent, considering the pronounced similarities of the pleadings in the two cases, that the philosophy of the judge before whom such a case is brought has a very substantial bearing on the result.

In the light of the judicial framework provided by these two cases, this note will treat of the following aspects of the problem of injurious falsehood: (a) the development of the tort and some instances of its application; (b) the elements of the action; (c) the type of relief granted; and (d) the defenses to the action.

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50 N. Y. S. (2d) 287 (Sup. Ct. 1944).
The Development of the Tort and Some Instances of Its Application

"That an action will lie for written or oral falsehoods not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law." The tort labeled variously "disparagement of property", "slander of goods", and "trade libel" was developed in the latter part of the sixteenth century in England as an action for "slander of title", i.e., a type of economic interference resulting when the defendant's false oral statements clouded the plaintiff's ownership of the land, whereby the plaintiff suffered loss through inability to sell or lease the land. Originating in situations involving realty, the form of action gradually expanded to include false and malicious aspersions upon one's title to personality. A subsequent development brought protection against the false, malicious disparagement of the quality of one's property. It is this latest phase of development that presents interesting modern applications.

Since the tort is based upon the publication of false and malicious

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6 Ratcliffe v. Evans, [1892] 2 Q. B. 524. Prosser, Torts (1941) § 106 excellently covers many phases of the tort of injurious falsehood; see Restatement, Torts (1938) §§ 624-652; 37 C. J. 130. The name of the tort of injurious falsehood was coined by Salmond. Salmond, Torts (9th ed. 1936) § 151. See also Pollock, Torts (14th ed. 1939) 243 et seq.


8 "At common law, if one sue a forged obligation knowing it to be so, an action on the case lay. And although she claimeth a lease to herself, yet she publishing it knowing it to be forged, an action lieth. . . ." Gerrard v. Dickenson, Cro. Eliz. 196, 197, 78 Eng. Rep. 452, 453 (Q.B. 1858). Thus, one casting false and malicious doubts on plaintiff's title to realty, by claiming that plaintiff lacks title to the property, or has defective title, would be liable for the loss suffered by the plaintiff. Womack v. McDonald, 219 Ala. 75, 121 So. 57 (1929); Coffman v. Henderson, 9 Ala. App. 553, 63 So. 808 (1913).


statements disparaging the title or quality of the plaintiff's property and resulting in economic loss to him, it follows that falsity, malice, special damage,\(^{11}\) and an estate or interest in the property on the part of the plaintiff\(^{12}\) are the essentials of the action. There is here a resemblance to the action of deceit, distinguished in that a third person, not the plaintiff, relies upon the misrepresentation.\(^{18}\) It is the fraud practiced on a third person, resulting in pecuniary injury to the plaintiff, that is the basis of the complaint. Injurious falsehood is also readily distinguished from defamation in that the words published are personally non-defamatory,\(^{14}\) the burden is on the plaintiff to establish the falsity of the statements,\(^{15}\) and special damages are almost invariably held to be essential. Some courts have likened the action for injurious falsehood to an action for defamation, wherein the title of the property is personified and subjected to many of the rules applicable to personal slander; \textit{i.e.}, indulging in the fiction of the personification of the goods, the quality of the goods is slandered.\(^{16}\)

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\(^{11}\)Western Counties Manure Co. v. Lawes Chemical Manure Co., 9 L. R. 218, 222 (Ex. 1874).


\(^{13}\)Cf. Long v. Rucker, 166 Mo. App. 572, 149 S. W. 1051 (1912); \textbf{Restatement, Torts} (1938) \S\ 537.

\(^{14}\)Regarding the distinction between defamation and disparagement, see the oft-quoted Smith, \textit{Disparagement of Property} (1913) 13 Col. L. Rev. 121. It is clear that a false statement, disparaging to one's business, is actionable as libel or slander, if malpractice, deceit, or other personally reprehensible characteristics are involved. Kilpatrick v. Edge, 85 N. J. L. 7, 88 Atl. 839 (1913); Midland Publishing Co. v. Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298 (1904); Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668 (1903). Although almost every disparagement of a business or its product could be construed as a reflection against its owner (thereby rendering appropriate the action of libel or slander), the courts in borderline cases have deemed applicable only the action for disparagement with its stricter prerequisites. National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F. (2d) 763 (C. C. A. 8th, 1927); General Market Co. v. Post-Intelligencer Co., 96 Wash. 575, 165 Pac. 482 (1917); Tobias v. Harland, 4 Wend. 537 (N. Y. 1830). See \textbf{Prosser, Torts} (1941) \S\ 106.

\(^{15}\)There is no presumption, as in a personal slander action, that the disparagement is false: International Visible Systems Corp. v. Remington Rand, Inc., 65 F. (2d) 540 (C. C. A. 6th, 1933); Brinson v. Carter, 29 Ga. App. 159, 113 S. E. 820 (1922); Long v. Rucker, 166 Mo. App. 572, 149 S. W. 1051 (1912).

Regarding the range of the interests protected by the action for injurious falsehood, one authority states:

"... everything which can be the subject of property, and the pecuniary value of which is appreciable and depreciable to an extent which can be defined and quantified, comes within the scope of this form of action."17

The core of the tort of injurious falsehood is the interference with the economic relationship between a third party and the plaintiff, caused by the defendant’s unjustified intermeddling or failure to act when he should have acted. Thus, in a case somewhat similar to the Hit Parade cases, the defendant professed to give the public a full list of all the reputable express companies doing business around Boston. Without justification, the plaintiff’s company was omitted from the list, thereby casting doubt on its existence. In that case the court said:

"The public is misled by the intentional publication of an incorrect list. But the gist of the plaintiff’s action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong."18

Similarly, a disparagement of one’s business may result from reflecting adversely on its character, its employees, its customers, or the method by which it is operated.19 The diversity of these cases makes it apparent that the action for injurious falsehood is one capable of arising under a variety of factual guises.

**Elements of the Action for Injurious Falsehood**

As we have seen, the elements of the action are falsity, malice, and special damages. Obviously, the falsely disparaging statements must be communicated to a third person, they must have a substantial bearing on the special damages suffered, and the material extent of the falsity must be affirmatively demonstrated.

By the same token, the burden of proof in establishing malice lies upon the plaintiff. Actual malice is not necessary, since from the publi-
cation, the material falsity thereof, and the special damage, malice may be inferred where no privilege or justification is shown.  

Disparaging words spoken of property are not in themselves actionable; therefore, special damage to the plaintiff must be properly alleged in order to state a cause of action.  

The special damage must be a pecuniary one, distinctly and particularly set out.  

This is clearly shown by the specificity of the allegations deemed necessary by the New York courts. Personal elements of damage, such as consequential mental distress, are not recoverable.

It will be remembered that in the successful Hit Parade case all of the essentials of the action are alleged: the falsity of the statements is appropriately pleaded; malice may be inferred from the allegations of actual injury, though express malice is lacking; and special damages are adequately set forth. It is well to note again that the special damages pleaded in both of the New York cases were very similar; yet in the one case they were deemed insufficient, while in the other they were considered adequate. The decision admitting the cause of action was the more liberal in that only a reasonable precision in the pleading of special damages was insisted upon. This is a tentative step forward in the history of the tort of injurious falsehood; and, since the elements of the action are all grounded in well-established tort law, this slight advance seems a reasonable one.

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TYPE OF RELIEF GRANTED

Since the action for injurious falsehood is generally considered a legal action,\textsuperscript{24} the remedy ordinarily takes the form of a money judgment for the special damage sustained. The usual reluctance to apply the equitable device of injunction is suggested by the following language from an old New York case:

"... the jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander. Equitable jurisdiction to restrain the use of a name or a trade-mark, or letters, rests upon the ground of plaintiff's property in his name, trade-mark or letters, and of the unlawful use thereof."\textsuperscript{25}

Drawing an analogy between the action for injurious falsehood and that for defamation, many courts, in the interest of free speech and press, have denied injunctive relief.\textsuperscript{26}

Equity ordinarily will not enjoin the publication of a mere libel or slander in itself, and this principle is unaffected by the fact that the disparagement may injure the plaintiff's business or property.\textsuperscript{27} Injunctive relief, however, is appropriate when the disparagement is made by a competitor,\textsuperscript{28} is incidental to the commission of a more inclusive tort such as a conspiracy to ruin plaintiff's business by coercing his customers,\textsuperscript{29} or is a wrongful use by defendant of plaintiff's property, trade-mark, or name.\textsuperscript{30} The imminence of irreparable damage, as where the disparaging defendant is insolvent,\textsuperscript{31} justifies injunctive relief, since in such a case the legal remedy is clearly inadequate. There is a tendency among the courts to view defendant's disparagement as a type of unfair

