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Constitutionality of the Delegation of Legislative Power to Control Prices, Rents, Wages, and Salaries: The Economic Stabilization Act of 1970

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THE CONSTITUTIONALITY OF THE DELEGATION OF LEGISLATIVE POWER TO CONTROL PRICES, RENTS, WAGES, AND SALARIES: ECONOMIC STABILIZATION ACT OF 1970

The proposition that the federal government is one of enumerated powers is firmly established and requires no substantiation. The United States Constitution clearly and expressly so provides in the tenth amendment.[1] Therefore, every act of Congress must find its root in a provision of the Constitution. A discussion of the extent of the powers upon which control of prices, rents, wages, and salaries could be founded is beyond the scope of this article. However, brief comment concerning the legislative power is in order. The congressional power to legislate in the areas encompassed by the Economic Stabilization Act of 1970[2] could be based on the commerce clause or the war power.[3] The commerce power is broadly construed by the United States Supreme Court to allow Congress to regulate any interstate activity or any activity which affects interstate commerce.[4] Likewise, the war power is extensive. Under this power, the Court has sustained price controls,[5] rent controls,[6] prohibition,[7] conscription,[8] and racial exclusion.[9] A review of the cases cited indicates that if Congress had directly controlled prices, rents, wages, and salaries, rather than delegating the power to do so to the President, the action would be sustained. Therefore, for the purpose of this article, the power of Congress to control prices, rents, wages, and salaries is assumed.

Economic control of some form has long been a factor in the United States,[10]

[1] U.S. Const. Amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[2] Pub. L. No. 91-379, Aug. 15, 1970, 84 Stat. 799; as amended, Pub. L. No. 91-558, 84 Stat. 1468; Pub. L. No. 92-8, 85 Stat. 13; Pub. L. No. 92-15, 85 Stat. 38; 12 U.S.C. § 1904 note.

[3] U.S. Const. Art. I, § 8. The necessary and proper clause provides, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ." The necessary and proper clause might be included here; but, as shown by its language, it is not a basic power and, therefore, its operation must be founded on another power granted in the Constitution.

[4] *See* United States v. Sullivan, 332 U.S. 689 (1948); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby Lumber, 312 U.S. 100 (1941); Mulford v. Smith, 307 U.S. 38 (1938); National Labor Relations Board v. Jones & Laughlin Steel, 301 U.S. 1 (1937).

[5] Yakus v. United States, 321 U.S. 414 (1944).

[6] Wood v. Miller Co., 333 U.S. 138 (1948); and Bowles v. Willingham, 321 U.S. 503 (1944).

[7] J. W. Hamilton v. Kentucky Distilleries Co., 251 U.S. 264 (1919).

[8] United States v. O'Brien, 391 U.S. 367 (1968).

[9] Hirabayashi v. United States, 320 U.S. 81 (1943); and Korematsu v. United States, 323 U.S. 214 (1944).

[10] Safety-Appliance Act of 1893, 45 U.S.C. § 1; Federal Trade Commission Act of 1914, 15 U.S.C. § 41; Tariff Act of 1922, 19 U.S.C. § 154; Radio Act of 1927, 47 U.S.C. § 89. The Adamson Act of 1916 fixed a permanent eight-hour standard working day for employees engaged in the operation of trains upon interstate railroad carriers and *temporarily regulated*

but not until the National Industrial Recovery Act[11] did Congress pass legislation which directly invaded the economic life of virtually every American. Even this Act did not directly control wages and prices[12] as is currently occurring under the Economic Stabilization Act of 1970. There have only been two prior periods of time in which wage and price maximums have been imposed—during World War II and the Korean War. It is the purpose of this article to explore the current vitality of the non-delegation doctrine as an attack upon the constitutionality of the Economic Stabilization Act of 1970 and to offer suggestions for curtailing the arbitrary exercise of administrative power.

