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A FURTHER LEGAL INQUIRY INTO RENEGOTIATION: II*

Charles W. Steadman†

CONSTITUTIONAL CONSIDERATIONS

Several issues concerning constitutionality of the Renegotiation Act were discussed in a previous article. That prior inquiry was, of course, not complete, nor is it possible here to exhaust all of these problems. The changes which the Revenue Act of 1943 made in renegotiation together with the manifest importance of this subject and the national interest which has been created by the challenges made concerning its constitutionality warrant further inquiry into this phase of the act. The issues of delegation of legislative authority, impairment of contracts, due process and judicial review, as well as the nature of renegotiation as a price regulating measure will be examined.

Delegation of Legislative Authority and Standards of the Act

Article I, section 1 of the Constitution vests the power to legislate in Congress. In the sense that the Constitution intends "the legislative function consists of the power to make policy and the power to make detail." Congress must declare the policy; but it may delegate the power to make the detail, if in so doing it defines "the circumstances when its announced policy is to be declared operative and the method

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by which it is to be effectuated." To put this another way, if Congress declares an intelligible policy it may give the authority to carry out that policy to administrative bodies, if it also provides them with adequate guides and standards by which to govern their acts in making the policy effective. Applying these tests to the Renegotiation Act we find that Congress has enunciated a clear policy against the realization of exorbitant profits from contracts held directly or indirectly with the war agencies. This policy is apparent in both the 1942 and the 1943 Acts. The issue is whether the standards are sufficiently clear and the methods for carrying out this policy well enough defined to meet the constitutional criteria.

The 1942 Act tells the secretaries that they may determine through renegotiation what are excessive profits but in so doing they must consider certain factors. Standards are set up directing the allowance or disallowance of certain deductions, excessive salaries and costs and the kind of contracts which are to be renegotiated. The area within which the law is to operate is clearly defined, but aside from these factors the renegotiating agencies are not given much additional direction by the 1942 Act as to the method to be followed in determining excessive profits. The 1943 Act, however, goes much further. In addition to the standards established for the guidance of the administrators in the 1942 Act, an extensive criteria was adopted which must be considered in the determination of excessive profits. The term, profits derived from contracts with the departments and subcontracts, is defined to be "the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto." The administrators of the act are directed to determine these costs from the books of the contractor except that where the contractor's accounting system is not adequate to reflect properly costs and allowances and deductions, they shall be as estimated to be allowable by chapters 1 and 2E of the Internal Revenue Code.

These factors appear as a certain enough definition of the circumstances in which the policy against the realization of inordinate profits shall operate and the ways in which this policy shall be effectuated. This writer suggested in a previous article that under the present con-


198 Subsection (a)(4)(A) of the 1943 Act.

199 Subsection (a)(4)(B) of the 1943 Act.

200 Ibid.

\textit{Bowles v. Willingham},\footnote{See note 204 supra.} \textit{Yakus v. United States}\footnote{See note 205 supra.} and its companion case, \textit{Rottenberg v. United States}\footnote{See note 206 supra.} have at least for wartime laid the \textit{Schecter} case gently to rest. In \textit{Bowles v. Willingham}, Mrs. Willingham had brought a suit in the Georgia court to restrain the issuance of certain rent orders which the administrator proposed to issue under the Emergency Price Control Act of 1942. The issuance of these orders was challenged on the ground that the statute was unconstitutional. The state court issued a temporary injunction with a “show cause” order. The administrator then brought action in the federal district court to restrain the further prosecution of the state proceedings and the violation of the act. The administrator’s suit was dismissed by the district court which held the act unconstitutional and there was a direct appeal to the Supreme Court.

Section 2(b) of the act provides, among other things, that:

“Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this
Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense rental area."

On April 28, 1942, the administrator had issued a declaration which designated certain areas as "defense-rental areas" including that area in which the defendant held property, and the order stated that it was necessary to reduce and stabilize certain rents in order to effectuate the purposes of the act. It recommended that pursuant to section 2(b) of the act the maximum rent for housing accommodations should be that which existed on April 1, 1941, and, where accommodations were not rented as of April 1, 1941 or were constructed thereafter, the rent should be in principle no greater than the generally prevailing rents in the particular area on April 1, 1941.

Section 2(b) of the act also provides that:

"...if within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area."
Pursuant to this section of the act the administrator issued a Maximum Rent Regulation effective July 1, 1942 which established the maximum legal rents for housing in given areas.

The defendant received notice from the rent director in June, 1943 that he proposed to decrease the maximum rent for three apartments owned by her, not rented on April 1, 1941 but first rented in the summer of 1941, for the reason that the first rents received for these apartments were in excess of those generally prevailing in the area for comparable accommodations on April 1, 1941. The defendant objected. She was advised that the rent director would proceed to issue the order and she brought suit in the Georgia court.

Passing the question presented to the Court as to whether the litigant must follow the procedure and resort to the tribunal established by the act for a determination of her case, the issues presented in this case and its companion case, Yakus v. United States, supra, are directly in point in this inquiry. In contending that the act was unconstitutional one of the chief arguments relied upon by the defendant was that there had been an improper delegation of the legislative function without proper standards and criteria. The Court in holding the act to be constitutional decided that it was not an undue delegation of legislative authority; that the policy was clearly enunciated and sufficient standards had been established by Congress for the administrator's actions. Mr. Justice Douglas delivered the opinion of the Court (pp. 512-513):

211 Mr. Justice Roberts dissented saying (pp. 537-538):

"Without further elaboration it is plain that this Act creates personal government by a petty tyrant instead of government by law. Whether there shall be a law prescribing maximum rents anywhere in the United States depends solely on the Administrator's personal judgment. When that law shall take effect, how long it shall remain in force, whether it shall be modified, what territory it shall cover, whether different areas shall be subject to different regulations, what is the nature of the activity that shall motivate the institution of the law,—all these matters are buried in the bosom of the Administrator and nowhere else.

"I am far from urging that, in the present war emergency, rents and prices shall not be controlled and stabilized. But I do insist that, war or no war, there exists no necessity, and no constitutional power, for Congress' abdication of its legislative power and remission to an executive official of the function of making and repealing laws applicable to the citizens of the United States. No truer word was ever said than this court's statement in the Minnesota Mortgage Moratorium Case [Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 425, 426, 54 S. Ct. 231, 235, 78 L. Ed. 413, 88 A.L.R. 1481] that emergency does not create power but may furnish the occasion for its exercise. The Constitution no more contemplates the elimination of any of the coordinate branches of the Government during war than in peace. It will not do to say that no other method could have been adopted consonant with the legislative power of Congress. 'Defense-rental areas' and 'defense activities' could have been reasonably
"When it came to rents Congress pursued the policy it adopted respecting commodity prices. It established standards for administrative action and left with the Administrator the decision when the rent controls of the Act should be invoked. He is empowered to fix maximum rents for housing accommodations in any defense-rental area, whenever in his judgment that action is necessary or proper in order to effectuate the purposes of the Act. A defense-rental area is any area 'designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes' of the Act. . . . The controls adopted by Congress were thought necessary 'in the interest of the national defense and security' and for the 'effective prosecution of the present war.' . . . They have as their aim the effective protection of our price structures against the forces of disorganization and the pressures created by war and its attendant activities. Sec. 1(a); S. Rep. No. 931, 77th Cong. 2d Sess. pp. 1-5. Thus the policy of the Act is clear. The maximum rents fixed by the Administrator are those which 'in his judgment' will be 'generally fair and equitable and will effectuate the purposes of this Act.' Sec. 2(b). But Congress did not leave the Administrator with that general standard; it supplied criteria for its application by stating that so far as practicable the Administrator in establishing any maximum rent should ascertain and give consideration to the rents prevailing for the accommodations, or comparable ones, on April 1, 1941. The Administrator, however, may choose an earlier or later date if defense activities have caused increased rents prior or subsequent to April 1, 1941. But in no event may the Administrator select a date earlier than April 1, 1940. And in determining a maximum rent 'he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs.' Sec. 2(b). And Congress has provided that the Administrator 'may provide for such adjustments and reasonable exceptions' as in his judgment are 'necessary or proper in order to effectuate the purposes of this Act.' Sec. 2(c).

defined. Rents in those areas could have been frozen as of a given date, or reasonably precise standards could have been fixed, and administrative or other tribunals could have been given power according to the rules and standards prescribed to deal with special situations after hearing and findings and exposition of the reasons for action. I say this only because the argument has been made that the emergency was such that no other form of legislation would have served the end in view. It is not for this court to tell Congress what sort of legislation it shall adopt, but in this instance, when Congress seems to have abdicated and to have eliminated the legislative process from our constitutional form of Government, it must be stated that this cannot be done unless the people so command or permit by amending the fundamental law." (Italics supplied).
"The considerations which support the delegation of authority under this Act over commodity prices (Yakus v. United States) are equally applicable here. The power to legislate which the Constitution says 'shall be vested' in Congress (Art. I, Sec. 1) has not been granted to the Administrator. Congress in § 1(a) of the Act has made clear its policy of waging war on inflation. In § 2(b) it has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense. Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144, 657, 61 S. Ct. 524, 532, 85 L. Ed. 624."