\textsuperscript{24}Francis v. Flinn, 118 U. S. 385, 388 (1886).
\textsuperscript{25}Mauger v. Dick, 55 How. Pr. 132, 134 (N. Y. Super. 1878). For an excellent general discussion of the propriety of injunctive relief in cases of injurious falsehood, see: 4 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 1358.
\textsuperscript{27}Hicks Corp. v. National Salesmen's Training Ass'n, 19 F. (2d) 963 (C. C. A. 7th, 1927); American Malting Co. v. Keitel, 209 Fed. 351 (C. C. A. 2d, 1913).
\textsuperscript{29}Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13 (1898).
\textsuperscript{31}Shoemaker v. South Bend Spark Arrestor Co., 135 Ind. 471, 35 N. E. 280 (1893). It is noteworthy in this case that, in addition, the defendant intimidated plaintiff's customers.
competition enjoinable in equity. Customarily, the courts consider unfair competition as a single concept equally compounded of the elements of unfairness and competition; but, in cases involving third party economic relationships, as in the Hit Parade cases, where it is difficult or impossible to show direct competition, the courts have necessarily laid more stress upon the element of unfairness.32

Dean Pound has made a strong plea for the wider use of injunctive relief in cases of injurious falsehood, since "In substance, the traditional doctrine [of permitting only legal, not equitable relief] puts anyone's business at the mercy of any insolvent, malicious defamer, who has sufficient imagination to lay out a skillful campaign of extortion."33

The complaints in the cases forming the basis of this note seek both legal relief—damages for the claimed tort—and equitable relief—an injunction restraining the tobacco company from advertising that its ranking of popular songs is authentic. Since the parties sell songs and tobacco products, respectively, it would seem to stretch matters somewhat to consider them competitors. Therefore, the court, in the successful case, accentuated the point of unfairness rather than the customary concept of competition and concluded that the parties were competitors in their respective attempts to influence the public as to the comparative popularity of popular songs.

DEFENSES TO THE ACTION

In general, the defenses applicable to the action for personal slander, i.e., privilege and truth, are relevant to the action for injurious falsehood. Privilege may be absolute, for instance, statements directly connected with a bona fide judicial proceeding;34 or it may be conditional, e.g., the right of a newspaper critic to make a fair comment or that of a


33Pound, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 Harv. L. Rev. 640, 668; cf. Nims, Unfair Competition by False Statements or Disparagement (1933) 19 Corn. L. Q. 63.

34Maginn v. Schmick, 127 Mo. App. 411, 105 S. W. 666 (1907). In Gudger v. Manton, 21 Cal. (2d) 537, 134 P. (2d) 217 (1943), the court decided that a malicious levy of execution was not an act in the course of a judicial proceeding but a ministerial act, and therefore not absolutely privileged.
salesman to "puff" his wares.\textsuperscript{35} In regard to the privilege attached to "puffing", only general comparative statements are permissible. The courts consider such statements as mere opinion and not actionable; however, when the comparisons become specific and individual false statements are made, liability ensues.\textsuperscript{36}

At best, the American Tobacco Company had only a conditional privilege when it made false statements which had the effect of disparaging the quality of the Advance Music Corporation's property. Its privilege, if any, hinged upon confining itself to the role of a fair critic. Evidently, negligence in selecting the rankings for the songs would go beyond this critical role and wipe out the conditional privilege. One has difficulty in seeing how the tobacco company could rely on a competitor's right to "puff", since the song-publisher deals in such wholly unrelated merchandise.

\textbf{Conclusion}

The invention of the radio, its eager reception by the American people, and its consequent influence in molding public opinion have necessitated the development of a new body of law. Thus far, this law has been chiefly of a regulatory nature, important to a group of legal specialists and scarcely affecting the majority of the Bar. The \textit{Hit Parade} cases reviewed in this note present an entirely different aspect, in that they are concerned with tort law, a field of wide practical importance.

The commission of a tort through the medium of radio advertising was not entirely unexpected. The very magnitude of the advertising campaigns and the highly personalized methods employed by the advertisers in attracting customers made it practically inevitable that some innocent party would eventually be harmed.

It is interesting that one of the first important judicial proceedings involving a radio tort action should be based on an injurious falsehood. Remedy for the wrong of injurious falsehood is no novelty in the law of torts. It has existed under many labels for many years, but the agency here involved (radio) and the peculiar relationship of the parties have necessitated a measure of judicial legerdemain in order to reconcile the old concept of the cause of action with the new factual situation.

Without approving the ways and means by which the court reached its decision in the second \textit{Hit Parade} case, we can still applaud the result.


\textsuperscript{36}National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F. (2d) 763 (C. C. A. 8th, 1927).
The court's hesitancy must be evaluated in the light of the fact that it was dealing with an expanding tort—one whose limits are not too sharply defined and whose hybrid nature, as its resemblances to the actions of deceit and defamation clearly suggest, presents many difficulties. Generally, the action provides protection against unjustified interference with the economic relationship between the plaintiff and a third party, induced by the careless, irresponsible statements of the defendant. The paramount significance of special damages necessitates the precise pleading of that type of damage. It would probably be better to depart from the rigid rule requiring already realized special damage before granting injunctive relief, since in many conceivable situations it might be extremely difficult to prove the exact special damages. The degree of precision required in the pleading of special damages should be determined by the circumstances of each case. Where economic loss seems imminent, equitable relief would appear to be appropriate. Unfortunately, the historical linking of the action for injurious falsehood with the action for defamation has restricted the use of the injunctive device.

Considering the elements of this wrong, one is puzzled by the refusal of the court to recognize this type of injurious falsehood as an independent tort and by its insistence on tailoring the case made out by the pleadings to fit the measure of the old common law tort of unfair competition. It is to be hoped that the courts will abandon this evasive technique and recognize the factual situation presented here as a wrong per se—one which the law must remedy—without striving to give it one of the ancient labels or to drop it into one of the familiar pigeon-holes. Only the future will reveal the precise delineation of this changing tort, for there is a wide variety of situations to which it might well be applied.

EDWIN R. FISCHER
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RECENT DECISIONS

CONSTITUTIONAL LAW—An Exclusion Order, Directed Against An Entire Class of Civilians, Is Not an Unreasonable Discrimination Offending Due Process of Law, If Deemed Necessary by The Military.

Petitioner, Korematsu, an American citizen of Japanese ancestry and a resident of California was convicted in the federal district court for remaining in his home contrary to a civilian exclusion order issued by the Commanding General of the Western Command of the United States Army. The exclusion order was issued pursuant to EXEC. ORDER NO. 9066, 7 FED. REG. 1407 (1942) authorizing the Army Commander to "prescribe military areas" and to determine their boundaries "from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" the Commanding Officer "may impose in his discretion." The Executive Order, the basis of the exclusion order, was issued pursuant to an Act of Congress of March 21, 1942, 56 STAT. 173, 18 U. S. C. § 97a (Supp. 1943). The exclusion order was applicable to persons of Japanese ancestry only. The case presents no controversial issues with respect to petitioner's wilful violation of the exclusion order. Rather, it is a question of the constitutionality of his conviction for violation thereof. Held, an exclusion order, directed against an entire class of civilians, is not an unreasonable discrimination offending due process of law, if deemed necessary by the Military to avert a national peril. Korematsu v. United States, 89 L. Ed. 202 (1944). A preliminary Army order of March 1942 prohibited petitioner and all others of Japanese ancestry from leaving a designated military area in which was located petitioner's home. The efficacy of this preliminary order was specifically confined in duration "until and to the extent that a future proclamation or order should so permit or direct." 7 FED REG. 2601 (1942). The exclusion order under attack by the petitioner was issued May 3, 1942, and was considered by the Court to be the "future order" referred to in the preliminary order. The exclusion order was deemed to supersede the preliminary order. The former provided for the exclusion of all designated persons from the specified area after a certain date.

The Court split six to three on this case and handed down five opinions: one majority, one concurring, and three dissenting. The majority, speaking through Mr. Justice Black, at the outset recognized the well-established principle that not all discrimination is unconstitutional; also, that the President of the United States is vested with the executive power, as Commander in Chief of the armed forces, to wage war which Congress has declared and to carry into effect all laws passed by Congress concerning the conduct of the war. The power of the Congress and the President to wage war under Articles I and II of the Constitution has been interpreted to mean the power to wage a successful war. Hirabayashi v. United States, 320 U. S. 81 (1943); Ex parte Quirin, 317 U. S.
1 (1942); United States v. Sweeney, 157 U. S. 281, 284 (1895). See Hughes, War Powers Under the Constitution (1917) 42 A. B. A. Rep. 232, 238. Moreover, this power as construed by the Court in the Hirabayashi case, "extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war." Hirabayashi v. United States, supra at 93. See also United States v. Macintosh, 283 U. S. 605, 622-23 (1931); McKinley v. United States, 249 U. S. 397, 399 (1918); Miller v. United States, 11 Wall. 268, 303-14 (U. S. 1870); Stewart v. Kahn, 11 Wall. 493, 506-07 (U. S. 1870).