Delegation of Legislative Power—History

No one could seriously contend—as long as sanity prevails, that is—that delegation of functions and powers vested in Congress should not be allowed within certain limits. If Congress were required to personally exercise all the functions of one major administrative agency—Interstate Commerce Commission, National Labor Relations Board, Civil Aeronautics Board, Federal Communications Commission, or Securities and Exchange Commission—it would have time for no other activity. Clearly, administrative agencies are necessary and will continue to be an integral part of our governmental system. If such agencies are to exist and to serve a useful purpose, Congress must be able to delegate a portion of its power to these agencies. The real question, and one still to be resolved, is what *effective* methods of control and limitation of power can be developed which, while allowing the agencies to perform their functions, prevent them from usurping the legislative, executive, or judicial powers of our federal government.

The separation of powers doctrine is implied from the first three articles of the United States Constitution which establish the three coordinate branches of the federal government. The separation of powers doctrine and article I of the Constitution[13] are the mortar and brick from which the non-delegation doctrine is constructed. In order to fully understand the current vitality of the prohibition on delegation of legislative power by Congress to the executive branch of the federal government, a historical review is necessary.

A. *Pre-Panama Refining and Schechter*

The earliest case dealing with delegation was *The Brig Aurora v. United States*.[14] Congress had delegated to the President the power to reinstate sections

the wages of such employees. See Wilson v. New, 243 U.S. 332 (1917); and Powell, *The Supreme Court and the Adamson Law*, 65 U. Pa. L. Rev. 607 (1917).

[11] Act of June 16, 1933, ch. 90, 48 Stat. 195, 15 U.S.C. § 703.

[12] *See* Schechter v. United States, 295 U.S. 495 (1935) where the live poultry code fixed hours per workday, maximum number of hours per week, and provided for a minimum rate of pay of 50 cents per hour.

[13] U.S. Const. Art. I, § 1. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

[14] 7 Cranch 382 (1813).

of a previously expired act if he should declare by proclamation that either Great Britain or France had ceased violating the neutral commerce of the United States. On the question of whether the provisions of the act were revived by President Madison's proclamation, the Court said curtly, "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[15]

Seventy-nine years after *The Brig Aurora*, in *Field v. Clark*,[16] a tariff act[17] was attacked by importers as an unconstitutional delegation to the President of the power to lay taxes and duties.[18] In this case the Court, for the first time, considered the delegation of legislative power in detail. The act was sustained (1) by relying on the decision in *The Brig Aurora* and three state court cases,[19] (2) by considering prior delegations by Congress, and (3) by interpreting the act such that "[i]t does not, in any real sense, invest the President with the power of legislation."[20] In *Field*, Mr. Justice Harlan stated unequivocally "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[21] The Court declared that "he may deem" in the statute meant that the President shall "ascertain the fact" whether the commercial regulations of other countries were "reciprocally equal and reasonable." The Court felt that "[l]egislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress."[22]

In *Buttfield v. Stranahan*,[23] the Court sustained the Tea Inspection Act of

15 *Id.* at 388.

16 143 U.S. 649 (1892).

17 Act of October 1, 1890, ch. 1244, 26 Stat. 567.

18 U.S. Const. Art. I, § 1, *supra* n.13. U.S. Const. Art. I, § 8. "The Congress shall have power to lay and collect taxes, duties, imposts and excises. . . ."

19 Cincinnati, Wilmington &c. Railroad v. Commissioners, 1 Ohio St. 88 (1852). ("The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."); Moers v. City of Reading, 21 Penn. St. 188 (1853) ("Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law."); and Locke's Appeal, 72 Penn. St. 491 (1873) ("The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.")

20 143 U.S. 649, 692 (1892).

21 *Id.*

22 *Id.* at 693.

23 192 U.S. 470 (1904).

1897[24] which made it unlawful to import tea "which is inferior in purity, quality, and fitness for consumption." The Act directed the Secretary of the Treasury to appoint a board of tea experts to submit to him standard tea samples. The Secretary was to establish standards of purity, quality, and fitness for consumption based on the recommendations of the board. Suit was brought against the collector of the port of New York by an importer whose tea was seized and destroyed under the Act. The Court rejected the contention that the Secretary was vested with legislative power saying:

> Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.[25]

This case clearly shows the realization on the part of the Court that effective government requires delegation. The germ of the later idea that delegation will be sustained where there is a congressionally established standard is indicated by the first sentence of the above quotation.