This decision rests largely upon the recognition that in governing a complex society congressional powers under the Constitution can only be made to operate effectively and practically through considerable delegation of authority to administrative agencies. In dealing with this question of delegation the Court adopted the position that it took in Opp Cotton Mills, Inc. v. Administrator: 212

212 "There is no grant of unbridled administrative discretion as appellee argues. Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases. Congress has directed that maximum rents be fixed in those areas where defense activities have resulted or threaten to result in increased rentals inconsistent with the purpose of the Act. And it has supplied the standard and the base period to guide the Administrator in determining what the maximum rentals should be in a given area. The criteria to guide the Administrator are certainly not more vague than the standards governing the determination by the Secretary of Agriculture in United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 576, 577, 59 S. Ct. 993, 1014, 83 L. Ed. 1446, of marketing areas and minimum prices for milk. The question of how far Congress should go in filling in the details of the standards which its administrative agency is to apply raises large issues of policy. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398, 60 S. Ct. 907, 914, 84 L. Ed. 1263. We recently stated in connection with this problem of delegation, 'The Constitution, viewed as a continuously operative charter of Government, is not to be interpreted as demanding the impossible or the impracticable.' Opp Cotton Mills, Inc. v. Administrator, supra, page 145, 61 S. Ct. page 533, 85 L. Ed. 624. In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue. Congress here has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective." Bowles v. Willingham, 321 U.S. 503 at 514-515 (1944).

213 312 U.S. 126 at 145, 61 S. Ct. 524 (1941).
"The Constitution, viewed as a continuously operative charter of Government, is not to be interpreted as demanding the impossible or the impracticable."

The Yakus and Rottenberg cases involved convictions for violation of the price ceiling regulations prescribed under the authority of the Emergency Price Control Act of 1942. Upon similar constitutional considerations the convictions were affirmed and the act was upheld. Chief Justice Stone rendered the opinion saying:

"That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds. . . .

"The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established." [Citing cases.]

The Chief Justice then proceeds to distinguish the Schecter case:

"The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in Schechter Poultry Corp. v. United-States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947, which proclaimed in the broadest terms its purpose 'to rehabilitate industry and to conserve natural resources.' It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare Sunshine Anthracite Coal Co. v. Adkins, supra, 310 U.S. at page 399, 60 S. Ct. at page 915, 84 L. Ed. 1263." 214

The force of these cases in the consideration of this problem is enormous. It does not seem that there are any real and fundamental distinctions between the discretionary authority conferred upon the ad-

ministrators of renegotiation and upon the administrators under the Emergency Price Control Act. The policy of one is to prevent the realization of excessive and inordinate profits from war contracts. The aim of the other is the "effective protection of our price structures against the forces of disorganization and the pressures created by war and its attendant activities." 215 There are factual differences in the standards established by each act for the guidance of the administrators which may offer superficial distinctions, but to find fundamental differences which would differentiate this holding in the emergency price control cases from the problems created by the Renegotiation Act, will be very difficult. 216

**Impairment of Obligations of Contract**

The retroactive features of the Renegotiation Act have created constitutional problems with regard to contract impairment, most of which have been dealt with before. 217 But there remains for consideration here at least one question of this category which is of prominent importance. That question is raised by section 1 of the Military Appropriation Act, 1944, 218 which amended the Renegotiation Act to bring within its scope the four subsidiaries of the Reconstruction Finance Corporation—The Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company. At the time that this amendment became effective, July 1, 1943, many contracts with these agencies were in effect and many that remained executory on April 28, 1942, when renegotiation became law, had become executed before July 1, 1943. Section 1 of the Military Appropriation Act, 1944, makes no mention of whether it was intended to operate retroactively with respect to contracts held by producers with these RFC subsidiaries, or only in the future. On this point Congress was silent. It, therefore, is necessary to seek the legislative intent from the manner in which the amendment was enacted and other circumstances which attended this legislation.

This amendment was accomplished by directing that there be inserted in the Renegotiation Act sections which brought these RFC subsidiaries within its scope. Section 1 of the Military Appropriation Act,

1944 stipulates that subsection (k) should be included in the Renegotiation Act as it was then constituted\(^{219}\) and amended clauses 1 and 2 of subsection (a) of the act to read as follows:

"Provided further, That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

"Sec. 403(a) For the purpose of this section—

"1. The term "department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively."

No other changes were made in the act. As it then stood section 403, as amended, obtained with respect to all contracts upon which final payment had not been made as of April 28, 1942. After this amendment the Renegotiation Act, read as a whole, may appear to gather within its field all contracts and subcontracts with these RFC subsidiaries which were unpaid for—executory—on April 28, 1942. If this is what Congress intended, if it intended that the act be retroactive, was an adequate way selected for expressing this intent? It may be contended that the means chosen for adding contracts with the RFC subsidiaries to the area of renegotiation does not require any additional expression of intent on the part of Congress in order for it to apply to those contracts on the same basis that it applies to contracts with the other war agencies. Indeed, a forceful argument can be made that, if it was the intention of Congress for renegotiation to be operative on a different basis regarding contracts with the RFC subsidiaries than with respect to contracts held with the other renegotiating departments, then such an expression must affirmatively appear. For renegotiation was designed to eliminate unreasonable profits arising from contracts with the war agencies. If the act is to be applied to contracts with the RFC subsidiaries on a different ground, then a discrimination in the treatment of these contracts arises which would seem to require specific direction, since such an unequal treatment is not entirely logical and thus not to be inferred. On the other hand, reasons must be recognized for construing the silence of the statute as an expression that it was to have only prospective applica-

It is a well-considered canon of statutory construction that statutes will be applied only with respect to the future when to give them retroactive effect will upset rights which are ordinarily considered to be established. Between July 1, 1943 and April 28, 1942 many contracts with the RFC subsidiaries had become executed. They were fully and wholly performed. Nothing remained to be done with regard to them. These are facts difficult to ignore in the study of this problem and, in the absence of a specific statutory declaration undertaking to make the act retroactive, the courts may be reluctant to give other than a prospective application to this amendment.

Renegotiation as it originally became law was effective only with regard to executory contracts, contracts for which final payment had not been made on April 28, 1943. Perhaps this offers the best argument against construing this RFC amendment to be retroactive. It is possible to infer from the attitude of Congress as expressed in the original act that renegotiation should apply only to executory contracts at any time. Congressional silence as indicating an intention to apply the act only in futuro gathers force from the manner in which the other amendments have been made. In the three other amendments to the Renegotiation Act great care was taken to spell out the effective dates of


Subsection (d) of § 801 of the Revenue Act of 1942, Pub. L. 753, 77th Cong., 2d sess., approved October 21, 1942, 56 Stat. L. 798 at 985, states:

"The amendments made by this section shall be effective as of April 28, 1942."

Section 5 of Pub. L. 149, 78th Cong., 1st sess., approved July 14, 1943, states:

"Sec. 5. The amendments made by this Act shall be effective as of April 28, 1942."

Section 701 (d) of the Revenue Act of 1943, Pub. L. 235, 78th Cong., 2d sess., enacted February 25, 1944 provides:

"The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act."
the various portions of these laws and to distinguish particularly between those provisions to be applied retroactively and those which are to apply on the effective date of these statutes. In view of these facts does it not seem that Congress would have been equally as careful in its expression if it had intended the amendment bringing the RFC subsidiaries within the Act to be effective as of April 28, 1942? Perhaps the answer is that Congress expressed itself by directing that the amendment be made by inserting in the statute the changes that have already been indicated. Moreover, the fact that Congress stated that other amendments should be effective as of April 28, 1942 or upon other specified dates seems to have been necessary because the means adopted for changing the statute through these amendments was more in the nature of a rewriting than in the character of revision by inserting a section in the statute. The RFC amendment, however, does provide for the rewriting of subsection (a) of section 403 as amended. It is quite apparent that it is difficult to grasp any firm conclusion as to the legislative intent in this analysis of the statute. The courts have followed a principle of construction leading them to avoid an unconstitutional interpretation. If it can be effectively argued that this amendment construed retroactively would result in an unconstitutional application of the law then it seems most likely that a prospective application would be established since it must be presumed that Congress intended to act within the Constitution. There is also to be considered in this connection the principle that constitutional issues will be avoided where it is not necessary to decide them.


