HB 215

<TARGET><BILL>HB 215</BILL><SUBJECT>HB 215</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA GASLINE DEVELOPMENT CORP.
GAS FOR ALASKANS

March 15, 2012

Joe Dubler
Vice President/Chief Financial Officer
Alaska Gasline Development Corporation
3301 C Street, Suite 100
Anchorage, Alaska 99503

Dear Mr. Dubler:

The question you have asked me to address is whether the shipment of natural gas recovered below the 68th Parallel in the pipeline currently under consideration by the Alaska Gasline Development Corporation ("AGDC") could expose the state to liability under AS 43.90.440(a).

AGDC has been very careful and deliberate to avoid creating liability under AS 43.90.440(a). The answer to your question is no.

The potential liability you have asked about arises in the context of the Alaska Gasline Inducement Act ("AGIA" at AS 43.90). AGIA authorized the Commissioner of Revenue and the Commissioner of Natural Resources, acting jointly (the "Commissioners"), to award a license which, under AS 43.90.110 entitles the licensee to certain inducements.

The stated purpose of AGIA (AS 43.90.010) is to encourage expedited construction of a natural gas pipeline that (1) facilitates commercialization of North Slope gas resources in the state; (2) promotes exploration and development of oil and gas resources on the North Slope in the state; (3)maximizes benefits to the people of the state from the development of oil and gas resources in the state; and (4) encourages oil and gas lessees and other person to commit to ship natural gas from the North Slope to a gas pipeline system for transportation to markets in this state or elsewhere. To further that purpose, the inducements in AS 43.90.110 include (1) matching state contributions for certain qualifying expenditures; (2) the benefit of an Alaska Gasline Inducement Act coordinator who has the authority prescribed in AS 43.90.250 (the "License Inducements") -- I note that AS 43.90.250 contains no explicit grant of authority to the coordinator. The application requirements set forth in AS 43.90.130 include a "thorough description of a proposed natural gas pipeline project for transporting natural gas from the North Slope to market. . . ."

In addition to the License Inducements, Article 3 of AGIA sets forth a "resource inducement" (AS 43.90.310), which is accompanied by a gas production tax exemption (AS 43.90.320), and a system of inducement vouchers (AS 43.90.330).

The foregoing summarization of AGIA provisions clearly demonstrate (as emphasized by the underlining) that AGIA's focus is on the transportation of "North Slope" natural gas. The definitions provisions of AGIA make it clear (as set forth below in this opinion) that "North Slope" means north of the 68th Parallel.

The potential liability to the state arises under AS 43.90.440(a). In that subsection, the state grants to the licensee assurances that the licensee has exclusive enjoyment of the inducements provided under this chapter before the commencement of commercial operations. If, before the commencement of commercial operations, the state extends to another person preferential royalty or tax treatment or grant of state money for the purpose of facilitating the construction of a competing natural gas pipeline project in this state, and if the licensee is in compliance with the requirements of the license and with the requirements of state and federal statutes and regulations relevant to the project, the licensee is entitled to payment from the state of an amount equal to three times the total amount of the expenditures incurred and paid by the licensee that are qualified expenditures for the purposes of AS 43.90.110 that the licensee incurred in developing the licensee's project before the date that the state first extended preferential treatment to another person.

For purposes of the liability described in the preceding paragraph, a "competing natural gas pipeline project" means a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market. (AS 43.90.440(c)(1)). AGIA defines "North Slope" to mean that part of the state that lies north of 68 degrees North latitude. (AS 43.90.900(16)).

It follows that the shipment of natural gas in any quantity cannot create a "competing natural gas pipeline project" if the gas is not "North Slope" gas, and gas is not "North Slope" gas unless it is recovered north of 68 degrees North latitude. As long as the AGDC pipeline is not designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market, the liability provisions of AS 43.90.440(a) will not apply.

Sincerely,

Kenneth E. Vassar
General Counsel
Alaska Gasline Development Corporation

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 15, 2011

SUBJECT: Review of CSHB 215(FIN) am (Work Order No. 27-LS0741\E.A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked for a review of CSHB 215(FIN) am (bill) to identify constitutional or statutory conflict. You specifically want to know how *Moore v. State*[1] may apply to the bill.

Local or special legislation.

Sections 1 - 4 of the bill relate to covenants in AS 38.35.120(a) that the Alaska Housing Finance Corporation (AHFC) would not be bound to agree to as a condition of receiving a right-of-way lease. The covenants in AS 38.35.120(a) were enacted by the legislature and the bill would make several of those covenants inapplicable to a lease entered into with AHFC. Carving out an exception to AHFC raises a question under art. II, sec. 19, Constitution of the State of Alaska, as to whether the exclusion unique to AHFC makes the bill a "local or special act" that is contrary to the prohibition. A general Act that excludes the same covenants for any gas pipeline could avoid the "local or special" question. The fact that AHFC is a public corporation and government instrumentality[2] may be a factor considered by the court if faced with a challenge under art. II, sec. 19.

Another factor that may be considered under a challenge under art. II, sec. 19, is the policy expressed in AS 38.35.010(a) of the Right-of-Way Leasing Act. AS 38.35.010(a) reads as follows:

> (a) The natural resources of this state in crude oil and natural gas and in its land for transportation of these resources and their products by pipeline toward markets both in and out of the state are capable of making a significant contribution to the general welfare of the people of this state.

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[1] 553 P.2d 8 (Alaska 1976).

[2] AS 18.56.020.

> It is the policy of this state that the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its residents, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment.

That policy, considered along with the enactment of ch. 7, SLA 2010, which created the Joint In-State Gasline Development Team in AHFC,[3] expresses the state policy to develop an in-state pipeline and have that project developed by AHFC.

In *Baxley v. State*,[4] the Alaska Supreme Court considered an Act that provided relief to a legislative enactment that gave effect to modifications of four state oil and gas leases in the Northstar Oil Field.[5] The Court concluded that the Act was not special legislation, "[b]ecause the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes[.]"

AHFC would not be required to agree to the covenants from which it is excluded under the bill. Considering the state policy expressed in AS 38.35.010 and the enactment of AS 38.34 (that requires AHFC to develop a gas pipeline project), it is likely that a court would find that the favorable treatment of AHFC in the bill relates to legitimate state purposes. It is reasonable to expect that a court would find that bill does not violate art. II, sec. 19, Constitution of the State of Alaska.

Standing and the limitations on actions relating to the right-of-way lease.

Sections 5 and 6 of the bill amend AS 38.35.200. Currently, AS 38.35.200 limits standing to object to a right-of-way lease, the period in which an objection must be raised, and the issues relating to the issuance of the right-of-way lease that are subject to judicial review.[6] The period for raising an objection is 60 days after the commissioner of

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[3] AS 38.34.030.

[4] 958 P.2d 422 (Alaska 1998).

[5] 958 P.2d at 424.

[6] Sec. 38.35.200. Judicial review of decisions of commissioner on application. (a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

natural resources (commissioner) publishes notice that an application for a right-of-way lease has been received under AS 38.35.070.

