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Rationing as a Proper Wartime Governmental Function†

Perry H. Taft*

INTRODUCTION

The magnitude of the present global conflict has already outstripped the scope of all past wars. As a result of this, the public is being inconvenienced in various and sundry ways and is likely to be more than merely inconvenienced before the existing war is terminated. Against this somber backdrop of a rather foreboding future, the trials and tribulations of the last World War seem insignificant by comparison. Two things seem to have contributed to insuring that the inconveniences of the present war will develop into hardships of major importance, involving every segment of our civilian population. First, our enemies have acquired territories which contain substantial sources of supply of some of our basic raw materials. Second, the scope of unrestricted submarine warfare by our enemies has imposed severe shipping limitations upon certain imported consumer commodities. It has therefore been necessary for our Government to impose controls to prevent the reduction of existing stocks of materials below a point which might endanger this country's ability to successfully prosecute the present war.

Certainly it has been necessary to husband drastically this country's basic critical materials so that its war production can be properly geared to full and complete utilization. War production control has thus been essentially a problem of coordination of the element of time so that the more important war plants can get first call on the most critical materials. On the other hand, so far as consumer's necessary goods are concerned, the problem is one primarily of an equitable distribution of the available stockpile. The priorities system is therefore used to effect war production control while an equitable apportionment of consumer's goods is obtained through the medium of rationing.1

†This article represents the views of the author only.
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1 See Baruch, American History in the War (1941) 47, 59. It should be noted that the Priorities System has now been supplanted by the Controlled Materials Plan.
Since rationing will inevitably lead to hardships and inconveniences, a natural resistance on the part of those affected is bound to occur. This resistance will usually diminish to a large extent because of patriotism and understanding, but a case of extreme hardship is very likely to result in litigation. A recent case\(^2\) is therefore of interest because it not only involved some elements of hardship but also because it involved a challenge of the validity of the first consumer rationing program of the present war. The defendant in that case refused to observe the tire rationing regulations\(^3\) which grew out of the tire freezing order\(^4\) as well as the order prohibiting sales of tires except upon the presentation of a proper certificate.\(^5\) When the Price Administrator sought to enjoin the disposal of new tires by defendant, contrary to these regulations, he contended that they were unconstitutional because they “effected a taking of property without due process of law or just compensation therefor”. The case is of added interest because it involved the ever perplexing problems of war power and delegation of legislative power.

### RATIONING AS A PROPER INCIDENT OF THE WAR POWER

Under our Federal Constitution, Congress has the power to declare war, provide for the common defense and to make all laws necessary and proper for the carrying on of war.\(^6\) Since the express power to declare war and to make laws necessary to the carrying out of war exists, it is evident that it includes the implied power to wage war with all the force necessary to make it effective.\(^7\) The immense scope of the present conflict would appear to permit a wide latitude to Congress in the exercise of its war power under present day circumstances, since the laws necessary to the carrying on of war would necessarily depend upon the size of the job to be done by our armed forces. Allocating of scarce and critical materials, as provided for in

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\(^7\) Stewart v. Kahn (1871) 78 U. S. (11 Wall.) 493.
the Priorities and Allocation Act,\(^8\) when considered in the light of the mechanized nature of our present war effort, would seem to be a proper incident of Congressional exercise of war power. As the Court so aptly stated in *United States v. Macintosh*:

"To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, therefore under the protection of the Constitution seized without due process of law in the ordinary sense of the term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and the other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."\(^9\)

It must therefore be conceded that in its determination of what measures are proper to promote our national war efficiency, Congress can, of the necessity borne of the times, exercise a wide discretion\(^10\) wholly unfettered by the normal peacetime restraints. To bear this out, one has only to recall the litigation that arose from legislation in the last war which seriously impeded and hampered the exercise of normal civilian activities. Some of the more illustrative examples were the prohibition of the manufacture and sale of alcoholic beverages,\(^11\) the regulation of prices of certain commodities,\(^12\) the taking over and operation of railroads,\(^13\) as well as the taking over and operation of telephone and telegraph lines.\(^14\) In each instance, the courts gave judicial approval of what were considered to be proper and necessary means of effectively waging war.

Even in peace times, where a proper relationship to this country's ability to wage war is established, war legislation can be enacted since it implements the power which must be exercised in case this country

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\(^{9}\) *United States v. Macintosh* (1931) 283 U.S. 605, 622.

\(^{10}\) *Ex parte Milligan* (1866) 71 U.S. (4 Wall.) 2; *Hamilton v. Kentucky Distilleries & Warehouse* Co. (1919) 251 U.S. 146.