223 Chicago v. Fieldcrest Dairies, 316 U.S. 168, 62 S. Ct. 986 (1942). The Court's statement here is worthy of note. Mr. Justice Douglas said at p. 173: "It is of course true that respondent sought to raise in its complaint a constitutional issue—an issue which lurks in the case even though it not be deemed substantial. But here, as in the Pullman case, that issue may not survive the litigation in the state courts. If it does not, the litigation is at an end. That again indicates the wisdom of allowing the local law issues first to be resolved by those who have final say. Avoidance of constitutional adjudications where not absolutely necessary is a part of the wisdom of the doctrine of the Pullman case.

See also Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 at 498, 61 S. Ct. 643 (1941), wherein Mr. Justice Frankfurter said:

"The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law."
If the amendment, properly interpreted, means that it is to be applied retroactively so as to be effective with regard to contracts unpaid for on April 28, 1942, is the amendment unconstitutional as an impairment of contractual obligations? The original law was effective only with regard to executory contracts. When discussing the aspect of the statute which relates to its application to contracts in existence on April 28, 1942, but which remained executory at that time, this writer expressed the opinion that this question was at least yet undecided and in all probability Justice Stone's concurring opinion in *Perry v. United States* would prevail in a decision of this issue. The question which confronts us here is whether the Constitution under these circumstances confers a different treatment upon executed contracts.

Does the Constitution in prohibiting the states from impairing the obligation of contracts distinguish between executory and executed contracts? It would seem that it does not. Authorities beginning with *Fletcher v. Peck* and *Trustees of Dartmouth College v. Woodward*, and continuing with *Wood v. Lovett*, have established the principle that an executed contract is a grant; that the Constitution makes no differentiation between contracts executed or executory and that a contract once performed carries with it an agreement not to reassert the right which has been conferred through the performance of the contract by one party upon the other. *Fletcher v. Peck*, one of the landmark cases in our body of law, stands for these principles.

In that case the Georgia Legislature had undertaken to annul one of its prior acts which had provided for the transfer of certain land belonging to the state and sought to render “null and void” any claims that might arise under that prior act. The grantees of the land, engaging in one of the early land speculations in this country, had sold several parcels. One of these was purchased by Peck. Peck had then sold to Fletcher. Fletcher then brought an action (probably collusive) against Peck for the recovery of the purchase money. The object of this action was to test one of the covenants in the deed which Fletcher had received from Peck. The covenant stated that “the title to the premises had been in no way, constitutionally or legally impaired by virtue

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224 April 28, 1942.
227 6 Cranch (10 U.S.) 87 (1810).
228 4 Wheat. (17 U.S.) 518 (1819).
229 313 U.S. 362, 61 S. Ct. 983 (1941).
of any subsequent act of any subsequent legislature of the state of Georgia.\textsuperscript{231} Fletcher alleged a breach of this covenant and the Court was presented with the issue of whether the subsequent action of the Georgia legislature repealing the grant of lands impaired Fletcher's title. It was held that there was no impairment of title and that the attempt of the Georgia Legislature to repeal the grant was without any force or effect. Marshall rendered the opinion. He said:

"... The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

"Does the case now under consideration come within this prohibitory section of the constitution? In considering this very interesting question, we immediately ask ourselves, what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since, then, in fact, a grant is a contract executed, the obligation of which still continues; and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution, as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

"If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of

\textsuperscript{231} 6 Cranch (10 U.S.) 87 at 131 (1810).
contracts between two individuals, but as excluding from that in-
hibition contracts made with itself? The words themselves contain
no such distinction. They are general, and are applicable to con-
tracts of every description. If contracts made with the state are to
be exempted from their operation, the exception must arise from
the character of the contracting party, not from the words which
are employed."

Marshall thought that a contract still remained a contract even
though the promised performance had been given and received. The
Court in *Fletcher v. Peck* was, of course, construing that part of Article
I, section 10 of the Constitution, which prohibits the states from passing
laws which impair the obligations of contracts. The prohibition against
the Federal Government's impairing contractual obligations arises
through the Fifth Amendment which bars the Federal Government
from depriving persons of property without due process of law by
virtue of a construction of the term "property," for, as it there appears,
it includes contracts. And "contract" in the Fifth Amendment must
be presumed to have the same meaning which attaches to that word as
used throughout the Constitution. If such is the case then contracts,
whether executory or executed, are embraced within the Fifth Amend-
ment and the powers of Congress are either sufficiently broad or not
broad enough to permit impairment of contractual obligations under the
circumstances which gave rise to renegotiation. The more fundamental
inquiry here is whether the Constitution permits the impairment of
these contractual obligations.

If the Court decides that the RFC amendment is retroactive to
April 28, 1942 and therefore includes executed contracts, it is unlikely
that it will undertake to question the legislative wisdom in this re-
gard. The problem remaining open to the Court would seem to be
one purely of determining whether the prohibition of the Fifth Amend-
ment is sufficiently hostile to the impairment of these contractual obli-
gations to compel a decision which would omit them from renegotiation.

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282 Id. at 136-137.
283 Lynch v. United States, 292 U.S. 751, 54 S. Ct. 840 (1934). See also,
Weaver, (C.C.A. 4th, 1936) 86 F. (2d) 372; Moragne v. United States, (D.C.S.C.
1936) 16 F. Supp. 1008.
284 Perry v. United States, 294 U.S. 330 at 359 (1935), concurring opinion of
Mr. Justice Stone; Lynch v. United States, 292 U.S. 571 (1934).
285 Northern Securities Co. v. United States, 193 U.S. 197 at 337-338, 24 S.
Ct. 436 (1903); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S.
573, 60 S. Ct. 1021 (1940).
The same considerations attend this problem which must be considered in deciding whether Congress has the power under war circumstances to impair those contracts in existence on April 28, 1942. The disastrous effect of excessive profits from war contracts upon inflation and national esprit, the lack of competition brought about through wartime conditions and the general maintenance of a wartime economy must all be considered here in deciding whether this is such a situation as to permit the exercise of congressional powers in a way that might otherwise be regarded as an unconstitutional interference with individual rights. Whether the exigencies of war permit congressional power to encompass the regulation of wartime business in such a way as to interfere and impair contract rights leads to an exploration of the true nature of the Renegotiation Act. What kind of a regulation is it and how does it fit within the scope of substantive due process?

Renegotiation as a Regulation of War Business—Substantive Due Process

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Renegotiation is a means of wartime business regulation. It is a measure seeking to regulate the prices for war commodities by imposing a limitation upon profits. Among its objectives are the suppression of inflation and the reduction of the cost of the war. These beyond question are legitimate governmental aims.

In those cases where prices at which war goods are to be delivered were agreed upon prior to the passage of the Renegotiation Act or prior to the amendment which included the RFC subsidiaries, the question is posed as to whether the congressional power is sufficiently great to permit such price regulation or whether in attempting to do so the

constitutional features of substantive due process have been transgressed.

The use of property in the making of contracts and the establishment of prices at which goods are to be sold are normally regarded in the conduct of business matters as of private rather than governmental concern. But this is not always so and government interference in these fields has received approval under many circumstances. There has been a growing tendency, especially in the past decade, for Congress as well as the state legislatures to find it necessary to impose regulations on the use of private property, the making of contracts and the establishment of prices. These regulations have been generally upheld as a proper exercise of the police powers, and the subordination of private rights to the public benefit has often been held to be within the power of the legislatures under both the Fifth and the Fourteenth Amendments.

Without undertaking an exhaustive review of the cases which have brought the courts to what is believed to be their present point of view, a recital of a few of the things that can be constitutionally regulated or prohibited will illustrate this point. Laws regulating or prohibiting billboard advertising, kinds of construction, and zoning are all permissible. Regulations aimed at preventing waste of natural resources, forbidding unfair competition and prohibiting monopolies are recognized as being within the regulatory power of the state.

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 at 228, 20 S. Ct. 96 (1899).


Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 at 228-229 (1899); Northern Securities Co. v. United States, 193 U.S. 197 at 332 (1903); United Shoe Machinery Corp. v. United States, 258 U.S. 251 at 462-464, 42 S. Ct. 363 (1922).
The basis upon which persons doing business may enter into contracts and the terms upon which they may agree are within the power of the state.\textsuperscript{245} The amount of fire insurance premiums that may be paid can be fixed\textsuperscript{246} and laws preventing usury are not unconstitutional.\textsuperscript{247} Compensation to be paid to an insurance company's agents may be regulated.\textsuperscript{248} Moreover, the coal industry is subject to regulation\textsuperscript{249} and the handling of milk is subject to governmental regulation.\textsuperscript{250} Nor is this the least of the regulatory control that rests with the legislature. The fixing of prices has been upheld where necessary to the public interest.\textsuperscript{251} Labor relations,\textsuperscript{252} hours of work,\textsuperscript{253} employment of children,\textsuperscript{254} working conditions for women\textsuperscript{255} have all been subjected to governmental fiat.

The power to impose these regulations depends upon the circumstances of each case. What is due process in one instance may not be in another. But there is nothing in the Constitution assuring that business may be conducted free from regulation and there is no category of business which may not, under the proper circumstances, be governed by laws reasonably related to a proper legislative aim even though


\textsuperscript{246} German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 S. Ct. 612 (1914).