In *Moore v. State*, the case you mentioned in your request, the Alaska Supreme Court stated, "Whether a party has standing to obtain judicial resolution of a controversy depends on whether the party has sufficient personal stake in the outcome of the controversy."[7] The plaintiffs in *Moore*, who for the most part were commercial fishermen, claimed that they would be adversely affected if oil exploration and production were to be allowed in Kachemak Bay. The court concluded that the plaintiffs' interest in the outcome is essentially economic, and, "As such, it clearly meets the injury-in-fact requirement for standing."[8] Under the decision in *Moore*, the direct financial interest requirement for standing in the present AS 38.35.200 and in the proposed amended version may be satisfied by a person whose livelihood may be affected by a right-of-way lease or an action related to that lease. To secure standing, a person must raise the required objection with 60 days after the notice of an application has been published.

Section 5 of the bill limits standing to the same persons as in current law -- a competing applicant, a person that has a direct financial interest affected by the lease, and the applicant. The bill moves the placement of the naming of the applicant so that the amended AS 38.35.200(a) makes the 60-day period to object applicable to the competing applicant and the person with the directly affected financial interest, but removes the applicant from the requirement to raise an objection during the 60-day limitation period. This is logical because the basis for the applicant's appeal may not arise until the commissioner's decision on the application.

Section 5 further amends AS 38.35.200(a) by adding judicial review of "**an action described in (c) of this section**." Under the amended language, an applicant is not subject to the limitations in AS 38.35.200(c), which is added by sec. 6 of the bill. However, a competing applicant or a person with the affected direct financial interest must make an objection within the 60-day period described in AS 38.35.200(a) to have standing to seek judicial review. Although other provisions of law may provide for appeals of a state commissioner or agency action described in AS 38.35.200(c), the subsection is, after making an exception for the applicant under AS 38.35.200(a), prefaced with the phrase "notwithstanding any contrary provision of law. . . ." If a

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(1) failure to follow the procedures set out in this chapter; or

(2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process. (Sec. 1 ch. 72 SLA 1972; am. Sec. 19 ch. 3 FSSLA 1973)

[7] *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

[8] 553 P.2d at 24.

conflicting law is applicable but does not have a similar "notwithstanding" limitation, the conflict likely would be resolved in favor of the limitations in AS 28.35.200(c).

There may be an access to the courts issue raised if an action that is the basis for a person to seek judicial review is not reasonably foreseen during the 60-day period. The impacted person may still try to access the courts and challenge the 60-day period to acquire standing as barring access to the courts. Whether a court would set aside the 60-day period to acquire standing is difficult to predict; the outcome may depend on the issue that is presented and the alleged risk or harm.

In any case, the amended AS 38.35.200 is an incentive for anyone with even the remotest possibility of being affected by a right-of-way lease or an action related to that lease to raise an objection to preserve standing.

Applicability of art. VIII, sec. 10 of the Alaska constitution.

Article VIII, sec. 10, Constitution of the State of Alaska, prohibits leases of state lands "without prior public notice and other safeguards of the public interest as may be prescribed by law." The Right-of-Way Leasing Act provides for public notice, a hearing, and findings by the commissioner of natural resources before granting a right-of-way lease application, in whole or in part.

AS 38.35.020 authorizes the commissioner to grant a noncompetitive right-of-way lease. The requirements that must be met to be eligible for a right-of-way lease are within AS 38.35, as well as the process for applying. A person seeking a right-of-way lease begins the process by filing an application[9] that is followed by the publication of a notice stating that an application has been received.[10] It is the publication of this notice that starts the 60-day period for raising an objection and it is during this 60-day period that a person must establish standing to pursue judicial review under AS 38.35.200, as amended by the bill.

Consistent with the requirements in art. VIII, sec. 10 of the constitution, by enacting AS 38.35.070 the legislature required prior public notice before the commissioner may approve a lease application. AS 38.35.080 requires a public hearing and requires the commissioner to prepare an analysis of the application, which is made available at least 30 days before the date set for the hearing.

After the hearing, AS 38.35.100 requires the commissioner to determine and make a written finding on an application as to whether "the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the

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[9] AS 38.35.050.

[10] AS 38.35.070.

present or future public interest." If the commissioner finds the application may be granted, the commissioner may grant the application in whole or in part. The limitations in AS 38.35.200 in current law limit standing to seek judicial review of a decision made under AS 38.35.100.

Article VIII, sec. 10 of the state constitution requires that no lease of state land "shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The legislature has prescribed that there be notice of a right-of-way application (AS 38.35.070), analysis and public hearing (AS 38.35.080), and a decision by the commissioner based on written findings (AS 38.35.100). Whether this process satisfies the requirements in art. VIII, sec. 10, is a question of law which thus far has not been addressed by the Alaska Supreme Court. Under AS 38.35.200(c), as added by the bill, a claim alleging the invalidity must be brought within 60 days after the effective date of the Act enacting the subsection, and a claim alleging that an action will deny rights under the state constitution must be brought within 60 days after the date of an action.

The limitations on bringing a claim under AS 38.35.200(c) are set by law; the equitable remedy of laches is not applicable. With regard to the defense of laches, which is discussed in the *Moore* case, the Alaska Supreme Court wrote:[11]

> The defense of laches is inapplicable to an action at law. Although this proposition has never been directly asserted by the court, this was our implicit conclusion in *State v. Alex*, 646 P.2d 203, 215 (Alaska 1982). Moreover, limiting the defense of laches to equitable actions is in accord with the case law of virtually every other jurisdiction. When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of the right.

In *Moore v. State*, the defendants raised the defense of laches, and were successful in obtaining summary judgment in their favor on that basis on the lower court.[12] The Supreme Court reversed after reviewing the timing of events in the lease sale, from the call for nominations, through the lease sale, the issuance of the leases, the issuance of the first permits in November 1974, and the filing of the plaintiff's suit in December 1974.[13] The court found that the plaintiffs were "not guilty of inexcusable delay" and sufficient prejudice had not been established on the record.[14]

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[11] *Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059, 1064 - 1065 (Alaska 1994) (footnotes omitted).

[12] 553 P.2d at 14.

[13] 553 P.2d at 14 - 16.

[14] 553 P.2d at 16.

Actions by the Department of Environmental Conservation.

In the course of considering HB 215, concern was expressed over the effect of limiting review of the actions in the proposed AS 38.35.200(c) on the authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency. AS 38.35.200(d) was added in the House Judiciary Committee and was adopted in CSHB 215(JUD) to avoid this conflict.

This analysis may not be conclusive or address every issue raised by CSHB 215(JUD) am given the limited time available as the session ends. If you do hear the bill in your committee, you may wish to seek additional comments from the Department of Law, who would defend the enacted provisions of the bill.

If I may be of further assistance, please advise.