\(^{11}\) *Hamilton v. Kentucky*, *ibid.*


is called upon to defend itself. Thus legislation having the effect of creating a reverence for one's country has a proper connection with the general war power of the constitution. The suspension of the operation of the statute of limitations also has a close and definite relation to the proper exercise of war power. Preparation of fighting men while a country is still at peace also has a direct and proper relation to the Congressional war power, since the existence of a fighting force is necessary to the ability of the country to be prepared in case of attack. It can thus be observed that legislation is proper as war power legislation even though it be admitted that its relation to the actual waging of war is somewhat remote at the time of its enactment.

Somewhat similar is the problem involved in legislation creating instrumentalities for war purposes, even though the country may not actually be engaged in a war at the time of their creation. Thus the creation of government corporations for the manufacture of merchant vessels, production of aircraft, as well as the creation of power for the manufacture of explosives bear a direct and substantial relation to the waging of war, whether or not at the time of their creation the country is actually at war, so that their propriety cannot be disputed.

What then, may we ask, can be said regarding the Priorities and Allocation Act? Restriction upon normal sources of supply of certain consumer commodities combined with the difficulty of effecting substitutes for replacement appear to make a strong case for the validity and desirability of such legislation. The wisdom of such legislation is apparent when it is remembered that sources of supply of such commodities have been cut off in increasing numbers, and when we observe that many of those commodities have a material relation to the health and morale of this country. In addition, the Act is not without some precedent, in that legislation was enacted during the last war which was designed to restrict the availability to consumers of necessary civilian commodities. Since the maintenance of the efficiency, health and morale of our civilian population has a substan-

17 Stewart v. Kahn, supra note 7.
19 Sloan's Shipyards v. United States Fleet Corp. (1922) 258 U.S. 549.
20 Clallam County v. United States (1923) 263 U.S. 341.
22 Highland v. Russell, supra note 12.
tial relation to this country's ability to successfully prosecute its war effort, and in view of the ability of legislation of this character to accomplish these ends, at least in part, it would seem that Congress has in this Act, enacted a proper and necessary measure pursuant to the exercise of its war power.

RATIONING REGULATIONS AS A PROPER DELEGATION OF LEGISLATIVE WAR POWER

Since our entry into World War II, rationing of quite a few consumer commodities has already been effected. The rationing regulations issued by the Office of Price Administration, which have executed this rationing program, illustrate a high point in an ever increasing trend toward delegation of its power by our legislative branch of government. A review of the historical background of such legislative delegation reveals that it gathers added momentum in time of stress, particularly in wartimes. The past several years, therefore, has seen an accelerated operational pace of our federal government, in which more and more our legislative branch has entrusted its powers with the executive so that the complex and varied problems raised by the pressure of the times could be swiftly and capably

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dealt with. The rationing regulations of the present war are based upon the broad legislative grant of power of the Priorities and Allocation Act already referred to. This Act contains a specific clause which provides the basis for the authority in the executive to ration, and it would appear that the prime question of importance with respect to this clause is a determination of whether or not it establishes sufficiently definite and intelligible standards. This is important because of the well known constitutional requirement that delegated power must provide a standard which will permit the proper exercise of that power upon the part of the executive branch. Otherwise Congress will be considered to have abdicated its legislative functions.

Normally, when the demands of war do not exist, the tendency of the courts is toward stricter interpretation of legislative delegation of power. Therefore, in normal times, a legislative grant which establishes a primary standard and places in the executive the "power to fill in the details" has been held valid, whereas legislation permitting an administrative official to exercise a modification of that legislation would be an improper delegation. The difference between these two grants would seem to rest upon the question of whether the executive is given the power to legislate rather than administer, and the latter certainly would not include the ability to "exercise unfettered discretion to make whatever regulations one thinks may be needed or advisable for the rehabilitation of industry". Even in peace times, however, where the power granted is that to act in the field of international affairs, a different measuring stick is used by

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23 Stat. (1941) 236, 41 U.S.C. (1943) §2(a)(2) prec. §1. "... Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." In the instant case, it was contended in court by defendants that the word "allocate" could not be interpreted to include the term "ration" within its context. The court, speaking from the bench, when granting a temporary injunction, did not sustain this contention.


the courts in determining the propriety of the legislative grant. As was stated in the Curtiss-Wright case:

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."28

Since a wider latitude of legislative grant is inherent in the international field, as distinguished from the domestic, little doubt can be raised against an even broader grant in times of war, if the grant is an incident of the war power of Congress. This principle is well stated by the Supreme Court in its decision upon the validity of legislation authorizing the President to take over the telephone and telegraph systems of the country, when it said:

"That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota Railroad Rate Case. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him."29

Thus, in effect, the Court sustained this far reaching delegation of power in the last war as it also did in the instance of legislation giving broad discretion to the executive in dealing with alien enemy property.30 Certainly, the great magnitude of the present war would lend support to the argument that the Priorities and Allocation Act not only is encompassed within the class of legislation sustained in the last war, but in addition, the complex and constantly changing character of this war lends emphasis to the need for legislation of this character so that the executive can be insured of the ability to meet any and all contingencies which might suddenly arise. In addition, an examination of the rationing clause in this Act reveals that very definite and specific standards have been set forth for the exer-

29 Supra note 14, at 183.
cise of executive action, which would add weight to the argument that it is a valid legislative grant.