\textsuperscript{249} Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 at 398, 60 S. Ct. 907 (1940).


\textsuperscript{253} Bunting v. Oregon, 243 U.S. 426, 37 S. Ct. 435 (1917).


there is a restriction on the freedom of the contractor or an impairment of contractual obligations.

In *Nebbia v. New York* the Supreme Court upheld an act of the New York Legislature which conferred upon the Milk Control Board of that state the power to fix the price to be charged or paid for milk and imposed penalties for violation of any such order. The statute and the order were attacked as being a denial of due process under the Fourteenth Amendment, and therefore unconstitutional. The Court decided that prices could be fixed directly under the circumstances existing in the milk industry during the depression period of 1932, which had become chaotic because of prices which were below cost. Mr. Justice Roberts, rendering the opinion of the Court, said:

"... The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." 

The *Nebbia* case is not the first one to uphold direct price control but it certainly clearly established that direct price control by legislative action may be undertaken in any industry where the situation so warrants.

Beginning with *Munn v. Illinois*, which upheld a statute regulating the price that might be charged for the storage of grain, a succession of cases have firmly established the legislative right to determine prices where circumstances require. But Chief Justice Waite in *Munn v. Illinois* rested his conclusions upon the convenient phrase that the business involved was "affected with a public interest." From then until the *Nebbia* decision the courts have been imbued with the "public interest" idea as a requisite for price regulation. As an argument for upholding the constitutionality of renegotiation it might well be contended that all

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256 291 U.S. 502 (1934).
257 Id., 291 U.S. at 538-539.
258 94 U.S. 113 (1876).
259 94 U.S. 113 at 126 (1876).
business in wartime is "affected with a public interest"; that modern war reaches all types and natures of business. Since the Nebbia case, however, no reliance need be placed upon such an argument. For that case explains the phrase "affected with the public interest" as merely a way of stating the conclusion that due process has been satisfied. Mr. Justice Roberts said:

"It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth Amendment and Fourteenth Amendments is

An interesting discussion upon the trend of business regulation is found in Dodd's article "For Whom Are Corporate Managers Trustees?" 45 HARV. L. REV. 1145 (1932). There the author tracing the history of regulation says at page 1148:

"Several hundred years ago, when business enterprises were small affairs involving the activities of men rather than the employment of capital, our law took the position that business is a public profession rather than a purely private matter, and that the businessman, far from being free to obtain all the profits which his skill in bargaining might secure for him, owes a legal duty to give adequate service at reasonable rates. Although a growing belief in liberty of contract and in the efficacy of free competition to prevent extortion led to abandonment of this theory for business as a whole, the theory survived as the rule applicable to the carrier and the innkeeper. In recent years we have seen this carrier law expanded to include a variety of businesses classed as public utilities. Under modern conditions the conduct of such businesses normally involves the use of a substantial amount of property. This fact, together with the accidental circumstances that a passage from Lord Hale was quoted in one of the briefs in the leading case of Munn v. Illinois, had led to a change in the conventional legal phraseology. Instead of talking, as the early judges talked, in terms of the duty of one engaged in business activities toward the public who are his customers, it has become the practice since Munn v. Illinois, to talk of the public duty of one who has devoted his property to public use, the conception being that property employed in certain kinds of business is devoted to public use while property employed in other kinds of business remains strictly private.

"This approach to the problem has been justly criticized as attempting to draw an unreasonably clean-cut distinction between businesses which do not differ substantially, and as furnishing no intelligible criterion by which to distinguish those businesses which are private property from those which are property devoted to public use. The phrase does, however, have the merit of emphasizing the fact that business is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profit to its owners. Accordingly, where it appears that unlimited private profit is incompatible with adequate service, the claim of those engaged therein that the business belongs to them in an unqualified sense and can be pursued in such manner as they choose need not be accepted by the legislature. Despite certain recent conservative decisions such as Tyson v. Banton, it may well be that the law is approaching a point of view which will regard all business as affected with a public interest. If certain businesses then continue to be allowed unregulated profits, it will be as a matter of legislative policy because the lawmakers regard the competitive conditions under which such businesses are carried on as making regulation of profits unnecessary, and not because the owners of such enterprises have any constitutional right to have their property treated as private in the sense in which property held merely for personal use is private."
to determine in each case whether circumstances vindicate the challenged regulations as a reasonable exercise of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 535, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A.L.R. 1208. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.\textsuperscript{262}

No better precedents need be sought nor can be found for governing this discussion than Bowles v. Willingham\textsuperscript{263} and Yakus v. United States, which upheld the constitutionality of the Emergency Price Control Act.\textsuperscript{264} There it was determined that the congressional power under the circumstances of war and the requirements for maintaining a reasonable price structure as well as the prevention of inflation was such as to permit the regulation and the fixing of prices for rents and commodities which were sold to the general public. Mr. Justice Douglas rendering the opinion in the Bowles case said:

"... We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort. Yakus v. United States, supra. A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property."\textsuperscript{265}

"... as we have held in Yakus v. United States, supra, Con-

\textsuperscript{262} Nebbia v. New York, 291 U.S. 502 at 536 (1934).
\textsuperscript{263} 321 U.S. 503 (1944).
\textsuperscript{264} 321 U.S. 414 (1944).
\textsuperscript{265} 321 U.S. 503 at 519 (1944).
gress was dealing here with the exigencies of wartime conditions and the insistent demands of inflation control.\(^{266}\)

All that can be said for these cases is equally applicable to renegotiation. The regulation of war prices and profits is equally as necessary and proper as that of rents and meat.

There has been some attention given to the theory that renegotiation is something in the nature of a public utilities regulation. It seems possible to support renegotiation, as far as the satisfaction of substantive due process of the Fifth Amendment is concerned, upon the ground that because the essential features of competition are largely lacking in the awarding of war contracts, and since such sales are being made directly or indirectly to one customer, the Government, that a monopoly has arisen in the industry. The war industries may then be regarded as being something like public utilities and renegotiation like utility rate making. At first blush this contention may appear to have merit. But the thought that there must be a monopoly before price control can constitutionally be undertaken has been exploded.\(^{267}\) Indeed, the grain elevators regulated by a statute which the Court in *Munn v. Illinois* said was constitutional, were not monopolies. It was the recognition of lack of competition which contributed to the enactment of the Renegotiation Law and caused Congress to continue renegotiation even in the face of more than a little opposition. At an earlier period in our jurisprudence, this argument would have formed a very useful basis for upholding renegotiation. It would have served as a basis for bringing war industry within the normally accepted concepts of the courts. It would have clothed industry in such a way that the courts might recognize it as the kind of thing over which the legislature might exercise its regulatory powers. Such a contention would have so characterized renegotiation as to make it appear as a regulation more likely to find acceptance because of the nature of the thing being regulated.

There was a time when the regulation of prices outside the utilities field was not a matter well regarded by the courts. However, as we

\(^{266}\) Id. at 520.


"The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, *Munn v. Illinois*, supra. Nor is it the enjoyment of a monopoly; for in *Brass v. North Dakota*, 153 U.S. 391, 14 S. Ct. 857, 38 L. Ed. 757, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state."
have already seen, such an argument is not necessary as a ground for supporting renegotiation as a proper regulation under due process. The analogy between renegotiation and utility rate-making is questionable. True, utilities operate as monopolies and there is a great deal of fact to support the view that war industries are in a sense monopolies. It is also true that utility rate-making is usually made upon an individual basis, company by company, and excessive profits are determined in renegotiation company by company. And in both instances the circumstances for each utility or each war producer are separately considered in determining the fairness of the rate or the fairness of the price and profit. But here, the similarity between rate-making and the determination of excessive profits seems to end.