Mr. Justice Lamar broke with the "ascertainment of fact" test of *Field* and *The Brig Aurora* in *United States v. Grimaud.*[26] Congress had authorized the Secretary of Agriculture to protect public forests and forest reservations from destruction and to regulate their use to this end. The Court unanimously upheld the delegation on the theory that the Secretary was not legislating when he promulgated regulations, but that he was acting as a congressional agent given the "power to fill up the details." Although put differently, the Court here, as was expressed in *Buttfield*, stated the idea that Congress had made the basic decisions and had only delegated the administrative task of implementing them. The Court at this point in time was still harboring the notion that Congress was doing the legislating and that the executive official was merely following their directive. This was obviously not so. The power to pass regulations which are enforced by sanctions is the power to make law and, therefore, is legislation.

In *J. W. Hampton, Jr. & Co. v. United States*,[27] a new theory for sustaining delegations was born. The controversy involved the flexible tariff provision of the Tariff Act of 1922.[28] The President, after an investigation by the United States Tariff Commission, could adjust import tariffs within 50 percent of rates specified by the Act. The purpose was to equalize the cost of production of goods in foreign countries with that of the United States. Chief Justice Taft reaffirmed the validity of the separation of powers doctrine, but felt that some

[24] Act of March 2, 1897, ch. 358, 29 Stat. 604.
[25] 192 U.S. 470, 496 (1904).
[26] 220 U.S. 506 (1911).
[27] 276 U.S. 394 (1928).
[28] Act of September 21, 1922, ch. 356, 42 Stat. 858.

delegation to the executive branch "within defined limits" was necessary. He went on to establish a new word formula for sustaining legislative delegations:

> If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.[29] (Emphasis added.)

Here again the idea that Congress has done the legislating and that the administrator is only carrying out their directive is present. The intelligible principle test was short lived. In 1935 the Supreme Court took unprecedented action in two cases (discussed below) by holding provisions of the National Industrial Recovery Act of 1933[30] unconstitutional and thus for the first time establishing a limit on delegation of legislative power.

B. *Panama Refining and Schechter*

The economic depression which began in the fall of 1929 had produced a national crisis of untold proportions by 1933. To facilitate economic recovery, the National Industrial Recovery Act was passed. The first test of this delegation came in *Panama Refining Co. v. Ryan.*[31] The Court found section 9(c) of the Act to be an unconstitutional delegation. This section allowed the President to prohibit the transportation in interstate and foreign commerce of "hot oil"—petroleum products produced or removed from storage in excess of any state statute or regulation. A violation of any rule or regulation promulgated under the Act was punishable by fine, imprisonment, or both. This delegation was, in fact, no more extensive than some sustained in prior cases. In *Hampton*, for example, the President was granted discretionary power to increase or decrease tariffs by 50 percent. The discretionary power to increase or decrease tariffs is no greater than the discretionary power to prohibit or not to prohibit the transportation of "hot oil."

Panama Refining represents a discontinuity in what had been a uniform trend of gradually expanding discretion vested in administrative officials and agencies. Had the Court felt so disposed, limitations on the discretionary power granted the President could have been found as is shown by the dissent of Mr. Justice Cardozo.[32] While the dissent was viewing only the delegation at hand, the majority looked beyond it and saw no limitation on the powers which could be delegated in the future if section 9(c) were sustained. This conclusion is derived from the Court's statement:

> While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 9(c),

29 276 U.S. 394, 409 (1928).
30 *Supra* n.11.
31 293 U.S. 388 (1935).
32 Justice Cardozo agreed standards were necessary but found (1) the President was

> we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess of what the State may allow. If legislative power may thus be vested in the President, or other grantee, as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the State's requirements. That reference simply defines the subject of the prohibition which the President is authorized to enact, or not to enact, as he pleases. And if that legislative power may be given to the President or other grantee, it would seem to follow that such power may similarly be conferred with respect to the transportation of other commodities in interstate commerce with or without reference to state action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it, as the person, or board or commission, so chosen, may think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation.[33]