DMB:ljw
11-261.ljw

Cindy Smith

From: Badgley, Cori M (LAW) <cori.badgley@alaska.gov>
Sent: Thursday, March 29, 2012 11:44 AM
To: Cindy Smith
Cc: Hutchins, John C (LAW); Heese, Ruth Hamilton (LAW)
Subject: HB 215 (DNR ROW: instate gasline)
Attachments: Westlaw_Document_12_39_13.doc; Westlaw_Document_13_06_53.doc

Follow Up Flag: Follow up
Flag Status: Flagged

Cindy,

At the Senate Judiciary hearing yesterday on HB 215, Senator French requested that our attorney, John Hutchins, send the case citations for the U.S Supreme Court case he was discussing. That citation is *Yakus v. United States*, 321 U.S. 414 (1944).

In addition to the citation, I have also attached the court's opinion for Senator French and other committee members to review. We also thought it would be helpful to provide *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977), which much more explicitly uses *Yakus* to uphold a shorter period to bar a challenge to constitutionality.

We hope this helps answer some of the questions on this topic.

We are also working on putting together a response to Senator Paskvan's request relating to the Clean Water Act and the extent of federal jurisdiction. This is a complex area of law that is ever evolving. We will get a response to the committee on this as soon as possible.

Thank you.

Cori Badgley
Assistant Attorney General
Legislation and Regulations Section
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
cori.badgley@alaska.gov
(907) 465-2132

554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415
(Cite as: 554 F.2d 885)

United States Court of Appeals,
Eighth Circuit.
LLOYD A. FRY ROOFING CO., Appellant,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY et al., Appellees.

No. 76-1731.
Submitted March 15, 1977.
Decided May 11, 1977.

Alleged air polluter sought injunction against enforcement of Environmental Protection Agency's notice of violation and EPA order. The United States District Court for the Western District of Missouri, Elmo B. Hunter, J., 415 F.Supp. 799, dismissed and plaintiff appealed. The Court of Appeals, Matthes, Senior Circuit Judge, held (1) preenforcement review in the district court of notice of violations issued by the environmental protection agency under the Clean Air Act is precluded; (2) plaintiff must assert its claims as a defense or counterclaim in any action brought by the administrator; (3) statute providing that petition for review of administrator's action in promulgating any implementation plan may be filed only in the appropriate court of appeals and must be filed within 30 days of promulgation was applicable even though plaintiff challenged regulation as being unconstitutionally vague on its face.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 651

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak651 k. In General. Most Cited Cases

Administrative Procedure Act does not confer jurisdiction to review agency action where the regulatory statute itself precludes judicial review. 5 U.S.C.A. § 702.

[2] Administrative Law and Procedure 15A 751

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak751 k. Limitation of Scope of Review in General. Most Cited Cases

A congressional intent to limit review of agency action need not be express, but may be drawn from a statute's legislative history, purpose and design. 5 U.S.C.A. § 702.

[3] Environmental Law 149E 642

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek642 k. Air Pollution. Most Cited Cases
(Formerly 199k25.15(3.2), 199k25.15(1), 199k28 Health and Environment)

There being no express provision in the Clean Air Act prohibiting preenforcement judicial review of environmental protection agency abatement orders, agency had heavy burden to overcome strong presumption favoring such review. Clean Air Act, §§ 113, 113(a)(4), (b, c) as amended 42 U.S.C.A. §§ 1857c-8, 1857c-8(a)(4), (b, c); 5 U.S.C.A. § 702.

[4] Environmental Law 149E 642

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek642 k. Air Pollution. Most Cited Cases
(Formerly 199k25.15(1), 199k28 Health and Environment)

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Alleged violator of Clean Air Act lacks authority to maintain a preenforcement action to test the validity of an abatement order issued by the administrator of the Environmental Protection Agency and must assert its claims as a defense or counterclaim in any action brought by the administrator. Clean Air Act, § 113 as amended 42 U.S.C.A. § 1857c-8.

[5] Environmental Law 149E 670

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek670 k. Periods Applicable. Most Cited Cases
(Formerly 199k25.15(5), 199k28 Health and Environment)

Section of Clean Air Act providing that petition for review of administrator's action in promulgating any implementation plan must be filed in the appropriate court of appeals and within 30 days from date of such promulgation was applicable to review of regulation even though regulation was challenged as being unconstitutionally vague on its face. Clean Air Act, § 307(b)(1) as amended 42 U.S.C.A. § 1857h-5(b)(1).

[6] Constitutional Law 92 4324

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4324 k. Air Pollution. Most Cited Cases
(Formerly 92k278.1, 92k318(2))

Environmental Law 149E 669

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek669 k. In General. Most Cited Cases
(Formerly 199k25.15(5), 199k28 Health and Environment)

The 30-day time limit for filing petition for review of administrator's action under the Clean Air Act in promulgating any implementation plan is consistent with the legislative purpose and comports with due process. Clean Air Act, §§ 110, 307(b)(1) as amended 42 U.S.C.A. §§ 1857c-5, 1857h-5(b)(1); 5 U.S.C.A. § 706.

[7] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(9), 199k28 Health and Environment)

The importance which administrator of environmental protection agency is to accord to alleged polluter's efforts to comply with requirements of Clean Air Act is a matter of discretion. Clean Air Act, § 113(a)(4) as amended 42 U.S.C.A. § 1857c-8(a)(4).

***886** Thomas J. Leittem, Kansas City, Mo., for appellant; John H. Altergott, Jr., Kansas City, Mo., on the brief.

Maryann Walsh, Atty., Land and Natural Resource Div., Appellate Section, U. S. Dept. of Justice, Washington, D. C., for appellee; Peter R. Taft, Asst. Atty. Gen., Edmund B. Clark, Atty., and Todd M. Joseph, E. P. A., Washington, D. C., on the brief.

Before MATTHES, Senior Circuit Judge, and WEBSTER and HENLEY, Circuit Judges.

MATTHES, Senior Circuit Judge.

The primary question for determination on this appeal is whether an alleged violator of section 113(a)(1) of the Clean Air Act, 42 U.S.C. s 1857c-8(a)(1), is empowered to maintain a pre-enforcement action to test the validity of an abatement order issued by the Administrator of the Environmental Protection Agency (EPA). This is a question of first impression in the courts of appeals. Lloyd A. Fry Roofing Company (plaintiff) filed such an action against the United States Environmental Protection Agency, Russell Train, as EPA Administrator, Jerome H. Svore, as EPA Administrator for Region VII, and Earl J. Stephenson, as Director of the Enforcement Division for Region VII. The district court granted defendants' motion to dismiss the action

554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415
(Cite as: 554 F.2d 885)

for lack of subject matter jurisdiction and plaintiff has appealed from the dismissal.

I

Plaintiff operates an asphalt roofing plant in North Kansas City, Missouri. A by-product of its operation is a mixture of asphalt particles and gas which, after passing through the plant's air pollution control system, is emitted as a plume from a 100 foot high stack.