The sounder analysis of the character of renegotiation is that which has already been advanced. It is a price and profit regulation of war business. The analogy to utility rate-making in the case of renegotiation is not necessary nor is it accurate. The two fields do not square with each other. Utility rate-making and business price regulation rest upon concepts that have deep seated and fundamental differences. Business price regulation has developed primarily through an exercise of the police power of the state. Utility regulation, however, was conceived as an exercise of the power of eminent domain. As such it has conformed to the requirements of just compensation for a "taking" of property, out of which have developed theories of "fair value" and principles for preventing "deprivation" and "confiscation." There is nothing in the Constitution that requires the owner of property to be compensated for any loss of value or any loss of property which results from proper regulation. And there is no sound reason why utility regulation should be governed by other principles than those which obtain in the exercise of the police powers. Yet, for what appear to be only historical reasons,

utility regulation has been controlled by the doctrines of "fair return on the fair value" and "just compensation," which were given a Promethean spirit in our law by Ames v. Union Pacific Railway 272 and Smyth v Ames 273. The Nebbia Case freed the courts from the principal disclosed in Munn v. Illinois: that to be subject to regulation a business must be "affected with a public interest." But the Court in its attempts to separate utility rate regulation from the theories of eminent domain and to "lay the ghost of Smyth v. Ames" 274 has found the ghost of no easy virtue. 275 The confusion between confiscation and just compensation on the one hand and the regulation of business under police power on the other has not been dispelled. 276 To apply an analogy between renegotiation and utility rate regulation would only serve to envelope in a cloud of uncertainty the truth as to the nature of renegotiation. The Renegotiation Act as a regulation of prices and profits could hardly stem from the principles of eminent domain, for then every recapture of profits would involve a "taking" for which just compensation must be given so as to place the contractor in as good a position as if he had not been renegotiated; a result, no doubt, which would be agreeable to most, but which would obviously render renegotiation a nullity. Renegotiation is no more an exercise of the power of eminent domain and involves a "taking" to no greater extent than did the Emergency Price Control Act in the case of Bowles v. Willingham. There the Court said: 277

"... We are not dealing here with a situation which involves a "taking" of property. Wilson v. Brown, supra. By § 4(d) of the Act it is provided that 'nothing in this Act shall be construed to

272 (C.C.D. Neb. 1894) 64 Fed. 165 at 177.
273 169 U.S. 466 (1898).
275 See the concurring opinion of Mr. Justice Frankfurter in Driscoll v. Edison Light & Power Co., 307 U.S. 104 at 122 (1939).
276 Federal Power Commission v. Natural Pipe Line Gas Co., 315 U.S. 575 at 603-604 (1942). Little more than a year after the Court, through an opinion of Mr. Justice Roberts, had decided that there was nothing "sacrosant" about the fixing of prices and had put aside the principle that business must be affected with a public interest for it to be subject to regulation, West v. Chesapeake & Potomac Telephone Co., 295 U.S. 662 (1935) was decided. Mr. Justice Roberts also rendered that opinion, saying: "When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value" (p. 671).
277 321 U.S. 503 at 517 (1944).
require any person to sell any commodity or to offer any accommo-
dations for rent." There is no requirement that the apartments in
question be used for purposes which bring them under the Act. Of
course, price control, the same as other forms of regulation, may
reduce the value of the property regulated. But, as we have
pointed out in the *Hope Natural Gas Co.* case (320 U. S. page
601, 64 S. Ct. 281), that does not mean that the regulation is
unconstitutional. Mr. Justice Holmes, speaking for the Court,
stated in *Block v. Hirsh*, supra, 256 U. S. page 155, 41 S. Ct. page
459, 65 L. Ed. 865, 16 A.L.R. 165: "The fact that tangible prop-
erty is also visible tends to give a rigidity to our conception of our
rights in it that we do not attach to others less concretely clothed.
But the notion that the former are exempt from the legislative
modification required from time to time in civilized life is con-
tradicted not only by the doctrine of eminent domain, under
which what is taken is paid for, but by that of the police power in
its proper sense, under which property rights may be cut down,
and to that extent taken, without pay." A member of the class
which is regulated may suffer economic losses not shared by others.
His property may lose utility and depreciate in value as a con-
sequence of regulation. But that has never been a barrier to the
exercise of the police power. [Citing cases.] And the restraints
imposed on the national government in this regard by the Fifth
Amendment are no greater than those imposed on the States by
the Fourteenth. *Hamilton v. Kentucky Distilleries Co.*, supra;
*United States v. Darby*, 312 U. S. 100, 657, 61 S. Ct. 451, 85 L.
Ed. 609, 132 A.L.R. 1430."

Of course, if renegotiation is an unconstitutional enactment, ex-
cessive profits recaptured are a "taking" in the sense that one has been
deprived of profit without proper satisfaction of law. If the inter-
ference with contractual rights caused by renegotiation is justifiable
under these wartime conditions in the light of the aim which the act
seeks to serve, it will have conformed to the constitutional principles
of substantive due process.

Let us now explore whether procedural due process has been
satisfied, whether Congress has fairly given the parties a chance to
put forward their views at some point in the proceedings.

**Procedural Due Process**

The procedural provisions of the Renegotiation Act generate some
acute problems of procedural due process. Opportunity for hearing and
judicial review of administrative determinations, or lack of it, form this
field of inquiry. Delegation of judicial power is a correlative matter for consideration. Generally speaking, procedural due process requires that there be an opportunity for a fair hearing which offers to the interested parties the chance "through evidence and argument to challenge the result" and to a determination upon the evidence in a way that is not arbitrary.\(^{278}\) Neither the 1942 or 1943 Renegotiation Acts seem lacking in these respects. The 1942 Act states nothing that specifically requires the secretary of the department conducting the renegotiation to provide a hearing in so many words. It seems, however, that the opportunity to be heard is inherent in the arrangement of the act. Renegotiation by its nature contemplates an undertaking to reach an agreement for the elimination of excessive profits and, failing in this, the issuance of an order determining the amount of such profits and providing for their recapture. The 1942 Act contains provisions to support this position. It provides that whenever the secretary believes excessive profits have been realized from renegotiable contracts that he is "authorized and directed to require the contractor or subcontractor to renegotiate the contract price."\(^{279}\) Renegotiation under this statute, it is true, includes "the refixing by the Secretary of the Department of the contract price,"\(^{280}\) and the provision of the act in relation to the making of agreements is permissive in that the "Secretary may make such final or other agreements with a contractor . . . for the determination of excessive profits . . . as the Secretary deems desirable."\(^{281}\) Nevertheless, that portion of the statute which directs and authorizes the secretary to require the contractor to renegotiate contract prices lends itself to no other logical interpretation than that negotiations with the contractor must be had preliminary to the fixing of any such prices or the making of a unilateral order for the recapture of excessive profits. "Renegotiation" as used in this connection is clearly not in the sense of refixing of the contract price, since any such refixing would not be by the contractor or subcontractor, but rather through the direction of the secretary himself. If this reasonably is the meaning of the statute—and the activities of the departments administering the act show that they consider negotiations preliminary to the entry of an order to be a necessary part of the renegotiation procedure—then it appears that the


\(^{279}\) Subsection (c) (1) of the 1942 Act.

\(^{280}\) Subsection (a) (3) of the 1942 Act.

\(^{281}\) Subsection (c) (4) of the 1942 Act. (Italics supplied.)
contractor will have a chance to be heard during the process of renegotiation.  

Nor is this the end of his chance for a voice in the proceedings. If he is dissatisfied with the determination of the secretary he may file in the Tax Court for a redetermination of the amount of excessive profits which the secretary has found. The procedures of the Tax Court are such that a hearing before that tribunal would fully satisfy the requirements of procedural due process in the determination of excessive profits. 282 It is not clear that the act compels a hearing before the issuance of a unilateral order determining excessive profits is made by the secretary. But this would not seem to affect its constitutionality as long as the opportunity for a hearing is provided, as it is, at some place in the proceeding. 283

What has been said about the adequacy of the 1942 Renegotiation Act in this connection applies with even greater vigor to the 1943 Act, for the 1943 Act contains explicit provisions requiring that notice be given and conferences held aimed at the making of an agreement. The statute furthermore provides that if an agreement cannot be reached, then the board shall eliminate excessive profits by order. Inasmuch as the 1943 Act contemplates that the War Contracts Price Adjustment Board will make use of the existing organization in the various renegotiating departments used prior to the enactment of this statute and/or it contemplated that the original renegotiation proceedings would be conducted within those departments, there is provided before the War Contracts Price Adjustment Board a review of any determinations made by the secretaries which the contractor may obtain at his request. Lastly, a final administrative hearing on appeal from the board's order is provided to the Tax Court. Thus, we find that notice is required before the determination of excessive profits and two administrative reviews are provided the contractor, one by the War Contracts Price Adjustment Board and one by the Tax Court of the United States. We say "administrative review" with regard to the proceeding conducted by the Tax Court since, as mentioned before, the Tax Court is an administrative agency—it is not a "Court." 284

282 The Tax Court procedures have received favorable commendation from the Supreme Court which recently said in speaking of the Tax Court that its "procedures assure fair hearings" and that it "has established a tradition of freedom from bias and pressures." Dobson v. Commissioner of Internal Revenue, 320 U.S. 489 at 498, 64 S. Ct. 239 (1943).


284 Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716,
predecessor to the Tax Court, was defined in the statute which created it as an "independent agency in the Executive Branch of the Government." The name of this agency was changed but its duties remain the same.

We now come to the question of the finality which may be given to administrative determinations without permitting resort to the courts, and to the problem of delegating judicial power. The 1943 Renegotiation Act prohibits a review of the determination of excessive profits made by the Tax Court. Subsection (e) (1) of the 1943 Act provides:

"... Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of any such excessive profits, received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

Does this provision of the act violate procedural due process by excluding judicial review? And is it an unconstitutional delegation of judicial power?