Mr. Justice Roberts in dissenting stressed the inseparability and consequent contradictory provisions of the two Army orders, the first prohibiting petitioner from leaving his home and the second directing him to leave. He contended that the two were wholly inconsistent, and that to submit to the first precluded submission to the second and to submit to the second was tantamount to surrendering to a relocation center.

Ex parte Mitsuye Endo, 89 L. Ed. 219 (1944), is relied on by Justice Roberts in support of his opinion that the detention order is invalid and that it is part of the exclusion order, the two being inseparable. This position seems untenable, however, when it is recalled that the preliminary order specifically provided that it was to be in effect only until another order was issued. No fair inference may be drawn from the exclusion order to refute the interpretation that it was intended to and did supersede the preliminary order.

The minority opinion of Mr. Justice Murphy is predicated largely on the holding that, in the absence of martial law, it is an unreasonable exercise of the authority vested in the military authorities to exclude all persons of Japanese ancestry without first determining whether they are loyal citizens. Admitting that immediate, imminent, and impending public peril will justify the order, Justice Murphy declares that banishing all those individuals of Japanese ancestry, alien and non-alien alike, from a designated area of the Pacific Coast does not meet the test. He assails the order as "an obvious racial discrimination" and as depriving "all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment." Korematsu v. United States, supra at 212 (dissenting opinion).

The dissenting opinion of Mr. Justice Jackson points out that civil courts can have no alternative to accepting the declaration of the authority that issued the order that it was a reasonably necessary military expedient, but that does not preclude the Court from declaring the order unconstitutional when it appears in fact to have been so. This opinion distinguishes this case from the Hirabayashi case on the ground that in the latter the sole question was as to the validity of a curfew order and the Court in that case was careful to phrase
its decision in language calculated specifically to preclude any possibility of its use as a precedent for cases involving incidentally similar characteristics while differing in the material aspects of the issues. The rule is laid down that "a civil court cannot be made to enforce an order which violates Constitutional limitations even if it is a reasonable exercise of military authority." *Korematsu v. United States*, *supra* at 219 (dissenting opinion).

In the view of the majority, the exclusion order was a valid exercise of the power vested in the Army Commander to minimize the threat of the twin dangers, espionage and sabotage. The question of detention is not raised by the pleadings, because the petitioner was convicted only for disobeying the exclusion order. Had he obeyed this order and subsequently raised the issue of unlawful detention, another problem would be presented. It is significant that the majority specifically reserved opinion as to the validity of subsequent detention in a relocation center. In upholding the conviction, the majority held the view that the urgency of the situation requiring the issuance of the exclusion order must be viewed in the light of the prevailing circumstances, as of the date of issuance. Mr. Justice Black, in commenting on this phase of the case, states, "We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." *Korematsu v. United States*, *supra* at 207. The majority emphasizes that the exclusion order is upheld because the military authorities were apprehensive of grave, imminent danger to the public safety, and that nothing short of such considerations will justify the action. The Court does not commit itself as to the issues which might be raised had the exclusion order also contained a detention provision. It merely holds that the authority to exclude a certain class was a valid exercise of the war powers belonging to Congress and the President.

The majority distinguishes the present case from the *Endo case*, *supra*, on the ground that the latter presented the question whether the detention of one admittedly loyal to the United States and a citizen thereof was unconstitutional. In that case the detained person had fully complied with an exclusion order, had been transferred to a detention center, examined, and found to be loyal in all respects to this country. The original evacuation was not questioned, and the Court held that one who is concededly loyal presents no problem of espionage or sabotage and that, the power to detain having been derived from the power to protect the war effort against these dangers, a detention having no relationship to that objective is unauthorized. This position seems well taken and in no manner dictates that the exclusion order involved in this case is invalid merely because of the unconstitutionality of a separate detention order. The majority points out that petitioner might raise the question of unconstitutional detention when, in fact, he has been detained. He was convicted on the basis of a separate order providing merely for exclusion from a prescribed area.

The Constitution, in committing to the President and Congress the exercise
of the delicate and difficult war powers, has delegated to them a wide scope for exercise of their judgment and discretion in determining the nature and extent of the threatened danger and in the adoption of means best calculated to minimize the threat.

While the decision seemingly represents an extension of the war powers of the Congress and the Executive, with the resultant restriction of civil liberties, it may fairly be considered a full expression of the constitutionally defined powers of these branches of government to wage war successfully. The upholding of the exclusion order rested squarely on the necessity for summary action precipitated by the exigencies of the prevailing situation.

Only situations whose potentialities predict danger which is so immediate, imminent, and impending as not to admit of delay and consequently not to permit the intervention of ordinary constitutional processes can justify an order such as this exclusion order.

JAMES E. COTTER

CONSTITUTIONAL LAW—State Statute Requiring Paid Labor Organizers To Apply to the Secretary of State for Organizers' Cards as a Prerequisite to Solicitation of Members for Unions Imposes a Previous Restraint upon the Rights of Free Speech and Free Assembly.

Thomas, the appellant, president of the International Union, United Automobile, Aircraft, and Agricultural Implements Workers and vice-president of the Congress of Industrial Organizations, addressed an audience of oil workers at Baytown, Texas, on the evening of September 23, 1943; the meeting was part of a campaign to organize the employees of an oil plant into the Oil Workers Industrial Union Local No. 1002. Thomas addressed the meeting in violation of a restraining order issued ex parte by the District Court of Travis County forbidding him from soliciting members for any C.I.O. union without first registering for a card as required by the state statute. Tex. Stat. Ann. (Vernon, Supp. 1943) Art. 5154a § 5. The meeting was orderly and peaceful; in his address Thomas invited all the non-union persons there to join the union and orally solicited one employee, Pat O'Sullivan.

Thomas was held in contempt for violating the restraining order by the Travis County District Court, and a sentence of 3-day imprisonment and $100 fine was imposed. The Supreme Court of Texas denied a petition for a writ of habeas corpus, holding the statute a legitimate exercise of the state's police power to protect the public and the laboring class, Ex parte Thomas, 141 Tex. 591, 174 S. W. (2d) 958 (1943). On appeal to the United States Supreme Court the case was argued twice. The Court, in reversing the judgment of the state court, held that the statute as applied in this case imposed a previous restraint upon the appellant's rights of free speech and free assembly, Thomas v. Collins, 65 Sup. Ct. 315 (1945).
The appellant relied on the principle of a "clear and present danger" to sustain any restraint upon free speech and free assembly, Schenck v. United States, 249 U. S. 47 (1919). The Court pointed out that the restraining order issued in anticipation of the speech; that the general invitation extended to the audience in the speech and the specific oral solicitation extended to O'Sullivan cannot be distinguished; and that since the statute as applied in the instant case restrained and punished Thomas for the general as well as the specific invitation, the judgment of the state court must be upheld as to both or neither; Williams v. North Carolina, 317 U. S. 287, 292 (1942); Stromberg v. California, 283 U. S. 359, 368 (1931). The Court, pointing out the preferred position given to the fundamental freedoms secured by the First Amendment and the Fourteenth Amendment to the United States Constitution, upheld the view that any attempt to restrict those liberties must be justified by a clear, public interest threatened not doubtfully or remotely but by "clear and present danger". Only the gravest and most immediate dangers to paramount interests will allow any restrictions on the fundamental freedoms of speech and assembly.

The safeguards of the First and Fourteenth Amendments may be applied to economic activity; the line is not drawn at organizations "engaged in business activities or individuals receiving compensation from such organizations". The rule to be applied in such cases as in every other, is the rule invoked in the present case, i.e., the "clear and present danger" test. The Court carefully pointed out that this is not to be interpreted as indicating that labor unions have any special immunity from state regulation, but merely that such regulation can not transgress the bounds of free speech and assembly. The Court has recognized that: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." Thornhill v. Alabama, 310 U. S. 88, 102 (1940); Senn v. Tile Layers Protective Union, 301 U. S. 468, 478 (1937).