The most extensive delegation of legislative power in our history was struck down in *Schechter v. United States*.[34] This case involved section 3 of the National Industrial Recovery Act which granted the President authority to approve "codes of fair competition" submitted by trade groups or to promulgate such codes on his own initiative. Violation of the codes was made a misdemeanor. Before approving the codes, the President was required to find that the group submitting the code "imposed no inequitable restrictions on admission to membership," that the group was "truly representative," and that the codes were not intended to foster monopolies. The Court considered these requirements, the broad policy statement in section 1 of the Act, and the lack of precedent in prior cases for such extensive delegation in declaring it unconstitutional. The Court's decision was summarized as follows:

> In view of the scope of that broad declaration [section 1], and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.
>
> We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.[35]

Although the Court still speaks of a requirement of standards in order to sustain delegations, *Panama Refining* and *Schechter* are the only two cases invalidating congressional delegations to the executive branch of the government.[36]

limited to oil in excess of state regulations, (2) the means of regulation was specified, and (3) policies were announced in § 1 of the Act.

[33] 293 U.S. 388, 420-21 (1935).

[34] 295 U.S. 495 (1935).

[35] *Id.* at 541-42.

[36] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). A congressional delegation to coal producers and workers was invalidated.

C. *Post-Panama Refining and Schechter*

The extent to which the Court will go in finding standards upon which to sustain a delegation is exemplified in the recent case, *Arizona v. California*.[37] Arizona, California, and other southwestern states were engaged in a controversy over how the water of the Colorado River and its tributaries should be divided. The governors of the various states involved met in Denver in 1925 and 1927 and fashioned an apportionment of the water, but California and Arizona rejected the proposal. This proposal, the Colorado River Compact,[38] apportioned the water between the upper and lower basins of the Colorado River but did not make an apportionment between the various states. Three bills, introduced in Congress attempting to resolve the problem, were defeated. The fourth bill, which passed, became the Boulder Canyon Project Act.[39] The Act granted the Secretary of the Interior extensive powers to apportion the water among the various users by authorizing the Secretary to contract for delivery of water and by providing that no party could receive water without such a contract. The majority noted that Congress had "set out in order the purposes for which the Secretary must use the dam and the reservoir." The Act had provided:

> First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power.[40]

Mr. Justice Harlan, dissenting, felt that "Congress made a gift to the Secretary of almost 1,500,000 acre-feet of water a year, to allocate virtually as he pleases in the event of any shortage preventing the fulfillment of all of his delivery commitments."[41] He went on to say:

> The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. *First*, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.[42]

Although some might disagree with the primary function standards are to serve, Mr. Justice Harlan's disagreement with the majority is well founded. Certainly such broad statements as "river regulation" or "improvement of navigation" do not provide any real guidelines within which the Secretary must

37 373 U.S. 546 (1963). Other cases on point are collected and discussed in 1 Davis, Administrative Law Treatise §§ 2.03-2.05 (1958).

38 70 Cong. Rec. 324 (1928).

39 43 U.S.C.A. § 617 et seq.

40 373 U.S. 546, 585 (1963).

41 *Id.* at 626.

42 *Id.*

exercise his discretion, nor do they provide a basis for judicial review of any challenged action. Some authors have argued in favor of more meaningful standards,[43] while others argue in favor of discretion.[44] Kenneth C. Davis accurately and succinctly summarized the current vitality of the non-delegation doctrine when he said:

> The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the non-delegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power.[45]

Delegation of Power to Control Prices, Rents, Wages, and Salaries

Initially, Congress passed the Emergency Price Control Act of 1942 which provided for the control of prices and rents. This Act was amended by the Inflation Control Act of 1942 which allowed control of wages and salaries.[46] This delegation was attacked in *Yakus v. United States*[47] as an unconstitutional delegation to the Price Administrator of legislative power. The petitioners were convicted of selling beef at prices above the established maximums. The Court sustained the delegation by finding adequate standards in section 2(a) of the Emergency Price Control Act and section 1 of the amendatory Inflation Control Act. The Court found that the Acts marked the "boundaries of the field of the Administrator's permissible action" by providing that (1) prices were to be fixed to effectuate the policy of the Acts, (2) prices were to be "fair and equitable," (3) "due consideration, so far as practicable," was to be given to prevailing prices during the designated base period, and (4) adjustments were to