It is first important to define the essential features of a determination of excessive profits the review of which is prohibited. The 1943 Act says that:

"The terms 'renegotiate' and 'renegotiation' include a determination by agreement or order under this section of the amount of any excessive profits."

The determination then is the finding of an amount of profits considered to be excessive under the act.

In order to perform its functions under renegotiation the Tax Court in considering a petition asking that a finding of excessive profits be redetermined of necessity has to exercise law-determining powers. The Tax Court must find the facts. It must then apply the law to those facts and in so doing, like most administrative agencies, decides questions of law. This raises the issue of whether there has been a delegation of judicial power to the Tax Court in violation of Article III, section 1, of the Constitution.


Subsection (a) (3) of the 1943 Act.

The proceeding is de novo. Subsection (e) (1) of the 1943 Act.

"The judicial Power of the United States, shall be vested in one supreme
power was specifically raised in *Sunshine Anthracite Coal Co. v. Adkins.* There the Bituminous Coal Act was attacked upon the ground, among others, that it provided for an unconstitutional delegation of judicial power to the administrative agencies which Congress established for the regulation of bituminous coal production. The Court in discussing this question said through Mr. Justice Douglas:

"Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields v. Utah Idaho Central R. Co.*, *supra*, p. 180. The fact that such determination involved an interpretation of the term "bituminous coal" is of no more significance here than was the fact that in the *Shields* case a decision by the Interstate Commerce Commission of what constituted an "interurban" electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under § 6 (b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 146."291

The Renegotiation Act dictates that the courts shall not inquire into the determined amount of excessive profits; but how far can Congress go in making this administrative determination of excessive profits a final one, and to what extent can judicial inquiry be restricted without

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290 310 U.S. 381, 60 S. Ct. 907 (1940).
291 Id., 310 U.S. at 400.
violating the Constitution? As far as the determination of profits is a matter of finding facts, there would seem to be no doubt but that finality can be conferred upon this action of the Tax Court. When finality may be given to administrative determinations depends upon circumstances. Apart from the circumstances of a given case due process has no fixed definition. The Court has steadfastly refused to make this principle rigid. What is due process depends upon the situation at hand, the nature of the rights affected, the end to be served and the reasonableness of the methods selected. As the business of government has become more complex Congress has turned to administrative agencies for the conduct of a large segment of governmental functions. This is true especially in the regulatory fields of utilities, trade practices, taxation, labor disputes and business enterprises. It has become increasingly apparent that many administrative agencies are better qualified than courts to deal with these regulatory problems because of the special skill, technique, and expert knowledge required to deal with them, and the courts have recognized this. They have seen, moreover, that uniformity of regulations and the avoidance of confusion and discrimination which might arise through conflicting decisions of courts as to the fairness of rates, as to pricing regulations or trade practices, can best be avoided by permitting certain questions to be finally decided by administrative processes and to maintain an orderly procedure in the decision of these questions has caused them to uphold the legislative instructions as to finality of administrative determination. This led to a judicial self-limitation in many instances even in the absence or in the face of statutory expression. Thus, the primary jurisdiction for deciding regulatory matters has devolved upon administrative bodies.

These factors caused the Supreme Court to decide that there was no denial of procedural due process when there was conferred upon an

292 While the analogy of renegotiation to utility rate-making is unsatisfactory, procedurally these two types of regulation offer sounder bases for comparison.


295 Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350 (1907); Board of Railway Commissioners v. Great Northern Railway, 381 U.S. 412, 50 S. Ct. 391 (1930).

administrative body power to make final determinations of fact under a statute which allowed a judicial review of the facts only in the case of "lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the Board." 297

It must surely be understood that the Constitution does not guarantee to litigants the right to resort to the courts for an adjudication of all questions. Due process is not necessarily judicial process. 298 Congress may entrust to administrative agencies the final authority to determine value. This is true even in those cases where the constitutionality of the taking depends upon the value of the property or income. 299 Due process is not denied in condemnation proceedings and related cases where a board or a commission's findings of fact are made final and a statute permits a judicial review only in the event of "lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the Board." 300

Determinations of the Board of Tax Appeals, now the Tax Court, are given finality with regard to the determination of facts regarding income. The statute establishing the Board of Tax Appeals limited judicial inquiry of a decision made by that agency to the question of "whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made." 301 There is no transgression of due process when the finality of valuations under the Tariff Acts is made by appraisers. 302 And by like token, finality may within the limits of due process be given

299 "By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury." Bauman v. Ross, 167 U.S. 548 at 593, 17 S. Ct. 966 (1897).
to the determinations of appraisers as to fire loss and values. Likewise, determinations of value may be given finality for the purpose of ad valorem taxation under a statute giving little opportunity for a hearing.

Congress has, without violating due process, given executive officers the power to enforce penalties without invoking judicial power. As an example, the collector of customs, under section 9 of the Immigration Act of March 3, 1903, imposed a fine upon a transportation company for violating the part of the act which made it unlawful and punishable by fine to bring any diseased alien into the United States. Authority was conferred upon the secretary of the treasury to impose the fine when in his judgment the disease might have been detected by competent medical examination.

A similar situation arose in the case of United States v. JuToy under the Alien Immigration and Expulsion Law which made the finding of certain executive officers of the Government upon questions of citizenship and other questions of fact, final and conclusive in the absence of abuse of discretion.

In the recent case of Falbo v. United States, the Court was confronted with the question of whether due process had been provided by the Selective Training & Service Act which states that "the decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

The defendant was convicted for refusing to obey his draft board's order to report for induction. He had previously been classified as a conscientious objector and was to have been placed upon work selected for such persons during the war. The defendant contended at the trial that the merits of his classification should be tried de novo and also

304 State Rule Tax cases, 92 U.S. 575 at 610 (1875); Kentucky Railroad Tax cases, 115 U.S. 321, 6 S. Ct. 57 (1885); King v. Mullins, 171 U.S. 404 at 429-431, 18 S. Ct. 925 (1898).
305 32 Stat. L. 1215 at 1215.
308 Act of August 18, 1894, c. 301, § 1, 28 Stat. L. 372 at 390.
309 320 U.S. 549, 64 S. Ct. 346 (1944).
that the local board had been prejudicial and arbitrary in refusing to classify him as a minister of religion. A conviction resulted and the trial court held that these allegations did not constitute a defense. The circuit court of appeals affirmed the conviction and the Supreme Court decided, in upholding the conviction, that since the defendant was under a statutory duty to obey the draft board’s order his allegations as to the impropriety of the board’s action constituted no defense. It would appear then that where Congress provides an opportunity to be heard and gives to the board the obligation of making determinations under a statute such as this, the administrative remedy may be made exclusive.\(^{811}\)

No better summarization of the concepts of procedural due process can be found than those set forth by Mr. Justice Brandeis in his concurring opinion in *St. Joseph Stock Yards Co. v. United States*:\(^{812}\)

“These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on *ex parte* casual inspection or unveri-


Mr. Justice Brandeis, in reviewing the requirement of procedural due process in his concurring opinion in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 at 77-82, 56 S. Ct. 720 (1936), said:

"... The second distinction is between the right to liberty of person and other constitutional rights. Compare *Phillips v. Commissioner*, 283 U.S. 589, 596-597. A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare *Ng Fung Ho v. White*, 259 U.S. 276, 282-285; with *United States v. Jit Toy*, 198 U.S. 253 and *Tang Tun v. Edsell*, 223 U.S. 673, 675. But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court; and that in deciding whether such review is required, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found suitable or admissible in the special case, it will be adjudged to be "due process of law."' Mr. Justice Bradley, in *Davidson v. New Orleans*, 96 U.S. 97, 107." (Italics supplied.)

\(^{812}\) 298 U.S. 38 at 81 (1936).
fied information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi-judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of Government for prompt final decision. It has recognized that there is a limit to the capacity of judges; and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the finding of facts is left, by the Constitution, in large part to laymen. It has enquired into the character of the administrative tribunal provided and the incidents of its procedure. Compare Humphrey's Executor v. United States, 295 U.S. 602, 628. And where that prescribed for the particular class of takings appeared 'appropriate to the case, and just to the parties to be affected,' and 'adapted to the end to be attained,' Hager v. Reclamation District, 111 U.S. 701, 708, the Court has held it constitutional to make the findings of fact of the administrative tribunal conclusive. Thus, the Court has followed the rule of reason."