In its present application the statute proved to be a blanket restraint on free speech and free assembly. Thomas went to Texas for the sole purpose of making a speech as part of a labor organizing campaign. He used no language in the speech which involved an element of grave and immediate danger; the word "solicit" is not dangerous per se except under exceptional circumstances. Under the present circumstances general and specific invitations were inseparable parts of the speech, and the safeguards of the Fourteenth Amendment as it includes the First were applicable. No restraints can be imposed upon a speaker which will make him uncertain as to whether he is overstepping the stage of "lauding unionism" and entering the stage of "soliciting".
A statute which produces such a result unreasonably restrains free speech and free assembly.

The exact terminology of the statute under discussion is:

"Sec. 5. All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full; (b) his labor union affiliations, if any; (c) describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such applications being filed, the Secretary of State shall issue to the applicant a card on which shall appear the following: (1) the applicant's name; (2) his union affiliation; (3) a space for his personal signature; (4) a designation 'labor organizer'; and (5) the signature of the Secretary of State, dated and attested by his seal of office. Such organizer shall at all times, when soliciting members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership." TEX. STAT. ANN. (Vernon, Supp. 1943) Art. 5154a § 5.

If a speaker were to attempt to conform to this statute, he would be uncertain as to just how far he might go before overstepping the area it delineates. Such a statute is unreasonable. The controlling principle is found in De Jonge v. Oregon, 299 U. S. 353, 365 (1937). There the Court held that "consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime." In the instant case the Court goes further and states: "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order." Thomas v. Collins, supra at 327.

The minority opinion upheld the Supreme Court of Texas and the state's "business practice" theory. The issue, they state, is not one of free speech; it is the right of a state to have a paid labor organizer identify himself before soliciting members for a union. The labor organizer is in the same position as doctors, lawyers, bankers, insurance agents, and solicitors of every kind. It is the right of a person to be protected in dealing with those who hold themselves out in a business capacity; the state protects this right by requiring registration.

The dissenting opinion relied upon Mr. Chief Justice Alexander of the Supreme Court of Texas for the most accurate construction of the statute involved. That jurist, in 1943, held:

"A careful reading of the section of the law here under consideration will disclose that it does not interfere with the right of the individual lay members of unions to solicit others to join their organization. It does not affect them
at all. It applies only to those organizers who for a pecuniary or financial consideration solicit such membership. It affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union. Furthermore, it will be noted that the Act does not require a paid organizer to secure a license, but merely requires him to register and identify himself before being permitted to solicit members for such union. The Act confers no unbridled discretion on the Secretary of State to grant or withhold a registration card at his will, but makes it his mandatory duty to accept the registration and issue the card to all who come within the provisions of the Act upon their good-faith compliance therewith." Ex parte Thomas, 141 Tex. 591, 596, 174 S. W. (2d) 958, 961 (1943).

In the view of the minority, the Court has overlooked the important distinction, the actual crux of the issue, the fact that both the Act and the injunction are aimed not at the speech but at "a transaction, the solicitation of members for a union." The question is therefore not one of free speech but of the right of a State in the legitimate exercise of its police power to have paid solicitors register and identify themselves.

The state court held: "It applies only to those organizers who for a pecuniary or financial consideration solicit such membership." The appellant himself urged that the Act is unconstitutional because it "imposes a previous general restraint upon the exercise of Appellant's right of free speech by prohibiting Appellant from soliciting workers to join a union", without first obtaining an organizer's card. Thus the question presented by all parties is not one of free speech but of the right of a state to regulate solicitation.

The power of a state reasonably to regulate solicitation is conceded by the minority. Applying the "rational basis" test, the reasonableness of the regulation is not placed in question. The regulation here is reasonable. The card may be obtained by mail; no fee is charged; the appellant need only furnish his name and affiliation; the Secretary of State has no discretionary power to issue the card; the issuance is a ministerial act; the statute does not curtail, ban, or even regulate any of the organizer's activities.

The decision of the Court in this case straddles the issue and is not, therefore, completely enlightening. The Court invokes the convenient, "clear and present danger" rule. By so doing, it refused to pass on the question whether either individual solicitation or the general solicitation which inevitably accompanies labor organization meetings may be controlled, but restricts itself to the question of free speech and assembly. The dissent going to the opposite pole is equally unsatisfactory, for it fails to recognize any distinction between labor organizing and the use of the streets for the solicitation of money. Somewhere between these two poles lies the true answer to the question of the constitutionality of statutes regulating labor organizers. Is the free speech question so inextricably interwoven into the inevitable solicitation pattern of labor organizing that labor organizers cannot be required to register under any cir-
cumstances? Does the term "solicitation" in a statute sufficiently delineate the area of free speech, and does it become a question of fact in each case as to whether the state has transgressed this reserved area? As the statutory regulation of labor grows, we may expect the courts to answer this question with more precision in future cases. There must be an answer peculiar to the problems presented by labor.

PHILIP FELDMAN

CONSTITUTIONAL LAW—State Required to Give Full Faith and Credit to Judgment of Sister State for Arrears of Alimony Where Judgment Is Not Subject to Modification or Recall.

The petitioner sought a judgment in the courts of Tennessee to enforce an unpaid North Carolina judgment which was granted for unpaid accrued alimony under a prior decree of a North Carolina court. The Supreme Court of Tennessee refused to give full faith and credit to the North Carolina judgment, holding that the judgment was subject to recall and modification. Certiorari was granted by the Supreme Court of the United States because of an asserted conflict with Sistare v. Sistare, 218 U. S. 1 (1910). Held: (a) the judgment sued upon was not subject to modification or recall under North Carolina law, and (b) therefore the North Carolina judgment sued upon is entitled to full faith and credit in the courts of Tennessee. Barber v. Barber, 65 Sup Ct. 137 (1944).

The original North Carolina decree for alimony was based upon N. C. Gen. Stat. Ann. (Michie, 1943) § 50-16, the pertinent part being:

“If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence . . . the wife may institute an action in the superior court of the county . . . to have a reasonable subsistence and counsel fees allotted and paid or secured to her. . . . The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. . . .”

When, after respondent's failure to pay the alimony, the trial court gave petitioner a judgment for the amount of the alimony accrued and unpaid, respondent appealed to the Supreme Court of North Carolina contending that the lower court had no jurisdiction to enter such a judgment under the statute. In passing upon this contention, that court stated:

“. . . It is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modifications of orders already made, which the court will allow as the ends of justice require, according to the changed conditions of the parties. The orders made from time to time are, of course, res judicata between the parties, subject to this power of the court to modify them. The consolidation of the amounts due, when ascer-
tained in one order or decree, does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only by reason of the original service of summons, he is in court only for such orders as, upon motion, are appropriate and customary in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one. The court below, in its sound discretion, which is not ordinarily reviewable by this Court, under the motion of plaintiff in this cause can hear the facts, change of conditions of the parties, the present needs of support of any of the children and, in its sound discretion, render judgment for what defendant owes under the former judgment and failed to pay and see to it that such judgment is given to protect plaintiff ...." Barber v. Barber, 217 N. C. 422, 427, 8 S. E. (2d) 204, 208 (1940).

It was the opinion of the Supreme Court of Tennessee that the North Carolina statute and the paragraph from the opinion of the Supreme Court of North Carolina quoted above clearly indicated that money judgments rendered on unpaid and accrued alimony were subject to recall and modification under the law of North Carolina, and that therefore because of the decision in Sistare v. Sistare, supra, such money judgments were not entitled to recognition in the courts of Tennessee.

The Supreme Court of the United States asserted its right to review the decision of the Supreme Court of Tennessee on the ground that the judgment was a ruling upon a constitutional right, and that, therefore, it is for the Supreme Court of the United States to decide the sufficiency of the grounds for denial of that right. Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 443 (1943). Since a Constitutional right is involved, it is the duty of the Supreme Court to determine for itself the law of North Carolina. See Adam v. Saenger, 303 U. S. 59, 64 (1938). In its examination of the law of North Carolina the Supreme Court found no decision which held that an unconditional judgment of that state for accrued allowances of alimony might be modified or recalled after its rendition. The single paragraph in the opinion of the North Carolina Supreme Court upon which the Supreme Court of Tennessee based its decision, when taken in its context, was found not to refer to the power of the court to modify or set aside a judgment for alimony due and owing; but rather to the authority conferred by the statute of North Carolina authorizing the court in a suit for alimony to modify, in futuro, any previous order for the allowance of subsistence. This interpretation is further substantiated by statements made by the North Carolina Supreme Court elsewhere in the same opinion, Barber v. Barber, supra, at 427, 428, 8 S. E. (2d) at 208 (1940): "... the plaintiff is entitled to all the remedies provided by law for the enforcement thereof. ... There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one." In view of this unequivocal language the Court rightly held
that it would be inconsistent to say that such a judgment might be modified or set aside.