[43] Merrill, *Standards—A Safeguard For The Exercise of Delegated Power*, 47 Neb. L. Rev. 469 (1968) says that standards (1) provide guidance for administrators in the application of statutes, (2) provide safeguards against unwarranted enlargement of legislative grants, (3) focus attention upon the public objectives of statutes, (4) limit the extension of discretion, (5) improves legislative draftsmanship, (6) that observation of standards impels exploration by the agencies as to the existence or absence of conditions justifying proposed action, and (7) they are required for effective judicial review of administrative action. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 863, 867 (1961-62) argues: "A prime source of justified dissatisfaction with the type of federal administrative action which I will shortly specify is the failure to develop standards sufficiently definite that decisions will be fairly predictable and that the reasons for them will be understood; this failure can and must be remedied."

[44] Wade, *Anglo-American Administrative Law: Some Reflections*, 81 L.Q. Rev. 357 (1965).

[45] Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713 (1969).

[46] Act of January 30, 1942, ch. 26, 56 Stat. 23, 50 U.S.C. Appx. Supp. II §§ 901 et seq; *as amended* by the Inflation Control Act, ch. 578, 56 Stat. 765, 50 U.S.C. Appx. Supp. II §§ 961 et seq (1942).

[47] 321 U.S. 414 (1944).

be made to compensate for factors affecting prices.[48] The rent control provisions of the Acts were sustained on the same day as the *Yakus* decision in *Bowles v. Willingham*.[49]

The Defense Production Act of 1950[50] was the second instance of general price, rent, wage, and salary control. There are no significant cases deciding the constitutionality of the delegation involved. The only United States Supreme Court case did not reach the delegation issue,[51] and lower federal court opinions declaring the delegation constitutional did not give reasons for their decisions.[52] However, taking cognizance of prior decisions upholding the 1942 controls and the similarity between the two Acts, there is little doubt that the delegation in the 1950 Act would have been found valid had the Supreme Court considered the question.

August 15, 1971, President Nixon by Executive Order No. 11615[53] imposed a freeze on prices, rents, wages, and salaries. The authority for this action was the Economic Stabilization Act of 1970.[54] Eight days after the freeze was imposed, the first action was filed attacking the Act as an unconstitutional delegation of legislative power.[55] Two actions were filed shortly thereafter,[56] but only in *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally*[57] has the constitutionality of the delegation been decided by a three-judge court. In refusing to grant an injunction against the enforcement of the Executive Order, the court found the Act to be a constitutional delegation containing adequate standards. As indicated throughout this article, the courts invariably find standards in all delegations; therefore, a review of the standards found in the *Meat Cutters* opinion will be of no value. Instead, the actual wording of the Economic Stabilizaton Act of 1970 is compared with the Emergency Price Control Act of 1942, as amended, in tabular form in the appendix. The 1942 Act was chosen over the Defense Production Act of 1950 because the 1942 Act was found by the United States Supreme Court to be a constitutional delega-

[48] *Id.* at 423.

[49] 321 U.S. 503 (1944).

[50] Act of September 8, 1950, ch. 932, 64 Stat. 798; *as amended*, ch. 275, 65 Stat. 131, ch. 530, 66 Stat. 296, ch. 171, 67 Stat. 129, 50 U.S.C. App. (1946 ed. Supp. V) § 2061 et seq.

[51] Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954).

[52] United States v. Huler Abattoirs, Inc., 108 F. Supp. 536 (E. D. Mich. 1952); Oak Mfg. Co. v. United States, 193 F. Supp. 514 (N.D. Ill. 1961). *See also* United States v. Ericson, 102 F. Supp. 376 (D. Minn. 1951); *appeal dismissed* 205 F.2d 420 (8th Cir. 1951) which held federal price regulation did not violate the due process clause of the fifth amendment of the United States Constitution.

[53] 36 Fed. Reg. 15727 (1971).

[54] *Supra* n.2.

[55] Zuckman v. United States, Civil Action No. 1696-71 (D.D.C., filed Aug. 23, 1971).

[56] Other actions filed include: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally, Civil Action No. 1833-71 (D.D.C., filed Sept. 10, 1971); and National Education Association of the United States v. Cost of Living Council, (D.D.C., filed Sept. 24, 1971).