What then of the Renegotiation Act in conferring exclusive jurisdiction for a final determination upon the Tax Court? The determination of excessive profits involves matters of complicated business judgment, cost accounting, skilled technical study and demands as uniform procedure and result as is possible to achieve. It appears quite clearly that this determination is a matter especially suited to decision by an administrative agency. Indeed, even if Congress had not made such determinations final and had not given exclusive jurisdiction for making them to the the Tax Court, it is highly doubtful whether the courts would undertake a judicial review of such findings in view of the virile doctrine of judicial self-limitation in such instances. A case

313 Indeed, there is some question as to the value of a judicial review upon the determination even if one were possible. The Emergency Price Control Act, upheld as constitutional in Bowles v. Willingham, 321 U.S. 503 (1944), provides for a judicial review but in his dissenting opinion Mr. Justice Roberts observed at 541:

"But it is said the Administrator's powers are not absolute, for the statute provides judicial review of his action. While the Act purports to give relief from rulings of the Administrator by appeal to the Emergency Court of Appeals and to this court, the grant of judicial review is illusory. How can any court say that the Administrator has erred in the exercise of his judgment in determining what are defense activities?"
in point is *Railroad Commission of Texas v. Rowan and Nichols Oil Company.* There an order of the Railroad Commission of Texas with which authority for regulating oil production had been placed by that state had made a regulatory order with regard to limiting and pro-rating production of oil fields. This order was attacked by the oil company as a violation of the Fourteenth Amendment on the ground that it constituted the taking of property without due process of law. After discussing the complexity of the problem involved, the requirement for special study and skilled technical knowledge to determine the effect and extent of the board’s order, Mr. Justice Frankfurter, who rendered the opinion for the Court, said:

"Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the complicated and subtle factors that must enter into such judgments, the Commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. It is not for the federal courts to supplant the Commission’s judgment even in the face of convincing proof that a different result would have been better."

When Congress placed with the Tax Court exclusive authority to review determinations of excessive profits and conferred upon it final jurisdiction with regard to such determinations it made no further expression or provision for a judicial consideration of any of the renegotiation proceedings. What is the effect of this congressional silence? Did Congress mean to bar from the courts all or any consideration of renegotiation whether with regard to questions of law, questions of jurisdiction or the manner in which the proceedings had been conducted? Any court pronounce that the Administrator’s judgment is erroneous in defining a ‘defense-rental area’? What are the materials on which to review the judgment of the Administrator that one or another period in the last three years reflects, in a given area, no abnormal, speculative, or unwarranted increase in rent in particular defense housing accommodations in a chosen defense-rental area? It is manifest that it is beyond the competence of any court to convict the Administrator of error when the supposed materials for judgment are so vague and so numerous as those permitted by the statute."

314 310 U.S. 573 (1940).
315 Id. at 583.
ducted? Is the failure to provide for any such scrutiny by the courts to be taken as an attempted prohibition of judicial inquiry irrespective of the question involved? And, if this is the proper construction of the statute, can Congress under the circumstances of renegotiation properly forbid judicial inquiry of what are usually regarded as justiciable issues?

It is possible that congressional failure to provide a means for resorting to the courts was intended to bar further inquiry of any nature. A review of the committee reports and the hearings on the Revenue Bill of 1943, however, does not support such a conclusion, and reveals that when Congress conferred final jurisdiction for determining excessive profits upon the Tax Court, it did not intend an outright halt of judicial inquiry of what may appear to be proper issues for the courts. In fact, as the Revenue Bill of 1943 was reported by the Senate Committee on Finance, it contained a provision for resort to the Court of Claims.\(^{316}\) One of the reasons given for establishing the Court of Claims as the reviewing agency in this bill was to make available a judicial review.\(^{317}\) The house bill, however, permitted an aggrieved contractor to ask for a redetermination of excessive profits with the Tax Court.\(^{318}\) The house provision prevailed but it was adopted not upon the ground that Congress desired to prohibit resort to the courts, but rather because Congress believed that the Tax Court because of its nature, its familiarity with costs and problems of taxation which are related to renegotiation as well as general business problems, was a better qualified agency to review and redetermine excessive profits than is the Court of Claims. Convenience to place of performance of contracts because of the Tax Court's sitting in its various divisions all over the country was also a consideration.\(^{319}\) But the Tax Court does not

\(^{316}\) Subsection (e) (1) and (2) of the Revenue Bill 1943 (H.R. 3687) as reported by Senate Committee on Finance. S. Rep. No. 627 to accompany H.R. 3687, the Revenue Bill of 1943, 78th Cong., 1st sess., December 22, 1943, at pp. 34 and 109 (Committee on Finance).

\(^{317}\) The Report of the Senate Committee on Finance Said: "Review by the Tax Court would constitute merely a further administrative review and therefore, in the opinion of the committee, would serve no useful purpose." Id. at p. 109.

\(^{318}\) Subsections (e) (1) and (2) of the Revenue Bill 1943 (H.R. 3687) as introduced in the House November 18, 1943 by Representative Doughton.

\(^{319}\) "The Tax Court of the United States is peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose.

"Moreover a determination before The Tax Court will be of great convenience to contractors or subcontractors by reason of the fact that the Board sits through its
seem to have been selected with a view to barring a judicial review of justiciable issues. Congress was advised that there was grave doubt as to whether resort to the courts on questions of a mistake of law, fraud, or misconduct in the proceedings could be constitutionally denied to the courts.\textsuperscript{820} In other words, Congress was told that it probably could not prohibit a contractor's right to contest procedural due process.\textsuperscript{821} It appears, moreover, that there was no desire to institute such a bar.\textsuperscript{822}

It can be argued that, since Congress had before it the choice of providing a judicial review through selecting the Court of Claims as the reviewing agency or attaching finality to an administrative review with the Tax Court, Congress, having chosen to place final determining authority with an administrative and not a judicial body, thereby showed an intent to cut off judicial review. The chief difficulty with this argu-

\textsuperscript{820} See: Statements of the Undersecretary of War Patterson and Mr. Joseph Dodge, Chairman of the War Contracts Price Adjustment Board in S. Hearings on H.R. 3687, 78th Cong., 1st sess., Part 7, December 6, 1943, at pp. 987-1007, 1012-1017, 1064-1083 (Committee on Finance). The undersecretary said at p. 1017:

"With respect to the scope of review, I agree with the position of the Department of Justice, as expressed to the joint board, that it would be helpful if determinations of the secretaries of the departments or of the proposed War Contracts Price Adjustment Board should be final and conclusive except to the extent that the contractor can establish (on the basis of the record made by the contractor in the court review proceeding) that the determination was the result of a mistake of law, fraud, arbitrary or capricious action, or was so grossly erroneous as to imply bad faith.

"This proceeding would afford protection to a contractor who could show that he had been arbitrarily or unfairly treated and at the same time would give due weight to the determinations of the departments and avoid possible danger of overburdening the courts with a large volume of difficult and burdensome cases."

\textsuperscript{821} Statement of Francis M. Shea, Assistant Attorney General. Id., pp. 1032-1050.

\textsuperscript{822} In testifying before the Senate Committee on Finance upon the issue of whether the contractor should be permitted to seek a review with the Tax Court or the Court of Claims, the Undersecretary of War, Robert P. Patterson, said:

"I have repeatedly stated that I have no objection to the making of some statutory provision for judicial review, and, in fact, have expressed the opinion that there is such right of review under existing law." Statement of Undersecretary of War Patterson, id. at p. 1016.
ment is that the point before Congress was whether the determination of the board or secretary should be scrutinized or redetermined and not whether other issues of a justiciable nature such as those mentioned above might be litigated.\(^3\) Although the determination of excessive profits, involving as it does especial skill and technique, seems to be a problem which may be exclusively reserved for an administrative agency, one can only reluctantly reach a conclusion that the act may be constitutionally interpreted to bar a judicial consideration of questions of law and misconduct of proceedings. The circumstances here do not reasonably require such a result. To the contrary, they seem to admit of the conclusion that the contractor must be permitted access to the courts.

In *American School of Magnetic Healing v. McAnnulty*,\(^3\) the postmaster general had issued a fraud order to bar certain of the plaintiff's letters from the mails under a statute which provides no judicial review. Suit for injunction was then brought to prevent enforcement of the order. The statute permitted the postmaster general to exclude matter from the mails when in his opinion "upon evidence satisfactory to him [it appeared] that any person" was engaged "in conducting any fraudulent lottery, gift-enterprise, or scheme for the distribution of money" by use of the mails.\(^3\) In the trial court the defendant demurred and obtained judgment upon the demurrer. The Supreme Court reversed that judgment and decided that, although Congress has the full and absolute control over the mails, and the determination by the postmaster general upon the basis of the statute is conclusive in character, nonetheless, the courts have the power to grant relief through an injunction where the administrative office has assumed to act and exercise authority under a mistake of law. The determination of the postmaster general was held to be no defense where there was a mistake of law. The Court said through Mr. Justice Peckham:\(^3\)

"Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must de-

\(^{323}\) See: H. Rep. 871, 78th Cong., 1st sess., November 18, 1943, at pp. 76-77 (Committee on Ways and Means).
pend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not be the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such a violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because of the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the postmaster general has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the postmaster general, the facts stated must in some aspect be sufficient to permit him under the statute to make the order.

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolute uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld." (Italics supplied.)