The sub-delegative process by which the rationing orders were effected provides an interesting historical review of administrative governmental action. The Priorities and Allocation Act itself became law on May 31, 1941, as an amendment to the National Defense Act of June 28, 1940. Pursuant to the broad grant of the Act before this amendment, the President on January 7, 1941, created the Office of Production Management invested with the responsibility of allocating deliveries of materials. On April 11, 1941, the Chief Executive created the Office of Price Administration and Civilian Supply to assist in the making of studies with respect to price spiraling and rationing. Pursuant to the Act as amended, the Director of the Priorities Division of the Office of Production Management issued an order designed to conserve our rubber stockpile on June 20, 1941. On August 28, 1941, the President changed the title of the Office of Price Administration and Civilian Supply to that of the Office of Price Administration and at the same time abolished the Priorities Board and placed in the Office of Production Management the responsibility for performing the power granted by the Act as amended. Thus a foundation was laid for the issuance by the Office of Production Management of an order placing in the Director of the Priorities Division, the delegated authority which had been

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31 Supra note 23. §2(a)(2) is amended by the Second War Powers Act, 55 Stat. (1942) 841, 50 U.S.C. (1943) to include "facilities" as well as "materials."

32 Supra note 8.


34 Ibid. at 192. "Section 5. . . The Priorities Board shall . . . make recommendations with respect to . . . the allocation of deliveries and other related matters. In making its findings and recommendations, the Priorities Board shall take into account general social and economic considerations and the effect the proposed actions would have upon the civilian population."

35 Ibid. Section 2a (4). ". . . after the satisfaction of military defense needs, to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands."


38 Ibid. at 4483, Section 1b. "The Office of Production Management . . . is directed to . . . perform the functions and exercise all the power, authority, and discretion conferred upon the President by Public No. 89, 77th Cong., 1st Sess., entitled "An Act to amend the Act approved June 28, 1940, entitled "An Act to expedite the national defense, and for other purposes", in order to extend the power to establish priorities and allocate material", approved May 31, 1941."
placed in the Office of Production Management. The Director of the Priorities Division then issued the tire freezing order of December 10, 1941, and the tire certificate sales order of December 27, 1941, which also granted to the Office of Price Administration the authority to exercise the powers of the Office of Production Management in this respect. On December 30, 1941, the Office of Price Administration issued its first tire rationing regulations, the violation of which resulted in the injunction proceedings by the Office of Price Administration in the Bryan case.

It is obvious that an extensive series of sub-delegations occurred which at first blush might appear to be too broad in its nature. However, it is clear that even in the absence of express legislative authorization, the executive may sub-delegate his authority where it is difficult or impossible for him to exercise all the power granted to him. In the instant situation, we have the added factor of the Act as amended specifically providing for the exercise by the President of his power through his designated official and it is well settled that in such a case proper delegation has occurred. It may possibly be contended that rationing involves bureaucratic possibilities and yet the many and varied responsibilities placed upon the President in connection with its institution and enforcement give force to the conclusion that the basic Congressional intent with respect to rationing has been carried out in a manner commensurate with the circumstances. It is advanced, therefore, that proper delegation is present in the rationing regulations when a full and complete consideration is given to all the factors contributing to their establishment.

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41 Supra note 4.
42 Supra note 5.
43 Supra note 3.
44 Supra note 2.
46 Supra note 23. "... The President may exercise any power, authority or discretion conferred on him by this section, through such department, agency or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe."
47 Stoehr v. Wallace (1921) 255 U. S. 239.
RATIONING REGULATIONS AND "JUST COMPENSATION"

Of particular interest in the Bryan case was the argument that the tire rationing regulations effected a taking of property without due process of law and without just or any compensation, contrary to the Fifth Amendment. It was the contention of the defendants that the regulations placed them in the position of being at first unable to dispose of their stocks of tires and later of being permitted to make only a few sales under certificates even though during the entire period of time, liability for the ordinary incidents of their business such as rent, labor and utilities continued in force. Thus, they argued, the government in effect "had taken" their property and no compensation had been made to them for such "taking”.