Effective January 5, 1969 the EPA Administrator approved certain regulations known as "Air Quality Standards and Air Pollution Control Regulations for the Kansas City Metropolitan Area," which had been submitted by Missouri as part of the state implementation plan pursuant to section 110(a) of the Clean Air Act, 42 U.S.C. s 1857c-5. Regulation V Restriction of Emission of Visible Air Contaminants prohibits the discharge of air contaminants of a certain density, except where failure to meet the requirement stems solely from the presence of "uncombined water." Regulation V provides in pertinent part as follows:

A. Restrictions Applicable to All Installations

No person may discharge into the ambient air from sources of emission whatsoever any air contaminant a.) of a shade or density equal to or darker than designated as No. 1 on the Ringelmann Chart, or b.) of such capacity (sic) as to obscure an observer's view to a degree equal to or greater than does smoke designated as No. 1 on the Ringelmann Chart.

B. Exceptions

***887** 2. Where the presence of uncombined water is the only reason for failure of an emission to meet the requirements of Section A of this Regulation V, such sections shall not apply.

C. Method of Measurement

The Ringelmann Chart shall be the standard in grading the shade or opacity of visible air contaminant emissions. The Executive Secretary may with the consent of the source operator employ any other means of measurement which give comparable results of greater accuracy.

On September 25, 1975, defendant Svore, as Regional Administrator of EPA, issued a notice informing plaintiff that it was in violation of Regulation V. The notice was based on visual smoke readings which indicated that the opacity of the plume from plaintiff's stack exceeded that allowable under Regulation V. Plaintiff requested an opportunity to confer with EPA representatives concerning the alleged violation. A formal evidentiary hearing was held on November 7, 1975 at EPA's Region VII office in Kansas City. By letter of January 9, 1976, plaintiff was directed to install sampling ports and scaffolding on the main stack in preparation for an EPA stack test. Plaintiff consented to the stack test, but refused to install the necessary equipment at its own expense. On March 9, 1976, defendant Stephenson, as Director of the Enforcement Division for Region VII, issued an order pursuant to section 113(a) (1) of the Clean Air Act, 42 U.S.C. s 1857c-8(a)(1) directing plaintiff to eliminate opacity violations within the time schedule set forth therein.

On April 13, 1976, plaintiff filed a verified complaint seeking a temporary restraining order and a preliminary injunction to set aside the notice of violation and order as being unlawful, arbitrary, and capricious. Additionally, plaintiff sought a declaratory judgment finding Regulation V unconstitutional. Plaintiff alleged, in effect, that it was in compliance with the regulation because it was emitting a "wet" plume of less than twenty percent opacity and that the regulation was unconstitutionally vague because it contained no definition of "uncombined water" and failed to advise the industry of the scope of prohibited conduct. Jurisdiction was asserted under the Administrative Procedure Act, 5 U.S.C. s 701 et seq., the federal question statute, 28 U.S.C. s 1331, the statute conferring jurisdiction over cases arising under statutes affecting commerce, 28 U.S.C. s 1337, and the mandamus statute, 28 U.S.C. s 1361.

On May 6, 1976, defendants filed a motion to dismiss the complaint insofar as it sought pre-enforcement review of the abatement order and judicial review of Regulation V. Defendants' motion to dismiss was based upon contentions that Congress intended to preclude pre-enforcement review of EPA abatement orders and to make the United States Court of Appeals the exclusive forum for review of federally approved state implementation plans. On June 25, 1976, the district court filed a judgment granting de-

fendants' motion to dismiss. The court concluded, in an accompanying memorandum opinion, that it lacked jurisdiction to grant the relief requested in plaintiff's complaint. See Lloyd A. Fry Roofing Co. v. United States Environmental Protection Agency, 415 F.Supp. 799 (W.D.Mo.1976).

II

We address, initially, the question whether the district court correctly ruled that it lacked jurisdiction to review the abatement order issued against plaintiff. Plaintiff argues, and the defendants concede, that even in the absence of any provision for judicial review there is a strong presumption in favor of judicial review of final agency action, and that to preclude such review there must be a showing of "clear and convincing evidence" of a contrary legislative intent, Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); see Dunlop v. Bachowski, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); Ortego v. Weinberger, 516 F.2d 1005, 1009 (5th Cir. 1975); Garvey v. Freeman, 397 F.2d 600, 605 (10th Cir. 1968). The crux of the controversy is whether the ***888** pertinent legislative history and the statutory scheme demonstrate that Congress intended to foreclose judicial review of an EPA compliance order in an action for pre-enforcement review instituted by an alleged violator.

Under section 113(a)(1) of the Clean Air Act, 42 U.S.C. s 1857c-8(a)(1), [FN1] whenever ***889** the Administrator finds that any person is in violation of a state implementation plan he must notify the alleged violator and the applicable state of his finding. If the violation continues unabated for thirty days, the Administrator may either issue an abatement order, which does not become effective until after the alleged violator has had an opportunity to confer with the Administrator, see 42 U.S.C. s 1857c-8(a)(4), or may commence a civil action for appropriate relief in the district court, pursuant to 42 U.S.C. s 1857c-8(b). Violators are subject to a fine of up to $25,000 for each day of violation and imprisonment for up to one year, see id. s 1857c-8(c).

FN1. Section 113 of the Clean Air Act, 42 U.S.C. s 1857c-8 provides in full:

s 1857c-8. Federal enforcement procedures Determination of violation of applicable implementation plan or standard; notification of violator; issuance of compliance order or initiation of civil action upon failure to correct; effect of compliance order; contents of compliance order

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 1857c-6(e) of this title (relating to new source performance standards), section 1857c-7(c) of this title (relating to standards

for hazardous emissions), or section 1857c-10(g) of this title (relating to energy-related authorities) is in violation of any requirement of section 1857c-9 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 1857c-7 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

Civil action for appropriate relief; jurisdiction; venue; notice to appropriate State agency

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or

(B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 1857c-6(e), 1857c-7(c), or 1857c-10(g) of this title; or

(4) fails or refuses to comply with any requirement of section 1857c-9 of this title.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

Penalties

(c)(1) Any person who knowingly

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) of this section, or

(C) violates section 1857c-6(e), section 1857c-7(c), or section 1857c-10(g) of this title

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

> (2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

[1][2] Section 702 of the Administrative Procedure Act, 5 U.S.C. s 702, does not confer jurisdiction to review agency action where the regulatory statute itself precludes judicial review, see Califano v. Sanders.--U.S. --, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977). Section 113 of the Act contains no provision specifically providing for pre-enforcement judicial review of an EPA abatement order, nor does it expressly preclude such review. A congressional intent to limit review need not be express, but may be drawn from a statute's legislative history, purpose, and design, see Consumer Federation of America v. FTC, 169 U.S.App.D.C. 136, 515 F.2d 367, 370 (1975); Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970). Our analysis begins, then, with a brief review of the legislative history of section 113, particularly the process by which it was enacted as part of the Clean Air Act Amendments of 1970, Pub.L.No. 91-604, 84 Stat. 1676 et seq.[FN2]