Although the arguments for a given statutory construction based upon avoiding a meaning which would give an unconstitutional result and of shunning constitutional issues where it is not necessary


328 See note 222 supra.
to face them are frequently fraught with the fraility of assuming the point at issue, there is such grave doubt as to the constitutionality of the Renegotiation Act were it to be construed as to prohibit a judicial inquiry of questions of law and questions of misconduct in procedure, that such arguments cannot be ignored in the consideration of this problem. It is not the intention here, however, to leave the impression that Congress is without power under certain conditions to completely deny judicial inquiry and that it cannot make administrative determinations final and beyond the reach of the courts. The draft cases, *Falbo v. United States* and *Drumheller v. Berks County Local Board*, mentioned earlier in this discussion, and those cases closely akin involving court martial are illustrative of this point. But the *Falbo Case* goes off on the ground that to permit a judicial review would interfere with an orderly flow of men into the armed forces which is demanded for reasons of the nation's security, and the court martial cases are rested upon the traditions of military discipline which were prevalent at the time the Constitution was adopted. But these cases are hardly criteria for deciding the problem at hand. Their circumstances differ widely from those of renegotiation. That Congress may make final and conclusive the Tax Court's determinations of excessive profits, seems beyond serious question. But issues arising out of these proceedings which are in the nature of mistakes of law or occur because of alleged misconduct and are ordinarily considered to be justiciable in administration matters do not seem to be attended in renegotiation with conditions that require them to be placed beyond the pale of judicial exploration.

**Procedure**

The procedure by which a contractor may bring justiciable issues before the courts is outside the scope of this paper. Nevertheless, without undertaking to show their solution, it will be well to point out a few of the procedural problems which will be encountered by any contractor who finds necessary a judicial contest. Since the Renegotia-

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\[829\] See note 223 supra.

\[830\] 320 U.S. 549 (1944).

\[831\] (C.C.A. 3d, 1942) 130 F. (2d) 610.

\[832\] "What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its powers cannot be reviewed or set aside by the [civil] courts." McKenna, J., in *Reaves v. Ainsworth*, 219 U.S. 296 at 304, 31 S. Ct. 230 (1911).

\[833\] 57 HARV. L. REV. 577 (1944).
tion Act prescribes no method for reaching the courts, a collateral proceeding is necessary for obtaining an adjudication. An action on the contract in the Court of Claims under the Tucker Act \(^{884}\) for the full contract price is one means of presenting those issues to the courts. A suit for an injunction or an action for declaratory judgment \(^{885}\) may achieve the result. A writ of prohibition or mandamus, however, can not be used to contest the constitutionality of the Renegotiation Act as an original action in the Supreme Court. \(^{886}\) If the contractor seeks an injunction or a declaratory judgment, such suit must be against officers of the Government because of the principles of sovereign immunity. \(^{887}\) In these cases the contractor should be prepared to answer the contention that the suit is in fact one against the United States since the officer is being sued in his official capacity and it is therefore not maintainable because the sovereign has not consented to be sued. The United States District Court for the District of Columbia holding a three-judge statutory court recently decided on motion for summary judgment that suit to restrain a secretary from enforcing a determination of excessive profits in renegotiation was a suit against the official and not against the United States. \(^{888}\)

\(^{884}\) Act of March 3, 1887, 24 Stat. L. 505.


\(^{886}\) Ex parte Alliance Brass & Bronze Company, 320 U.S. 719, 64 S. Ct. 367 (1944); Rolls Royce, Inc. v. Stimson, (U.S. May 22, 1944) 64 S. Ct. 1147.


\(^{888}\) Lincoln Electric Company v. Frank Knox and James V. Forrestal, 13 U. S. Law Week, 2076 (1944). This case will be argued upon the merits which directly involve the constitutionality of the Renegotiation Act at an indefinite date which will probably be the latter part of November or early in December. Cf. New Electric Company v. Frank Knox and James V. Forrestal, Civil Action No. 21,866 in the United States District Court for the District of Columbia. Case argued June 27, 1944. The Government’s brief in support of the argument that such suit is against the United States as the sovereign and hence not permissible, cites: Minnesota v. Hitchcock, 185 U.S. 373 at 386, 22 S. Ct. 650 (1902); Louisiana v. McAdoo, 234 U.S. 627 at 629, 34 S. Ct. 938 (1914); Worchester County Trust Company v. Riley, 302 U.S. 292 at 296, 58 S. Ct. 185 (1938). Cited by the plaintiff as being contra: Philadelphia Co. v. Stimson, 223 U.S. 605 at 619-620, 32 S. Ct. 340 (1912); Ickes v. Fox, 300 U.S. 82 at 97, 57 S. Ct. 412 (1937); Kennington v. Palmer, 255 U.S. 100, 41 S. Ct. 303 (1921); Colorado v. Toll, 268 U.S. 228 at 230, 45 S Ct. 505 (1925); United States v. Lee, 106 U.S. 196, 1 S. Ct. 240 (1882); Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 at 137, 59 S. Ct. 366 (1939); Degge v.
The usual thing is to require the contestant to exhaust his administrative remedies before appealing to a judicial tribunal. The courts take the position that it is desirable to decide all issues in an orderly way. This concept is based upon the policy of eliminating all unnecessary litigation and it will best be served if disputes can be resolved in the administrative processes. Thus, the administrator is to be given every opportunity to correct any error before the matter comes to litigation. Although this is the general rule there seems to be some difference of treatment given those cases where only the constitutionality of a statute is attacked and no questions of administrative action are raised. And the courts have accepted jurisdiction where the object of the suit was to determine only the constitutional question and not to challenge administrative action. This, however, does not appear to be a principle of general application even in such instances. That no question should be judicially considered until the administrative processes have been completed is an argument that has received approval, for if the administrative remedy had been pursued it might have reached a result which would have caused no damage to the contestant. If the objection lies to administrative action as well as the constitutionality of the act exhaustion of the administrative remedy will probably be required before judicial arbitrament can be obtained.

If the administrative remedy is to be pursued before the act's con-


345 The problem of exhausting administrative remedies is dealt with similarly in those cases where a declaratory judgment is sought as in the instances where the prayer is for an injunction. Newport News Ship Building & Drydock Co. v. Schaufler, 303 U.S. 54 (1938). On the question of declaratory judgment in constitutional limitation see a note in 51 HARV. L. REV. 1267 (1938).
stitutionality is questioned, there is another issue, though of less impor-
tance, which ought not to be overlooked. Is the contractor estopped
from contesting the constitutionality of the statute after having fol-
lowed and submitted to its administrative procedures? *Cappelini v.
Commissioner*\(^{346}\) subscribes to this idea. There a deficiency had been
assessed against the taxpayer, Cappelini. He undertook to contest the
constitutionality of the statute and filed his complaint with the Board
of Tax Appeals. The board refused to consider the constitutional ques-
tion saying, it is "only by invoking the provisions of section 280 that
petitioner may come to the Board, for it is that section alone which
gives the board jurisdiction of these proceedings. It is a well settled
principle that one cannot invoke the aid of a statute conferring juris-
diction and at the same time attack the validity of the statute so
invoked."\(^{347}\) But there is considerable doubt as to the soundness of
such a principle and the *Cappelini* case received unfavorable comment
in *Routzahn v. Tyroler*\(^{348}\) where the court said:

"True, the contrary inference would follow, from the opinion
of the majority of the Board in the Cappelini Case, 14 B.T.A.
1269, but we cannot agree that any estoppel arises, as the Board
there thought. To say that an act may impose an unconstitutional
liability and forbid all judicial review except in one way, and then
that one who appeals for review in the way provided for him
thereby estops himself to deny the validity of the imposition, is,
to our minds, an obvious solecism."\(^{349}\)

**Concluding Remarks**

Renegotiation appears to have now reached the point where further
legislative changes of a major character are unlikely. The assault upon
the act seems to have spent itself in the amendments which the Revenue
Act of 1943 brought forth. Moreover, the urgency of any further
changes which might be proposed may well be dissipated by the fact
that the renegotiation will certainly terminate by July 1, 1945 if ex-
tended by the President and even sooner if he does not exercise this
authority.

The cases pending before the courts will eventually bring a decision
on the act's constitutionality. The weight of the war as creating the

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\(^{346}\) 14 B. T. A. 1269 (1929).

\(^{347}\) Id. at 1272.

\(^{348}\) *C.C.A. 6th, 1929* 36 F. (2d) 208.

\(^{349}\) Id. at 209.
urgent necessity for renegotiation will bear enormous effect in this consideration. The ability of the Government to conduct its affairs through administrative agencies must be recognized as being of even greater importance in time of war than under other conditions. The trend is not away from upholding statutes for the regulation of business—to the contrary. And the regulation of war prices and profits which stem from contracts for the manufacture and sale of the implements of war are an extension of these principles which the circumstances of these times may be found to justify.