The Supreme Court of the United States first considered the Constitutional "full faith and credit" requirement in connection with alimony decrees in *Barber v. Barber*, 21 How. 582 (U. S. 1858). In that case a New York decree granted a separation with alimony. The decree provided that unpaid installments of alimony were to bear interest and "that execution might issue therefore toties quoties." The Supreme Court of the United States upheld the United States District Court for Wisconsin, granting judgment for the unpaid alimony in accordance with the New York decree, saying, "Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.

The case of *Lynde v. Lynde*, 181 U. S. 183 (1901), involved a New Jersey alimony decree upon which judgment was sought in New York. The New Jersey decree awarded an amount for accrued and unpaid alimony, future alimony, attorney's fees, and certain aids to enforcement against the husband's property. The Supreme Court of the United States held that the judgment for alimony already accrued and for attorney's fees was for a fixed sum, but that unaccrued future alimony was not fixed and certain, since it could be altered at the discretion of the New Jersey court and accordingly was not entitled to full faith and credit. It was further held that the aids to enforcement were mere procedural elements of the decree and not entitled to foreign recognition.

*Sistare v. Sistare*, supra, the decision which the Supreme Court of Tennessee used as a basis for denying full faith and credit in the subject case, concerned a New York decree of separation awarding alimony. Judgment was sought in Connecticut for unpaid installments. The decision was amplified in *Lynde v. Lynde*, supra, holding that a decree for future alimony is entitled to credit as to past due installments if the right to them is "absolute and vested", even though the decree might be modified prospectively by future orders of the court. It also decided that such a decree was not entitled to credit if the past due installments were subject retroactively to modification or recall by the court after their accrual, even though no application has been made to annul or modify the decree.

It will be noted that the judgment sued upon in the present case was not the same as that in the *Sistare case*, but was rather a money judgment already rendered for alimony due and owing. The Supreme Court based its decision on its finding that, under the law of North Carolina, the judgment in question was not subject to modification or recall, reversing the Tennessee decision on that point. The Court thereby found it unnecessary to decide to what extent the Tennessee court could inquire into the law of North Carolina in a foreign action on the North Carolina judgment. The Court did say that the North Carolina judgment was "prima facie evidence of the jurisdiction of the court
to render it and of the right which it purports to adjudicate", 65 Sup. Ct. at 141.

A concurring opinion by Mr. Justice Jackson would do away with any question concerning the finality of the North Carolina judgment. His argument is in part: "Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to 'judicial proceedings' without limitation as to finality. . . . Whatever else this North Carolina document might be, no one denies that it is a step in a judicial proceeding . . . ." 65 Sup. Ct. at 141.

The views expressed by Mr. Justice Jackson are worthy of note, and it will be interesting to observe whether judges in future cases involving full faith and credit are influenced by his reasoning.

JOHN F. REILLY

REAL PROPERTY—In Applying the Rule Against Perpetuities to General Testamentary Powers of Appointment, the Permissible Period of Lives-in-Being Plus Twenty-one Years Runs from the Creation of the Power and Not from the Execution thereof.

Arthur J. Parsons, by will, created a trust for the benefit of his wife and two sons. Each child was given a general testamentary power of appointment of his share, and in default of such appointment the will directed that each son's share pass to his issue. The trust was to terminate twenty-one years after the death of the testator's wife. Arthur J. Parsons died in 1915, and his widow in 1934.

Jeffrey Parsons, one of the sons, by his will created a trust, which included the interest covered by the power, for the benefit of his wife and children. It provided for income to his wife for life and upon his wife's death for distribution of the income to his children until they reached the age of twenty-five. Jeffrey Parsons died in 1942, and his youngest child was born in 1940. An appeal, brought to determine the validity of Jeffrey's exercise of the general testamentary power of appointment, held, the attempted exercise thereof was invalid, because in violation of the Rule against Perpetuities and restraints on alienation, in that there was a possibility that title would not vest within lives-in-being plus twenty-one years from the creation of the power. Mondell v. Thom, 143 F. (2d) 157 (U. S. App. D. C. 1944).

The Rule against Perpetuities in effect in the District of Columbia is not the common law rule, but is created by statute making void in its creation every future estate (except to charitable uses) which shall or may by possibility suspend the power of absolute alienation for more than the period of lives-in-being and twenty-one years thereafter. D. C. Code (1940) § 45-102. This fact does not bear essentially on the point at issue, because any jurisdiction
retaining the common law rule concerning the vesting of future interests would reach the same conclusion as the Court of Appeals did in the instant case.

The Rule against Perpetuities applies to powers of appointment, St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S. W. (2d) 569 (1935), both in the period during which the power may be exercised, and the appointment made pursuant to the power. If a donor grants a power to a donee to appoint to another, and the power may be exercised beyond the period allowed by the Rule, such a power is void in its inception. In re Lawrence's Estate, 136 Pa. 354, 364, 20 Atl. 521, 522 (1890). Likewise, if a donee, exercising the power given him, creates an estate which will not vest within the period allowed by the Rule, such execution is invalid. Northern Trust Co. v. Porter, 368 Ill. 256, 13 N. E. (2d) 487 (1938). Since in the instant case the power created by the donor was valid because it had to be exercised within the permissible period after his decease, the only remaining question was whether the execution of the power fell within the Rule.

The most important classification of powers of appointment is that, which distinguishes between general and special powers according to the objects of the power. Lyon v. Alexander, 304 Pa. 288, 291, 292, 156 Atl. 84, 85 (1931). If the donee is given power to convey or devise a fee to anyone he chooses, such a power is general; but if he is limited in the individuals or class of individuals to whom he may appoint, such a power is a special one. The former type of power has long been recognized as tantamount to giving the donee full title to the property, since all he has to do is convey to himself and all other interests in the property are destroyed. Mifflin's Appeal, 121 Pa. 205, 15 Atl. 525 (1888); Gray, The Rule Against Perpetuities (4th ed. 1942) § 524. In such a case the Rule runs from the execution of the power of appointment by the donee, and not from the creation of the power by the donor.

In a special power of appointment, the donor limits the objects of the power. Thompson v. Garwood, 3 Whart. 286, 305 (Pa. 1838). By doing so, the general marketability of the property is destroyed, since it amounts to a restraint on alienation; and therefore the donee is not considered to be the dominus of the property. In the creation of such powers, the Rule runs from the creation of the power, and not from the execution thereof by the donee.

On the point in issue in the principal case—whether, in the creation of a general testamentary power of appointment, the permissible period under the Rule dates from the creation of the power or from the exercise thereof—there has been a conflict between the English courts and the majority of American courts, as well as between eminent text writers on the subject.

The original view of the English courts, as set out in the case of In re Powell's Trust, 39 L. J. 188 (Ch. 1869), adopted the view prevailing in most American jurisdictions today. In that case, A, the father, bequeathed stock to his married daughter, B, for life, with power of appointment of the remainder by will to such persons as B chose. B appointed to C, B's daughter,
for life, with remainder to C's children who should attain twenty-one years of age. In holding such exercise of the power of appointment invalid under the Rule against Perpetuities, the court said: "... the general power ... of appointing by her will the remainder in the fund, after the termination of her life interest, being exercisable only on her death, was not equivalent to her having the absolute ownership of the fund which was tied up for the whole of her life." That case, although overruled in England by Rous v. Jackson, 29 Ch. D. 521 (1885) has been followed by the great majority of American courts. However, In re Warren's Estate, 320 Pa. 112, 182 Atl. 396 (1936); Minot v. Paine, 230 Mass. 514, 120 N. E. 167 (1918); Reed v. McIlvain, 113 Md. 140, 77 Atl. 329 (1910); In re Lawrence's Estate, 136 Pa. 354, 20 Atl. 521 (1890); Gray, The Rule Against Perpetuities (4th ed. 1942) § 526.2. Delaware, by statute, Del. Rev. Code (1935) § 4414, and possibly Wisconsin, Miller v. Douglas, 192 Wis. 486, 213 N. W. 320 (1927), have refused to follow the general American rule.

The conflict between the two viewpoints centers on the issue whether or not the donee of the general testamentary power can be considered the owner of the interest covered by the power. Professor Gray of Harvard and Professor Simes of Michigan favor the view of the American courts that the remoteness of the vesting must be measured from the creation of the power, because the donee of the power can never appoint to himself and hence can never be considered the owner of the property. Gray, The Rule Against Perpetuities (4th ed. 1942) §§ 526.2, 950 et seq. Holding the opposite viewpoint was the late Professor Kales of Illinois, who stated that it was not important whether the property ever vested in the donee of the power, as long as he could act as the owner when he executed the general power. Kales, General Powers and the Rule Against Perpetuities (1912) 26 Harv. L. Rev. 64.