> FN2. The legislative history of the 1970 Amendments is fully discussed in Bonine, The Evolution of "Technology Forcing" in the Clean Air Act, Environment Reporter Monograph No. 21 (July 25, 1975) (hereinafter cited as Bonine); Luneburg, Judicial Review Under the Clean Air Act Amendments of 1970, 15 B.C.Ind. & Com.L.Rev. 667-78 (1974); Bolbach, The Courts and the Clean Air Act, Environment Reporter Monograph No. 19, at 1-3 (July 12, 1974); Comment, The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution, 14 B.C.Ind. & Com.L.Rev. 724-28 (1973); Note, Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 Geo.L.J. 153-59 (1972); see also Train v. Natural Resources Defense Council, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

In 1970 the Ninety-First Congress began considering proposals to amend the Air Quality Act of 1967, Pub.L.No. 90-148, 81 Stat. 485 et seq. (1967) to provide a more effective program to improve air quality. In considering amendments to the previous legislation, Congress expressed an awareness of the need to expedite the implementation and enforcement of air quality standards, see, e. g., H.R.Rep.No. 91-1146, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.Code Cong. & Admin.News, p. 5356; S.Rep.No. 91-1196, 91st Cong., 2d Sess. (1970). In the area of enforcement, the House bill, H.R. 17255, 91st Cong., 2d Sess. (1970) directed the Secretary of Health, Education and Welfare to issue a notice of violation to persons who failed to comply with state implementation plan requirements not being enforced by the states. The House proposal further authorized the Secretary to request the Attorney General to bring suit in cases where the state's failure to enforce its implementation plan extends more than thirty days after notification of violation. In a new section 112, the House provided for federal enforcement ***890** of federal emission standards for stationary sources. The House Amendments contained no language either specifically providing for or limiting judicial review.

The bill reported out by the Senate Committee on Public Works as S. 4358, 91st Cong., 2d Sess. (1970), established a new section 116(a) directing the Secretary to issue an abatement order to any person in violation of a state implementation plan not being enforced by the state or any federal stationary source emission standard requiring compliance to begin within seventy-two hours. The Secretary was additionally authorized to institute a civil action to obtain compliance with abatement orders. The Senate measure contained language specifically providing for pre-enforcement judicial review. The pertinent provision read as follows:

> (5) Any person subject to (an abatement order) and who undertakes compliance with such order shall not be foreclosed from instituting in the United States district court for the district in which the alleged violation occurred an action against the Secretary to challenge such order.

The House and Senate approved bills [FN3] were

then referred to a Conference Committee for reconciliation. The conferees, in reconciling the two bills, followed in the main the Senate measure, which as a whole, was more stringent and detailed than its House counterpart. See generally Bonine, supra note 2, at 11-21; Berlin, Federal Aid for Air and Solid Wastes Programs, Environmental Reporter Monograph No. 5, at 5 (October 2, 1970). The measure which emerged from the Conference Committee, and which was subsequently enacted into law as section 113 of the Act, 42 U.S.C. s 1857c-8, contained no language either providing for or limiting review. A reading of the report of the Conference Committee, see 1970 U.S.Code Cong. & Admin.News, p. 5374, sheds no light on the reason for the deletion of the Senate-approved language preserving the right to pre-enforcement review.

> FN3. The House and Senate bills, H.R. 17255 and S. 4358, are reprinted in full in A Legislative History of the Clean Air Amendments of 1970 (Jan. 1974) (prepared by the Environmental Policy Div., Cong. Research Serv., Library of Cong., for the Senate Comm. on Public Works, Serial No. 93-18).

Defendants point to the "silent deletion" as evidence of a "clear and convincing congressional intent" to preclude review. It is their theory that a person subject to an EPA abatement order can obtain review only by asserting his claim as a counterclaim or defense to a criminal or civil enforcement action commenced by the EPA pursuant to 42 U.S.C. s 1857c-8(b). This theory was adopted in large part by the district court, see Lloyd A. Fry Roofing Co. v. United States Environmental Protection Agency, supra at 805. Plaintiff contends that a more reasonable inference to be drawn from the deletion is that the Conference Committee recognized that the right to pre-enforcement review is so well established that specific provision for it need not be made. Thus, plaintiff argues, the deletion was meant to have no substantive effect.

[3] We recognize, of course, that there being no express provision in the Act prohibiting pre-enforcement judicial review of EPA abatement orders, the Agency bears a heavy burden to overcome the strong presumption favoring such review, see Dunlop v. Bachowski, supra, 421 U.S. at 567, 95 S.Ct. 1851. Nevertheless, the legislative history, when viewed together with the statutory language, the structure of the statutory scheme, and its design, does not support plaintiff's conclusion. First, the action of the Conference Committee in deleting language that would have expressly preserved the right to pre-enforcement review, although not by itself conclusive, strongly suggests that the intent of the omitted portion was rejected in the bill as passed, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

Secondly, as defendants note in their brief, pre-enforcement judicial review is ***891** wholly inconsistent with the enforcement mechanism established by Congress. Section 113 of the Act, 42 U.S.C. s 1857c-8, provides for two alternative methods of enforcement. If a violation of the Act continues unabated for more than thirty days after issuance of a notice of violation, the Agency may either (1) immediately commence a civil action for injunctive or other relief; or (2) issue a compliance order, which is not effective until after an informal administrative conference. Under the second alternative, if the order issued by the Agency is not met within the specified time or informal efforts to abate prove unsatisfactory, the Agency is authorized to initiate an action in the district court to compel compliance. Pre-enforcement review would severely limit the effectiveness of the conference procedure as a means to abate violations of the Act without resort to judicial process. Under plaintiff's reading of the statute, the Agency could easily side-step the possibility of pre-enforcement review by filing suit in the district court without prior issuance of an order pursuant to s 1857c-8(a)(1).

While this is a case of first impression, prior case law is entirely consistent with our conclusion. In West Penn Power Co. v. Train, 522 F.2d 302, 312 (3d Cir. 1975), for example, West Penn filed a complaint in the district court seeking injunctive and declaratory relief protecting it from any duty to comply with certain emission standards established as part of Pennsylvania's implementation plan after the Agency issued a notice of violation. In holding that the district court properly dismissed West Penn's complaint for lack of jurisdiction, the Third Circuit stated that at least two alternate avenues for relief would be available. First, the court noted, West Penn could seek redress in the state courts. Id. at 311. In describing the second route to relief the court stated as follows:

The second route to relief is opened by 42 U.S.C. s 1857c-8(a)(4) * * *. At the time West Penn brought this action, it had received only a notice of violation from Train. After receiving the notice, West Penn had the opportunity both for informally negotiating its differences with Train and for presenting its cause to a federal district court, should EPA take formal steps to enforce the regulations allegedly violated by West Penn. Thus West Penn has future relief available to it in both the state and federal courts.

Id. at 312 (emphasis added); accord, Reichhold Chemicals v. EPA, 8 Envir.Rep.Cases 1207 (7th Cir., June 2, 1975).