It is well settled that the right of eminent domain is an incident of sovereignty, so that the clause in the Fifth Amendment providing for just compensation for property taken is merely a limitation upon the use of that power. It is well to remember, however, that the extent of the exercise of the power of eminent domain is a matter for the legislature to determine, with the proviso that just compensation be paid. Not only is private property, real and personal, subject to this right of eminent domain, but so also are franchises, as well as contracts. However, when an appropriation has occurred, it must be attended by compensation, unless it be shown that a consequential injury incident to frustration has occurred rather than a direct taking. Just as in the case of a direct taking, the Government is under the obligation of making just compensation if the existence of an implied contract on its part can be established. As was stated in the Lynah case:

"Whenever in the exercise of its governmental rights it takes property, the ownership of which it conceives to be in an individual, it impliedly promises to pay therefor.”

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50 Shoemaker v. United States (1893) 147 U.S. 282.
51 See Phelps v. United States (1927) 274 U.S. 341.
52 Wilmington & W. R. Co. v. Reid (1872) 80 U.S. (13 Wall.) 264.
56 United States v. Lynah (1903) 188 U.S. 445 at 465.
Thus the rendering of agricultural land as unfit by the construction of a government dam is compensable as in the *Lynah* case, whereas damage to riparian rights by similar activity on the part of the government would be considered as only incidental.\(^{57}\)

The existence of war cannot change the guarantees provided for in the Fifth Amendment\(^{58}\) and therefore all war legislation must be considered in the light of whether or not just compensation is warranted by the circumstances of its exercise. Therefore an actual taking of private property by the Government in the exercise of its war power creates an obligation to reimburse proper compensation\(^{59}\) as is also the case with respect to the implied contract doctrine unless the injury be shown to be purely consequential.\(^{60}\) As was so clearly stated in the *Legal Tender* cases:

"Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contract. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?"\(^{61}\)

A review of the cases reveals a strikingly apparent hardship involved when individuals' rights have crossed the path of military necessity. A lessening of value rather than an appropriation has been found to exist in the instance of an alcoholic beverage manufacturer who was seriously affected by legislation forbidding the sale of his products.\(^{62}\) The rendering impossible of the performance on a contract by the requisitioning of the plant's production was held to be merely frus-

\(^{57}\) Gibson *v.* United States (1897) 166 U.S. 269.


\(^{61}\) Knox *v.* Lee (1871) 79 U.S. (12 Wall.) 457, 551.

\(^{62}\) Jacob Ruppert *v.* Caffey (1919) 251 U.S. 264.
rationation and not an appropriation. A maximum price imposed upon goods previously contracted for sale at a higher price was held to be incidentally connected. On the other hand, where a contract for the construction of a ship was already partially completed and a contract for the providing of generated power through a designated canal were terminated by governmental action, just compensation was accorded. Factors which appear to lend weight to the right of compensation in the latter cases as distinguished from the former would seem to lie in the existence of near tangible rights combined with the exercise of power amounting to a practical requisitioning in the latter cases, while in the former we have intangible contract rights affected by government action having only an incidental relation at most to those rights.

How then do the facts in the Bryan case fit into this picture? At most, it would appear there has been a possible loss of business incident to an exercise of lawful power by the government pursuant to an act under the war power of Congress. Even if it be said that an actual appropriation be shown, it is established that damages resulting from the loss of business incident to a taking by the government are not recoverable as part of the compensation for the taking. Here, however, no appropriation has been shown, and as stated so well by Judge Harrison:

"Here, it is to be observed, no tires, tubes, or any other properties have been taken from Bryan. He still has (or would have if he had not sold them in defiance of the regulations) all of his tires, less those which he may have sold in obedience to the regulations and for which he received rationing certificates. In fact, under the law there has been no taking of defendants' property, simply a regulation for its disposition."

The decision in the instant case, therefore, reaffirms the doctrine of "consequential injury" and extends the application of that theory to the broad exercise of rationing power.

63 Supra note 54.
64 Morrisdale Coal Co. v. United States (1922) 259 U.S. 188.
65 Brooks Scanlon Corp. v. United States (1924) 265 U.S. 106.
66 International Paper Co. v. United States (1931) 282 U.S. 399.
68 Italics added. Supra note 2, at 685.
In attempting to categorize injuries attendant to the exercise of rationing authority, it would be well to keep several points in mind. It is well established that an interference with private rights, contract or otherwise, which results only in "consequential injury" will normally not create liability for compensation on the part of the government, even in war times. The test to be applied, seems to be dependent upon the degree of tangibility of the right, with the near tangible rights creating an implied contract on the part of the government to make just compensation. At the same time, the exercise of requisitioning power by the government is attended by an obligation to compensate therefor. In any event, however, a regulation for disposition, as in the instant case, is not a taking, since it merely imposes a restriction upon the manner in which commodities may be sold, and does not involve an actual appropriation of those commodities by the government. The Bryan case can therefore be considered of value in this respect, when we consider that the present rationing programs may be only a prelude to what may be found necessary before the war is over.