[57] Civil Action No. 1833-71 (D.D.C., filed Sept. 10, 1971). Reported in BNA Federal Controls, Basic Texts, at 2:1315.

tion and because of the similarity of wording between the 1942 and 1950 Acts.

The table in the appendix shows that the substantive provisions of the 1942 and 1970 Acts, though worded somewhat differently, convey the same meaning when the 1970 Act is considered in conjunction with the implementing Executive Order No. 11615.[58] The primary difference is that the 1942 Act contains extensive procedural provisions while the 1970 Act contains none. This should not prove fatal to the Economic Stabilization Act of 1970 because section 203 provides, "The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate." Executive Order No. 11615 establishes the Cost of Living Council "which shall act as an agency of the United States." The Administrative Procedure Act defines agency broadly as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[59] This definition surely includes the Cost of Living Council and may include the President.[60] Therefore, through the Administrative Procedure Act, procedural provisions are incorporated into the 1970 Act reducing the dissimilarity between it and the 1942 Act. If the 1970 Act is considered by the Supreme Court, it will be found to be a constitutional delegation because of the similarity with the 1942 Act which was held to be constitutional.

The Need for a New Approach

By the first three articles and by article I, section 1, the framers of the Constitution did not mean to completely prevent congressional delegation. This conclusion flows from two facts:

(1) Considered unnecessary was Madison's motion at the Constitutional Convention that the President be given authority "to execute such other powers . . . as may from time to time be delegated by the national Legislature."[61]

(2) Numerous delegations were made by the first Congress which was composed predominantly of constitutional framers.[62]

58 *Supra* n.53.

59 5 U.S.C. § 701(b)(1).

60 Berger, *Administrative Arbitrariness—A Synthesis*, 78 Yale L.J. 965, 997 (1969); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. Pa. L. Rev. 823 (1966); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 769, 778, 781 (1958). Congress and the courts are expressly excluded from the definition of agency, thus fortifying the conclusion that the President is included in the definition.

61 1 Farrand, The Records of the Federal Convention of 1787 67 (1911).

62 The First Congress, without standards, delegated to the courts the power "to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States" (Judiciary Act of 1789, c. 20, § 17, 1 Stat. 73, 83); to district courts the power to impose "whipping, not exceeding thirty stripes" (*Id.* at 77); to the President the power to provide for military pensions "under such regulations as the President . . . may direct" (Act of Sept. 29, 1789, c. 24, § 1, 1 Stat. 95); and to the President the power to fix the pay for military personnel wounded in the line of duty (Act of April 30, 1790, c. 10, § 11, 1 Stat. 119, 121).

The courts have constructed the non-delegation doctrine block by block while at the same time continuing to allow delegation. It is a hollow, foundationless doctrine enshrouded in meaningless word formulas. It is time that the courts expressly recognize this in their opinions and replace the threadbare doctrine with new cloth capable of protecting the citizen from arbitrary and capricious discretionary action by administrative officials and agencies.

Today there are really only three possible limits on the exercise of unbridled discretionary power:

(1) The exercise of administrative power requires enabling legislation; therefore, Congress is free to limit or remove authority.

(2) Internal controls can be imposed by the administrative agency itself.

(3) Constitutional limitations are imposed by the Bill of Rights.

Congress, by careful initial draftsmanship of its enabling legislation and frequent evaluation of the actions of administrative officials or agencies, can effectively limit arbitrary discretion. Also, Congress could impose additional procedural safeguards by strengthening and broadening the scope of the Administrative Procedure Act.[63] However, from the nearly unlimited discretionary power historically granted by the legislature—and unfortunately sustained by the Court—it is apparent that this route will not prevent arbitrariness in administrative law. Likewise, the administrative agencies have not acted to contain their arbitrary exercise of power.[64] Of the three possible limitations, only those derived from the Bill of Rights appear to offer a plausible basis for future expanded protection.

Kent v. Dulles[65] is an example of a constitutional limitation. The Secretary of State, pursuant to an act of Congress, denied passports to petitioners because of their alleged communistic beliefs and their refusal to file affidavits concerning Communist party membership. The Court struck down the regulation under which the passports were denied because the right to travel is part of "liberty" and a citizen cannot be deprived of his liberty without due process of law under the fifth amendment. The fifth amendment is an ideal vehicle for transporting the individual outside the zone of arbitrary discretion of administrative officials and agencies. Through broader interpretation of the due process clause, greater procedural safeguards could be required in agency action, and increased judicial review could be provided. Hopefully, the courts will proceed further in the application of the Bill of Rights to reduce the zone of arbitrary discretion of administrative officials and agencies.