The Clean Air Act Amendments of 1970 were "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem." Union Electric Co. v. EPA, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976). Upon issuance of an EPA compliance order, the alleged violator is subject to penalties of up to $25,000 per day of violation and up to one year imprisonment. Plaintiff can protect itself from the unconscionable accumulation of large fines, however, by invoking the equitable doctrine of laches if the Agency fails to act promptly to seek enforcement.[FN4]

> FN4. Considering the heavy penalty to which a violator may be subjected, the Administrator is admonished to proceed expeditiously to institute enforcement proceedings in the event the alleged violator fails to comply with the timetable set forth in the abatement order so as to minimize any penalty which may be imposed.

[4] In sum, we are mindful that the pre-enforcement issue presents a close question. But we are persuaded by the legislative history of the Clean Air Act Amendments of 1970 to hold that plaintiff lacks authority to initiate and maintain litigation to challenge the EPA's order issued on March 9, 1976, and that plaintiff must assert its claims as a defense or counterclaim in any action brought by the Administrator of EPA under section 113 of the Clean Air Act, 42 U.S.C. s 1857c-8. The scales are balanced in favor of defendants by the action of the Conference Committee in deleting section 116(a)(5) of the Senate bill, which specifically and unequivocally sanctioned a pre-enforcement action by an alleged violator. Certainly Congress fully comprehended its power to grant access to ***892** the federal courts by any aggrieved person. And likewise, Congress knew that it could withhold such right. The course of passage of the House and Senate bills referred to supra convincingly demonstrate and reinforce this conclusion. The deletion of section 116(a)(5) of the Senate bill by the Conference Committee and the failure of the Congress itself to reincorporate a similar provision in the amended Clean Air Act impel us to rule that the Congress knowingly meant to and did foreclose plaintiff from maintaining this action.

For the foregoing reasons, we hold that the district court correctly determined that it lacked jurisdiction to review the disputed order.

III

We turn then to plaintiff's contention that the district court erroneously determined that it was without jurisdiction to review the constitutionality of Regulation V of the state implementation plan.

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. s 1857h-5(b)(1) [FN5] provides that review of the action of the Administrator in approving state implementation plans may be had within thirty days of such approval in the appropriate court of appeals. The district court held that since plaintiff had failed to challenge Regulation V in the court of appeals within thirty days or promulgation, its constitutional claims "were presented out of time and in the wrong forum." 415 F.Supp. at 806. It is plaintiff's contention that the exclusive jurisdiction of the court of appeals is not applicable here because the Regulation is challenged as being unconstitutionally vague on its face. [FN6] In plaintiff's view, a challenge based solely on a constitutional claim could not have been made in a section 307(b)(1) proceeding.

> FN5. Section 307(b)(1) provides:
>
> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be

> prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> FN6. Plaintiff argues that Regulation V does not provide a definite standard to advise industry of the scope of prohibited conduct, particularly because it contains no definition of the term "uncombined water."

[5] We disagree. Plaintiff's attack on the constitutionality of Regulation V falls directly within the purview of section 307(b)(1). As we noted in Union Electric Co. v. EPA, 515 F.2d 206 (8 Cir. 1975), the court of appeals, in reviewing the Administrator's action in approving state implementation plans, determines whether the Administrator's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, id. at 214; see 5 U.S.C. s 706. In making this determination, the court necessarily considers whether the plan itself is constitutional. See South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1st Cir. 1974).

[6] Plaintiff's contention that the section 307(b)(1) time limitation on its ability to challenge the constitutionality of the regulation does not comport with the requirements of due process is similarly without merit, cf. Union Electric Co. v. EPA, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). In **Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944)**, the Supreme Court ruled that a sixty day period allowed for protest of wartime price controls established under the Emergency *893 Price Control Act was not unreasonably short. The standard to be applied is whether the period allowed can be said to be reasonable under the circumstances, **id. at 435, 64 S.Ct. 660.** As we have noted, the purpose of the 1970 Amendments was to intensify federal efforts to check what was perceived to be a serious problem of air pollution. The thirty day time limit is fully consistent with the legislative purpose. Moreover, in section 110 of the Act, 42 U.S.C. s 1857c-5, Congress provided for reasonable notice and public hearings prior to the approval of a state implementation plan by the Administrator. The time limit is "not arbitrary but is designed to get issues resolved promptly and thereby prevent delay in cleaning the air." Granite City Steel Co. v. EPA, 501 F.2d 925, 926 (7th Cir. 1974).

Having failed to seek review of Regulation V of the state implementation plan within thirty days of the date of promulgation, plaintiff is now barred from doing so.

IV

[7] Finally, plaintiff argues that it was entitled to pre-enforcement review of its claim that the EPA failed to comply with certain duties mandated by statute. It is plaintiff's contention that the Administrator did not take into account its good faith and attempts to comply with the applicable requirements, in violation of section 113(a)(4) of the Act, 42 U.S.C. s 1857c-8(a)(4). We need not decide whether pre-enforcement review is available in this instance since the Administrator's order specifically stated that the " seriousness of (the) violation and any good faith efforts to comply" had been considered. Plaintiff is apparently challenging not a failure to consider this factor, but rather a failure to accord it controlling importance. This is plainly a matter of discretion.

The judgment is affirmed.

C.A.Mo. 1977.
Lloyd A. Fry Roofing Co. v. U.S. Environmental Protection Agency
554 F.2d 885, 10 ERC 1082, 7 Envtl. L. Rep. 20,415

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Supreme Court of the United States.
YAKUS
v.
UNITED STATES.
ROTTENBERG et al.
v.
SAME.

Nos. 374, 375.
Argued Jan. 7, 1944.
Decided March 27, 1944.

Albert Yakus, Benjamin Rottenberg, and B. Rottenberg, Inc., were convicted of making sales of wholesale cuts of beef at prices above maximum prices prescribed by Revised Maximum Price Regulation in violation of the Emergency Price Control Act, the convictions were affirmed, 137 F.2d 850, and the defendants bring certiorari.

Affirmed.

Mr. Justice RUTLEDGE, Mr. Justice ROBERTS, and Mr. Justice MURPHY, dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

West Headnotes

[1] War and National Emergency 402 ⚿1149

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1149 k. Power to regulate prices. Most Cited Cases
(Formerly 402k105, 402k4)

Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and the Emergency Price Control Act as amended by the Inflation Control Act was adopted in exercise of that power. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 961 et seq.

[2] War and National Emergency 402 ⚿1168

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1167 Establishment of Prices
402k1168 k. In general. Most Cited Cases
(Formerly 402k123, 402k4)

It is enough to satisfy the requirements of the Emergency Price Control Act that the Administrator finds that prices fixed will tend to achieve the objective of preventing inflation and will conform to statutory standards, and that the court in an appropriate proceeding can see that substantial basis for those findings is not wanting. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.