To prevent the forfeiture of estates caused by the application of the Rule to general testamentary powers of appointment as if they were special powers, the courts have made a distinction between what the donee of the power may have done in executing a power given him and what he actually did, as determined by facts and circumstances existing at the time of the execution thereof. In re Warren's Estate and Minot v. Paine, both supra. Thus, if A gives a general testamentary power of disposition of his property to B, and B appoints to C, his wife, for life, with remainder to the children when they reach thirty years of age, and B dies when the youngest child is only five years of age, the appointment is obviously invalid, because the five year old child will not attain thirty years within twenty-one years after C's death, if C dies before the child is nine years old. But if B does not die until the youngest child is fifteen years old the future estate will vest within twenty-one years after C's death; and because of the altered facts existing at B's death, the appointment is valid. Therefore, the fact that the donee may have made an invalid appointment under the power, will not invalidate an appointment which actually will vest the property interest
within the permissible period to be determined by conditions as they exist when the power is exercised.

The United States Court of Appeals for the District of Columbia, in *Mondell v. Thom*, *supra*, adheres to the generally accepted American doctrine that in the application of the Rule against Perpetuities to general testamentary powers of appointment, the permissible period is calculated from the creation of the power, and not from the execution thereof. Thus, the donee, in attempting to exercise the power granted him through creating a further trust for the life of his wife until his children reached the age of twenty-five, created a situation which might possibly suspend the absolute power of alienation of the interests covered by the power for more than lives-in-being and twenty-one years from the death of the donor. If the donee's widow, who was born before the donor's death, died before 1944, her youngest daughter, born in 1940, would not take her share within the twenty-one years allowed. Therefore, facts which existed at the death of the donee did not operate to save the validity of the execution. Here the appointment would have been upheld, had the donee died after 1944, without having further issue.

Since the limitation by the donee to his children was to them as a class, and each child's share was to be determined when the youngest reached twenty-five, the devise, failing as to one of the class, was void in its entirety. *Leake v. Robinson*, 2 Mer. 363 (Ch. 1817). Because the provision giving the donee's widow a life income from the trust was inseparable from the invalid provision for the children, inasmuch as the testator exhibited a complete testamentary scheme, and it would do violence to his intention to separate the provisions, the life estate was rejected along with the rest of the trust. *Wills v. Maddox*, 45 App. D. C. 128, 134, *cert. denied*, 242 U. S. 640 (1916); *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880 (1891).

The case is believed to be the first decided in the District of Columbia on the application of the Rule to a general testamentary power of appointment; thus adding another jurisdiction to those states supporting the majority rule in the United States.

_BARTHOLOMEW B. COYNE_
BOOK REVIEWS


The reader of this book will be well repaid for his effort. Lawyers especially will find it stimulating. While it is, in a sense, a record of events personal, national and international, it is really that and much more. It appraises men and events and in addition bears a message for the individual, for Americans, for lawyers, judges and civil servants. These messages in the form of penetrating reflections, sometimes expounded at length, sometimes crystalized into a line or two are probably the most valuable feature of the book.

The book portrays a man who has enjoyed a long life and a happy one, whether at work or at play. It portrays a man of wide accomplishments and distinctive achievements, a man who made a habit of deliberately forming habits that were conducive to a well balanced life, a man of serious thoughts and purposes peering out of a twinkling eye. This book of experiences was written we are frankly told for self gratification, but all in all it presents a modest and unaffected narration. Witty remarks and charming anecdotes spice narratives and discussions which are quite fascinating in their own right. It is a refreshing book, the kind of book one would like to present to young people at the start of their careers.

George Wharton Pepper was born in Philadelphia on March 16, 1867. Because of an eye ailment his early education was received from relatives and tutors. After he entered the University of Pennsylvania in 1883 his eyes suddenly got well. He completed his college work in 1887 and then went to the law school from which he graduated in 1889. While attending the law school he served an apprenticeship in the firm of Biddle and Ward. For the next 33 years he practiced law. During a great part of this time he taught at the University Law School. In 1922 at the age of 55 he was appointed to the U. S. Senate, but was defeated in the 1926 elections. He then returned to the practice of law, and at the age of 77 he is still an active member of his firm. For one year he was President of the American Law Institute.

His recollections from the early seventies on covers a span of seventy years. Because of his social opportunities, his marked personal ability and attainments, his variety of services as a lawyer, a teacher, a church leader and a Senator, his love of sports and out-door life, these recollections of 70 years embrace a wide contact with men and events not
allotted to many men. As he says himself: "Recollections of people met, work done and causes served are matched by memories of sporting events and of days and nights spent in the open."

The book is not mere narrative, it evaluates men, events, practices and social institutions. The appraisal of men includes in its ambit simple Maine natives, educators, churchmen, lawyers, judges, politicians, statesmen and foreign diplomats. The comments on Harding, Coolidge, Hoover, Willkie and members of the Senate are enlightening. Views as to law, law offices, legal education, law practice, fees, arbitration, politicians, the League of Nations and the work of Congress are thought provoking.

Despite the general excellence of the work, it opens up a few avenues of criticism. Democrats will not accept his appraisal of the New Deal philosophy. Catholics must repudiate his statement of the catholic explanation of the Eucharist. Some philosophers of law will wonder how he fits his acceptance of the theory of interest with his concept of the dignity and destiny of men.

Perhaps that which will prove to be the most striking revelation for many readers and especially for those of the legal profession will be the emphasis he places on faith, prayer and active devotion to religious practice as factors in his own life and as the basic remedy for world ills. This note is struck at the very beginning and is clearly discernible as a deep undertone all through until the closing chapter. A few excerpts will verify the statement.

"Just as I am confident of personal immortality so I believe that through the grave and gate of death America will pass to a joyful resurrection."

"If Postwar reconstruction is a vague conception, what the church has to offer is definite and soul satisfying. When we come to our senses it will be to our spiritual senses that we come first."

"There is something tragic in the spectacle of a man of intellect who has no fixed religious beliefs and rather wistfully confesses his longing for them. Happiness does not appear to be the lot of such. I fancy, for example, that I detect a certain undercurrent of sadness in the writings of Mr. Justice Holmes."

"As shadows lengthen and your cheek feels the evening damp, it is a great thing to be able to say with calm assurance: 'I look for the resurrection of the dead and the life of the world to come'."

"The preservation of personal dignity and the possibility of communion beyond the grave are essential to the conception of a happy death. It is therefore with calm confidence that I look for the resurrection of the dead and the life of the world to come."

Personal peace and world peace seem to him to rest on the same foundation. His deep faith seems to explain how he has taken the ups and downs of life in stride and with a calm, confident smile.
As you close the book you have an after-image of a scholarly man, a self disciplined man, an active man, a man of faith and hope, a man interested in social and civic affairs, a man interested in people, but above all a happy man. You can well believe him when he says: "... all my life I have taken a deep interest in people. The exploration of human personality seems to me an absorbing pursuit. I can say with confidence that never in my life have I been bored."

FRANCIS E. LUCEY, S.J.*


The list of books describing English courts and lawyers is as long as Homer’s catalogue of ships. Yet, this little book on the same subject—*English Courts of Law*, is a real addition. It is useful to have an accurate, compact review of the growth of the English judicial system, from the twelfth century to modern times, presented in an interesting, vivid style. The author, Harold Greville Hanbury, D.C.L., M.A., is a Fellow of Lincoln College, Oxford; University Lecturer in Equity; Sometime Vinerian Scholar and Rhodes Travelling Fellow; Tutor, Law Society’s School of Law; of the Inner Temple, Barrister-at-Law; author of *Modern Equity*, 3rd ed., 1943, and of *Essays in Equity*, 1934. The book is one of the series in the Home University Library of Modern Knowledge, and is written by a legal scholar, in a popular style, for lawyer and layman alike. It consists of 182 pages of text; a bibliography of three pages; an index of five pages. There are ten chapters. Chapter One, “The Content of the Law,” deals with the legal philosophy underlying the English system of courts. This is the first part of the book, as the reviewer sees it. The remainder of the book constitutes Part Two, and consists of nine chapters. Chapters Two, Three and Four set forth the history of the Courts from Henry II, approximately to 1833, the year in which Parliament passed the Act establishing the modern Judicial Committee of the Privy Council. Chapters Five, Six, Seven and Eight explain the later development of the Courts of Common Law and Chancery, to the present day. Chapter Nine is entitled: “The Place of the Judges in the Constitution.” Chapter Ten treats of Barristers and Solicitors.

Like a good Chancellor, Professor Hanbury extends his jurisdiction, and begins his book on the courts with a discussion of law in general.