[63] *Supra* n.59, §§ 551-559.

[64] Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 863, 867 (1961-62).

[65] 357 U.S. 116 (1958). *But see* Zemel v. Rusk, 381 U.S. 1 (1965).

CONCLUSION

Based on past decisions of the United States Supreme Court, the Economic Stabilization Act of 1970 is not an unconstitutional delegation of legislative power. Standards at least as substantive as those accepted by the Court in the past are present in this Act. However, the requirement of standards first expressed in the *Panama Refining* and *Schechter* cases must be recognized for what it is—a flowing liquid capable of assuming the shape of any container and offering no resistance to the legislative will when Congress seeks to pour it into a new receptacle. It is time that the Court stop dangling the carrot of standards before prospective challengers of legislative delegations and offer true protection to individual citizens against arbitrary administrative action.

JACK PINE

APPENDIX*

Emergency Price Control Act of 1942	Inflation Control Act of 1942	Economic Stabilization Act of 1970	Remarks
§ 1(a) Purposes			The purposes stated in § 1(a) are so extensive that almost any action could be found to be included within them.
§ 1(b) Termination	§ 6	§ 206 See also § 202(a)	The termination provisions, other than the date, are surplus. Congress can always terminate the act; and the President, having discretion to issue "such orders and regulations as he may deem appropriate," (§ 202(a)) can effectively terminate the Act. This was also true of the Price Administrator under the 1942 Act.
§ 1(c) Applicability		§ 205	§ 205 allows an agency of the United States to bring an action "in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States. . . ."
§ 2(a) Stabilization and Statement of Considerations	§ 1	§ 202(a) & (b)	The President is "directed" by the Inflation Control Act to issue a general stabilization order. However, he has discretion in making adjustments; therefore, the result is the same as is achieved by § 202(a) & (b) of the 1970 Act.
		Ex.O. § 3(c)	There is no requirement of a "statement of considerations involved in the issuance of such regulation or order" in the 1970 Act. Slightly greater discretion has been given to the President under

			the 1970 Act than was possible under the 1942 Act.
§ 2(b) Declaration		§ 202(a) & (b)	No declaration is required by the 1970 Act. The 1942 Act seems, on its face, to be more restrictive in allowing rent control; but the definition of "defense-rental area" given by the Act (§ 302(d)) makes the apparent restriction illusory.
§ 3 Agricultural Commodities	§ 3		Ex.O. § 1(c) excludes agricultural products, thereby preventing challenge on this point.
§ 4(a) Contract Impairment	§ 4 & 5	§ 202(a) & (b)	The 1942 Act expressly allows contract impairment; whereas, the 1970 Act does not. Therefore, impairment of current contracts may violate the due process clause of the fifth amendment; but judging from prior decisions, this is unlikely.
§ 201 & 202 Administration and Delegation	§ 2 Delegation		Administrative procedure is provided for by Ex.O. §§ 2-6. Delegation is provided for by § 203 of the 1970 Act.
§ 203 and 204 Review			No procedural provisions are included in the 1970 Act; however, the Administrative Procedure Act appears to apply.
§ 205 Violation, Penalties, and Jurisdiction	§ 11 Penalties	§ 204 & 205	
§302 Definitions	§ 10		The inclusion of definitions in the 1970 Act would have reduced ambiguity and, thereby, reduced the discretion granted. However, terms are often undefined in statutes, leaving to the courts the determination of their meaning. Therefore, the lack of definitions would not appear to be fatal to the 1970 Act.

* The table in this appendix has been organized around the Emergency Price Control Act of 1942. Less relevant provisions of the Emergency Price Control Act and the Inflation Control Act of 1942 have been omitted for the sake of brevity. Also omitted are amendatory provisions of the Inflation Control Act. When a reference is to Executive Order No. 11615, the short form Ex.O. and the Executive Order section number are used.