[3] Constitutional Law 92 ⚿2400

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2400 k. In general. Most Cited Cases
(Formerly 92k60, 15Ak205)

The Constitution does not require that Congress find for itself every fact upon which it desires to base legislative action, or that it make for itself detailed determinations which it has declared to be prerequisite to the application of legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

[4] Constitutional Law 92 ⚿2340

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases
(Formerly 92k50, 15Ak205)

Constitutional Law 92 ⚷2409

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2409 k. Fact finding. Most Cited Cases
(Formerly 92k50, 92k62(4), 92k62, 15Ak205)

The essentials of the "legislative functions" are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct, and the essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.

[5] Constitutional Law 92 ⚷2409

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2409 k. Fact finding. Most Cited Cases
(Formerly 92k62(4), 15Ak205, 92k62)

The fact that determination of facts and inferences to be drawn from them in light of statutory standards and declaration of policy call for exercise of judgment, and for formulation of subsidiary administrative policy within prescribed statutory framework is not objectionable.

[6] Constitutional Law 92 ⚷2409

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2409 k. Fact finding. Most Cited Cases
(Formerly 92k62(4), 15Ak205, 92k62)

The doctrine of separation of powers does not deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain conditions which Congress has made prerequisite to the operation of its legislative command.

[7] Administrative Law and Procedure 15A ⚷390.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak390.1 k. In general. Most Cited Cases
(Formerly 15Ak390, 283k103)

In passing on administrative regulations, the only concern of court is to ascertain whether will of Congress has been obeyed, and that depends, not on breadth of definition of facts or conditions which the administrative officer is to find, but upon determination whether definition sufficiently marks the field within which officer is to act so that it may be known whether he has kept within it in compliance with the legislative will.

[8] Constitutional Law 92 ⚷2340

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases
(Formerly 92k50)

The Constitution does not deny to Congress the necessary resources of flexibility and practicality to perform its function.

[9] Constitutional Law 92 ⚷2420

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2420 k. Foreign policy and national defense. Most Cited Cases
(Formerly 92k62(9), 92k62)

War and National Emergency 402 ⚷1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

In determining whether Emergency Price Control Act is an unconstitutional delegation of legislative power, it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.

[10] Constitutional Law 92 ⚷2406

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2406 k. In general. Most Cited Cases
(Formerly 92k62(1), 15Ak202.1, 92k62)

Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers, but it is free to avoid the rigidity of such a system and to choose instead the flexibility attainable by the use of less restrictive standards.

[11] Constitutional Law 92 ⚷2420

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2420 k. Foreign policy and national defense. Most Cited Cases
(Formerly 92k62(9), 92k62)

War and National Emergency 402 ⚷1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
~~402II(B)4 Price Control~~
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

Only if there was an absence of standards for guidance of the Price Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress had been obeyed, would court be justified in overriding congressional choice of means for effectuating declared purpose of preventing inflation. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.

[12] Constitutional Law 92 ⚷2420

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2410 To Executive, Particular Issues and Applications
92k2420 k. Foreign policy and na-

tional defense. Most Cited Cases
(Formerly 92k62(9), 92k62)

Where the Emergency Price Control Act prescribed the method of achieving legislative objective of fixing maximum prices to prevent inflation and laid down standards to guide Administrator's determination of both occasion for exercise of price-fixing power and particular prices to be established, the standards were sufficiently definite to enable Congress, the courts, and the public to ascertain whether the Administrator has conformed to those standards, and the act is not an unconstitutional "delegation of legislative power". Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq., Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.

[13] Federal Courts 170B 1140

170B Federal Courts
170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts
170Bk1131 Exclusive or Concurrent Jurisdiction
170Bk1140 k. War and emergency measures; renegotiation of war contracts. Most Cited Cases
(Formerly 106k518)

Where Emergency Price Control Act established the procedure for determining validity of Price Administrator's regulation, and conferred on Emergency Court of Appeals, and Supreme Court of review, exclusive jurisdiction to determine validity of Price Administrator's regulation, Federal District Court did not have power to consider validity of Price Administrator's regulation as defense to a criminal prosecution for violation of regulation. Emergency Price Control Act of 1942, ss 4(a), 203(a), 204(a—d), 205(b), 50 U.S.C.A. Appendix, ss 904(a), 923(a), 924(a—d), 925(b).

[14] War and National Emergency 402 1182

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1178 Review of Orders and Regulations
402k1182 k. Scope of review. Most Cited Cases
(Formerly 402k136, 402k4)

In considering hardship asserted for purpose of establishing invalidity of exclusive statutory procedure set up by Emergency Price Control Act for administrative and judicial review of price regulation, it was appropriate to take into consideration the purposes of the act and the circumstances attending its enactment and application as a wartime emergency measure. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.

[15] Administrative Law and Procedure 15A 681.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak681.1 k. In general. Most Cited Cases
(Formerly 15Ak681)

Constitutional Law 92 4028

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4028 k. Judicial review. Most Cited Cases
(Formerly 92k318(7), 92k318)

The restriction of judicial review of administrative determination to a single court does not offend against "due process of law" so long as it affords to those affected a reasonable opportunity to be heard and present evidence. U.S.C.A.Const. Amend. 5.

[16] Constitutional Law 92 889

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitu-

tional Questions; Standing
92VI(A)10 Due Process
92k888 Criminal Law
92k889 k. In general. Most Cited Cases
(Formerly 92k42.1(3), 92k42)

In prosecution for violating Price Administrator's maximum price regulation established under Emergency Price Control Act, the act could not be construed as denying "due process of law" on ground that 60-day period allowed for filing protest against regulation was insufficient, that procedure before Administrator was inadequate, that act precluded interlocutory injunction staying enforcement of price regulation before final adjudication of its validity, and that trial of validity of regulation was excluded from criminal trial for its violation, where accused had failed to seek administrative remedy and statutory review which were open to them. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.; U.S.C.A.Const. Amend. 5.

[17] Constitutional Law 92 ⚿1022

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1022 k. Due process. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4), 92k48)

Where Emergency Price Control Act authorized any person subject to any regulation of Price Administrator to file protest and authorized any person aggrieved by ruling on protest to appeal to Emergency Court of Appeals, in absence of any proceeding before Administrator, Supreme Court could not assume that Administrator would fail in performance of any duty imposed on him, or that he would deny due process, to person subject to a regulation. Emergency Price Control Act of 1942, §§ 203(a), 204(a–d), 50 U.S.C.A.Appendix, §§ 923(a), 924(a–d); U.S.C.A.Const. Amend. 5.

[18] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1183

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1178 Review of Orders and Regulations
402k1183 k. Proceedings on review. Most Cited Cases
(Formerly 402k137, 402k4)

Where Emergency Price Control Act authorized any person subject to any regulation of Price Administrator to file protest within 60 days and authorized any person aggrieved by ruling on protest to appeal to Emergency Court of Appeals, the authorized procedure was not incapable of affording protection to accused's rights required by "due process of law". Emergency Price Control Act of 1942, §§ 203(a), 204(a-d), 50 U.S.C.A.Appendix, §§ 923(a), 924(a-d); U.S.C.A.Const. Amend. 5.