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*Regent of the Law School, Professor of Law, Georgetown University.*
"Law," he says, "cannot be more accurately defined than as the sum of the rules of human conduct which the Courts will enforce." He discusses this, the teaching of Austin, "the father of English analytical jurisprudence," who "viewed all law as essentially the command of the sovereign power," that is, the state. Austin thought that the judgments and rules made by judges, as officers of the state, constituted commands of the state. Professor Hanbury tells us that Austin was "not primarily interested in history; though intensely learned in it, and keenly appreciative of all its lessons." He concludes that there has been "much ill-considered criticism of Austin," who was merely describing "the structure of government as it actually exists, . . . ."

"This book is a treatise on the judiciary, . . . the portrayal of the courts in their correct setting." The author thus delimits his field. Naturally, in a book describing a judicial system, we would expect to find the emphasis on the work of courts. But Professor Hanbury goes beyond the mere placing of emphasis, and, in measured words, declares that the definition of law, laid down by the Analytical School, is the true definition. According to that School, the state is above the law and superior to the law; all our rights, so-called, therefore, are merely creatures of the state.

Of course, there are many who do not agree with Austin, and the re-

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1Hanbury, English Courts of Law (1944) 11.
2Id. at 15.
3Ibid.
4Austin, Jurisprudence, (Campbell's ed. 1875) § 231.
5Hanbury, op. cit. supra note 1, at 15.
6Id. at 17.
7Id. at 73.
8Id. at 11.
9For a strong, comprehensive answer to the contention of the Analytical School, see Rev. Francis E. Lucey, S.J., Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society (1942), 30 Georgetown L. J. 493.

Austin fails to explain how the "habit of obedience", which is part of his theory, is developed and supported. Jones, Historical Introduction to the Theory of Law (1940) 209, where Krabbe, The Modern Idea of the State (1930) 47 n. 2, is quoted, " . . . there is only one source of law, viz., the feeling or sense of right which resides in man and has a place in his conscious life, . . . ."

Allen, Law in the Making, 3rd Ed. (1939), 4 et seq., says: "He (Austin) could not be content with pure analysis, but, in spite of himself, felt the necessity of supporting his main thesis by historical illustrations. Unfortunately, his examples, drawn almost entirely from Roman Law, are sometimes surprisingly inappropriate, . . . ." With respect to the view that Austin was merely analyzing the elements of a modern legal system, see Allen,
viewer is not convinced that criticism of Austin's teaching is "ill-considered." Our own times furnish a striking illustration of the tendency of his teaching. Thus, referring to the Third Reich, Bodenheimer says: "The power which an autocratic ruler like Adolf Hitler enjoys is the most extreme example of the Austinian sovereignty which can be imagined."

And, speaking of personal rights under the Nazi regime, Karl Lowenstein says: "'Fundamental rights which create free spheres for individuals untouchable by the state are irreconcilable with the totalitarian principle of the new state.'" 

Probably Professor Hanbury would contend that all this is a "... version of his (Austin) thought, or perhaps a perversion, much developed by his successors,—..." Thus, we might accept the teaching of Austin, but reject the errors of his disciples, who misunderstand him. We are told, on page 17, that the aim of Austin was simply to show us the structure of government as it is. Yet, on page 21, it is lamented that Austin did not explain the way in which the constitution functions in practice. But if Austin did not carry out his aim how can we be sure what his aim really was. When Professor Hanbury ascribes to Austin the aim of showing the structure of government as it is, he is seeking to transform Austin, the jurist (Mr. Hyde), dealing with abstract principles, into Austin, historian (Dr. Jekyll), innocently dealing with facts. Even considering Austin as a historian, Maine has shown that to speak of law as the outgrowth of a modern sovereign state is historically untrue.

\textit{supra} at 4, n. 1. Paraphrasing Professor Allen's note, it might be said that to discuss Austin merely as a historian and not a jurist is to transfer ideas and arguments from one plane to another, both in time and in conception, at the will of the interpreter.

"The danger of this famous Austinian Doctrine of Sovereignty is two-fold:— (a) that it provides a definition of a 'society political,' in terms of the Modern State, which previous ages (as Maitland was to show) would not have recognized; and (b) it made no inquisition into the limits of 'habitual obedience,' but substituted a lawyer's fiction of absolute authority... to the extent of overshadowing the moral limits of actual obedience by a juristic abstraction about theoretical power. It put government, in effect, in front of law, and denied, in the name of ephemeral sovereignty, the reality of Natural Law as formula of social fact. It is permissible to cite the warning of the Chinese Zenni, philosopher of the ninth century, A.D., who said: 'Pray never substantialize that which does not exist.'" \textit{Catlin, Story of the Political Philosophers} (1939) 246.

Austin denies the force of Natural Law. "... But in any case it is a law, strictly so called, by the establishment it receives from the human sovereign." \textit{Auston, Jurisprudence}, (Campbell's ed. 1875) § 789.

\textit{Bodenheimer, Jurisprudence} (1940) 67.


\textit{Maine, Early History of Institutions} (1888) 342-400 [Lectures 12 and 13].
Professor Hanbury’s summary of the growth of the English courts and of the forms of action at Common Law is well done. He does not falter in attacking strong citadels. “No appellation could be more inapposite,” he says, than to call Edward I “the English Justinian,” though the English King has enjoyed the title since Brunner dubbed him over sixty years ago. Edward the Confessor should have devoted himself to “the practice of efficient government as well as that of holy life.” Yet, at least one English historian does not find the evidence so clear. Thus, Trevelyan says: “The underlying motives of the politics of this troubled reign (the reign of Edward the Confessor) are obscure. The evidence we have is fragmentary, and modern historians equally well informed of all that there is to know, have differed widely from one another in their estimate of the character and policy of the chief actors.” In praising Blackstone as the author of “the first attempt to give a comprehensive account of the laws of England,” there is no mention of Bracton, though Professor Hanbury speaks of him later. The reference to Bracton, the first great English jurist to blend a knowledge of Roman and English Law in his writing, naturally suggests mention of Professor Hanbury’s sound observations as to the place of Roman Law in the growth of English Law, and also with respect to the teaching and study of Roman Law, even though, as he says, Roman Law today is “relegated to the provision of analogies, not of precedents.”

Comparisons of the American and English judicial systems are interesting. The United States “seduced by a false view of the essentials of democracy,” has adopted “the system of an elective judiciary.” In contrast, tributes to “the dignity of the British judges,” appointed by the Crown, are “offered with embarrassing unanimity by foreign observers,” and “the British judicial system to enjoy a dignity and prestige unknown to that of any other Bench in the world.”

16Hanbury, op. cit. supra note 1, at 55.
17Brunner, Sources of English Law (1877) in 2 Select Essays in Anglo-American Legal History (1908) 7, 27; Jenks, Law and Politics in the Middle Ages (1908) 41; Carter, A History of the English Courts (1944) 42.
18Hanbury, op. cit. supra note 1 at 45.
20Hanbury, op. cit. supra note 1, at 21.
21Id. at 54.
22Hanbury, op. cit. supra note 1, at 59; see Hanbury, Essays in Equity (1934) 141.
23Id. at 55.
24Id. at 178.
25Id. at 177.
26Id. at 162.
doubt, much is to be gained from the constant study of the English judicial system. But is there not room for a fair difference of opinion, on the whole, as to whether the system, as appointive, is superior to our own, which is largely, though not wholly, elective? The judicial system of each nation is an outgrowth and expression of national character. We should not hastily conclude that the English system would work well here. Woodrow Wilson said a good many years ago that there is a very heavy duty on imported legal ideas, and Professor Hanbury himself expresses the same thought when he refers to the possible importation of French legal ideas into England, and refers to "... Canary wine, it 'would not travel'."

Littleton warned his son, Richard, that he needed a stout heart and all his courage to master the law. Out of fatherly interest, we are told,

Even the English judicial system has not escaped criticism from at least one competent English scholar. **Jackson, The Machinery of Justice in England** (1940) 202 et seq., where the author states there should be a definite retiring age for justices, that the state of judicial statistics is deplorable, that since the Judicature Acts (1873-5) no suggestion, to 1913, has come from the English judiciary for changes in the law, that the Bench is deplorably weak in the interpretation of statutes, that the cost of litigation is excessive. See **Haynes, Selection and Tenure of Judges** (1944) 80, (Chapter IV) for a study of the social causes in the United States for "the sweeping change to the elective system for judges." The author, while paying tribute to the fine qualities of English judges, says that "... judicial appointments generally are strongly influenced by purely political considerations, ..." **Haynes, supra** at 147, though this has not interfered with the preservation of high traditions among the judges.

Speaking of the British judicial system, Jackson says:

"It has been customary for lawyers and others to bestow fulsome praises upon the judiciary. The Lord Chief Justice, speaking at the Lord Mayor's Banquet in 1936, said that: 'His Majesty's Judges are satisfied with the almost universal admiration in which they are held.' After making a generous allowance for the prevailing optimism at such functions it is really a remarkable public utterance. Complacency is a dangerous thing. So also is indiscriminate disparagement. Our machinery of justice is likely to continue in much its present form for some years; improvement is more likely to occur by investigation of its actual working than by apology or abuse." **Jackson, supra** at 218. A test of the argument for an appointed over an elected judiciary, at least in the United States, is found in the judicial interpretation of Workman's Compensation statutes. Professor Burdick of the Cornell Law School, writing in the Harvard Law Review, (Burdick, *Is Law the Expression of Class Selfishness?* 25 Harv. L. Rev. 349, 360) says: "Whether the judges were appointed by the governor, or chosen by the legislature, or elected by popular suffrage; ... everywhere and always the courts were agreed that the fellow-servant rule was only the formulation of common law-doctrine. ... Such was the opinion in England." It is not possible to predict, therefore, merely because the judge was elected or appointed, whether he will give a strict or a liberal interpretation to Workman's Compensation statutes.

**Hanbury, op. cit. supra** note 1, at 171.
he wrote his book on the Tenures, to help Richard in his studies. Whether Richard read his father's book, we are not certain. If he did, then, even though Lord Campbell called it "very pleasant reading," Richard's feat proved him a man of courage. We are all familiar with the complaints of law students in the 17th and 18th centuries, in our own Country and in England, over their struggles in the dreary wilderness of the law. When we recall the meager list of printed law books available before the opening of the 17th century, we are amazed at the determination of the law students of that day, who, virtually by solitary study of such material, made themselves efficient lawyers. One great obstacle then was the lack of books on the history of law, such as Professor Hanbury has given us. Written out of abundant learning and in an attractive style, Part Two of Professor Hanbury's book, especially, will "extend assistance to law students" in the spirit of Blackstone, whose tradition he carries on in Blackstone's University.

HUGH J. FEGAN*


This book is an exposition of problems incident to the occupation of the Rhineland following the conclusion of the Armistice of November 11, 1918, which terminated the last Great War. Occasional references are made by the author to a future occupation of Germany. The implication that the presentation of historical facts and the analysis of legal problems, and of the manner in which such problems were treated may be useful in dealing with future similar situations following the present war is opportune and well justified.

The book consists of two parts. The first deals with the period of the Armistice; the second with the period of military occupation of German territory by American, Belgian, British and French forces conformably to provisions of the Treaty of Versailles.

At the outset of the treatment of the first period, the author refers to the basic order given by Marshal Foch in which the Supreme Commander of the forces of the Allied and Associated Powers pledged the occupying forces to the observance of pertinent provisions of the Convention of The Hague of 1907, Number IV, relative to the conduct of war on land. The author commends this pledge made, as he says, at a

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time when “there was a substantial body of opinion to the effect that Germany had forfeited her right to enjoy the benefits of The Hague Convention by ignoring the obligations that it entailed”. The author’s observations with regard to this order made by Marshal Foch are interesting and sound.

Military honor may be said to be a technical term of military law; the sanction among soldiers back of the law pertaining to war. Reprisals, which are recognized by international law, against savage methods of warfare, may at times become warranted and necessary. But forces restrained by the sanction of military honor and native instincts of humanity will not duplicate atrocious violations by enemy forces of the beneficent provisions of the intended law-making treaty of 1907 designed for the safeguarding of life and property in occupied territories.

The author notes that there were some slips in the observance of principles asserted at the outset by the commander-in-chief. In a review of limited scope, it would of course not be possible to summarize either the author’s discussion of such matters or his detailed analysis of conflicts between local civilian authorities and military authorities.

The same is true with reference to the period following occupation under the terms of the Armistice. For this second period, the so-called Rhineland Agreement provided the basic governmental machinery. In an interesting and thorough manner, the author describes the difficulties incident to the execution of this agreement. Such difficulties, which were numerous, had their origin, it is explained, in defects in the framing of the agreement itself, in conflicts in the administration of justice by the military tribunals and by German courts, in conflicting views, policies and interests of the occupying military authorities and their respective governments, and in other varied forms of discord.

The book contains a chapter entitled “Prosecution of War Criminals”. The author justly observes that the “power to punish has to be reinforced by valid legal justification of the right to punish and by valid principles in regard to what is punishable.” It may be observed with reference to this soundly expressed requirement, that its realization would seem to require some clarification of the connotations of such terms as “war criminals” and “war crimes” and to require also a clear understanding of the nature of international law as a law regulating, not the conduct of individuals but the conduct of nations, on whose competency and honor we must rely for the maintenance of the law.

It is the duty of governments to control their nationals by appropriate measures in time of war as in time of peace, so that the nations may not become guilty of international delinquency. To this end, with
respect to the conduct of warfare, our Government and others have incorporated into their military codes rules making punishable the commission by individuals of offenses proscribed by international law. Rules of customary international law codified in the Convention of 1907 and other intended new rules of law incorporated into the Convention are not rules of criminal law by the application of which punishment can be inflicted on individuals.

What might be called the American military code, substantive and procedural, may be said to comprise the Articles of War of June 4, 1920, 41 Stat. 787, 10 U. S. C. §§ 1471-1593a (1940); the Basic Field Manual: Rules of Land Warfare, of 1940; and the Manual for Courts Martial of 1921. Fundamentally, this is a code of rules for the conduct of our military forces. And they provide our Government with a domestic machinery which is sufficiently comprehensive to give effect to those rules of international law which a state must observe as an honorable member of the family of nations.

The author refers to the rule laid down in the famous Lieber Instructions of 1863 to the effect that prisoners of war can be punished for criminal acts which they committed before their capture, if they have not been punished by their own authorities. The rule seems at times to have been construed to sanction in principle the punishment of members of enemy forces or civilian enemy nationals for offenses forbidden by international law, so that in effect, enemy nationals as well as nations can be called to account for infractions of that law. That view seems clearly to be based on an erroneous concept of the nature of the law.

Of course international law recognizes that an army has a right to protect itself against spies, activities of persons in disguise, and activities of persons who engage in so-called private warfare, that is, certain hostile acts of civilians, who are not members of armed forces. It was the principles relating to such matters to which the Supreme Court of the United States was required to give application, as it properly did, in the cases of the so-called saboteurs, Ex parte Quirin et al., 317 U. S. 1 (1942).

One reason why the vague provisions of Articles 227 and 228 of the Treaty of Versailles relative to the trial of so-called war criminals could not have been given sound application was the failure to formulate definite, applicable principles of law to guide prosecuting and judicial authorities.

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In this book the investigation and proof of facts regarding questioned documents is most convincingly demonstrated to be both a learned profession and a precise science. It is a science having for its ultimate object the rendition of justice by the discovery and demonstration of truth as involved in questioned documents.

The book records an important phase of the long struggle toward freedom and improvement against prejudice, conservatism and selfishness that opposes all progress.

The real purpose of the book is to furnish prompt assistance and brief, definite suggestions to the lawyer and to the questioned document examiner regarding the discovery and proof of facts in a Court of Justice. Both the experienced practitioner and the beginner in the field of law will find it entertaining, instructive and helpful.

Many of the comments, suggestions and observations may be applied and used in dealing with the whole field of expert testimony as it relates to trial work.

Mr. Albert S. Osborn, the senior co-author, is a layman, who by actual experience, study and the wisdom of his years knows more about the law, the courts and court room psychology than many lawyers. He is one of this country's outstanding authorities in the questioned document and handwriting field and has spent a lifetime not at the bar nor on the bench, but in the witness box.

From his lifetime of experience there is presented in this book, discerning comments on court room practices and the administration of justice as it has developed in the last half century.

Previous books by the same author are: Questioned Documents (1910, revised 1929), The Problem of Proof (1922) and The Mind of the Juror (1937).

There is an excellent bibliography at the end of the book with comments and estimates of the value of the various books named, which affords a splendid collection of material for those who may desire more completely and fully to study the subjects treated in the book.

Everyone confronted with questions or doubts as to the authenticity of documents should carefully read this book as background to an intelligent and logical solution to his problem. He will learn what to do, how to do it, and where and how to seek assistance. He will observe the best manner in which to present his evidence, the correct way in which to qualify and interrogate his expert witness. He will discover the
proper manner to evaluate, weigh and perhaps to undo and destroy the false testimony offered in opposition. Invaluable guidance and assistance is available not only in preparing a questioned document case, but also in its actual trial.

WILLIAM J. ROWAN*

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BOOKS RECEIVED