[19] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal

Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

The 60-day period allowed by Emergency Price Control Act for protest against Price Administrator's regulation is not unreasonably short in view of urgency and exigencies of wartime price regulation. Emergency Price Control Act of 1942, § 203(a), 50 U.S.C.A.Appendix, § 923(a); Federal Register Act § 7, 44 U.S.C.A. § 307; U.S.C.A.Const. Amend. 5.

[20] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

Where Emergency Price Control Act authorized any person subject to regulation of Price Administrator to file protest within 60 days, and provided for hearing before Administrator, the act could not be held invalid on ground that the administrative hearing provided for would prove inadequate. Emergency Price Control Act of 1942, § 203(a), 50 U.S.C.A.Appendix, § 923(a); U.S.C.A.Const. Amend. 5.

[21] War and National Emergency 402 ⚿1182

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1178 Review of Orders and Regulations
402k1182 k. Scope of review. Most Cited Cases
(Formerly 402k136, 402k4)

The Emergency Court of Appeals has power, under the Emergency Price Control Act, to review all questions of law, including the question whether Price Administrator's determination on protest against price regulation is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceeding. Emergency Price Control Act of 1942, § 204(a–d), 50 U.S.C.A.App. § 924.

[22] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k298(1))

War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

The Emergency Price Control Act which authorizes any person subject to regulation of Price Administrator to file protest within 60 days does not deny "due process of laws" because of inconvenience to

protestants in being required to make their protest to the Administrator in Washington, D. C. Emergency Price Control Act of 1942, § 203(a), 50 U.S.C.A.Appendix, § 923(a); U.S.C.A.Const. Amend. 5.

[23] Constitutional Law 92 ⚿4264

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4264 k. Charges and prices in general. Most Cited Cases
(Formerly 92k307, 92k298(1), 92k305)

War and National Emergency 402 ⚿1211

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1211 k. Injunction against enforcement of price controls. Most Cited Cases
(Formerly 402k163, 402k4)

The statutory prohibition of a temporary stay or injunction against the regulation of Price Administrator under Emergency Price Control Act does not deny "due process of law" in view of fact that no one is compelled to sell any commodity, and the Act provides an expeditious means of testing validity of any price regulation without necessarily incurring any of the penalties of the act. Emergency Price Control Act of 1942, §§ 4(d), 203(a), 204(c), 50 U.S.C.A.Appendix, §§ 904(d), 923(a), 924(c); Rules of United States Emergency Court of Appeals, rule 4(a). 50 U.S.C.A.Appendix following section 924; U.S.C.A.Const. Amend. 5.

[24] War and National Emergency 402 ⚿1177

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1177 k. Objections to orders, regulations, and prices. Most Cited Cases
(Formerly 402k132, 402k4)

One of the objects of Emergency Price Control Act authorizing protest against price regulation is to enable Price Administrator more fully to inform himself regarding the wisdom of a regulation through evidence of its effect on particular cases, and in the light of that information he is authorized to grant or deny a protest in whole or in part. Emergency Price Control Act of 1942, §§ 2(a), 201(d), 203(a), 50 U.S.C.A.App. §§ 902, 921, 923.

[25] Constitutional Law 92 ⚿1009

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1009 k. Economic legislation. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4), 92k48)

Where Emergency Price Control Act gave Price Administrator wide scope for exercise of discretionary power to modify or suspend regulation pending its administrative and judicial review, in passing on validity of provision of the act which prohibited a temporary stay or injunction, the Supreme Court could not assume that accused, had they applied to the Administrator would not have secured all the relief to which they were entitled. Emergency Price Control Act of 1942, §§ 2(a), 203(a), 204(a), 50 U.S.C.A.Appendix, §§ 902(a), 923(a), 924(a).

[26] Constitutional Law 92 ⚿4028

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4028 k. Judicial review. Most Cited Cases
(Formerly 92k318(7), 15Ak232, 92k318)

The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of "due process of law." U.S.C.A.Const.Amend. 5.

[27] War and National Emergency 402 ⚿1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

Where the alternatives are wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress may constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Emergency Price Control Act of 1942, § 204(c), 50 U.S.C.A.App., § 924.

[28] Injunction 212 ⚿1078

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1077 Discretionary Nature of Remedy
212k1078 k. In general. Most Cited Cases
(Formerly 212k135)

The award of an interlocutory injunction by courts of equity is not a matter of right, even though irreparable injury may otherwise result to the plaintiff.

[29] Injunction 212 ⚿1078

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1077 Discretionary Nature of Remedy
212k1078 k. In general. Most Cited Cases
(Formerly 212k135)

Injunction 212 ⚿1109

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1109 k. Balancing or weighing hardship or injury. Most Cited Cases
(Formerly 212k138.15, 212k136(3))

Even in suits in which only private interests are involved, the award of an interlocutory injunction is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.

[30] Injunction 212 ⚿1595

212 Injunction
212V Actions and Proceedings
212V(G) Determination
212k1595 k. Conditions. Most Cited Cases
(Formerly 212k153)

Equity court will avoid inconveniences and injuries to parties so far as may be, by attaching conditions to award of an interlocutory injunction.

[31] Injunction 212 ⚿1100

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1100 k. Public interest considerations. Most Cited Cases
(Formerly 212k138.12, 212k137(1))

Where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot com-

pensate, the court may in public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.

[32] Constitutional Law 92 ⚷2374

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2374 k. Practice of law. Most Cited Cases
(Formerly 92k52)

Constitutional Law 92 ⚷4055

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)2 Governments and Political Subdivisions in General
92k4055 k. In general. Most Cited Cases
(Formerly 92k253(1), 92k253)

The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of "due process of law" or an usurpation of judicial functions. U.S.C.A.Const. Amend. 5.

[33] Administrative Law and Procedure 15A ⚷470

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak469 Hearing
15Ak470 k. Necessity and purpose in general. Most Cited Cases

Constitutional Law 92 ⚷3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and timing of deprivation; pre- or post-deprivation remedies. Most Cited Cases
(Formerly 92k318(7), 92k318)

Where justified by compelling public interest, the Legislature may authorize summary action subject to later judicial review of its validity.

[34] Federal Courts 170B ⚷1.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk1 Judicial Power of United States; Power of Congress
170Bk1.1 k. In general. Most Cited Cases
(Formerly 170Bk1, 106k258)

Under its constitutional power to define jurisdiction of inferior federal courts, Congress had power to create the Emergency Court of Appeals, give it exclusive equity jurisdiction to determine validity of price regulations prescribed by Price Administrator under Emergency Price Control Act, and to foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation. Emergency Price Control Act of 1942, s 204(d), 50 U.S.C.A.Appendix, s 924(d).

[35] Administrative Law and Procedure 15A ⚷391

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak391 k. Determination of validity; presumptions. Most Cited Cases

Constitutional Law 92 ⚷4026

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4026 k. Rules and regulations. Most Cited Cases
(Formerly 92k318(1), 92k318)

There is no constitutional requirement that test of validity of administrative regulation be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process.

[36] Constitutional Law 92 2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and procedure in general. Most Cited Cases
(Formerly 92k55)

There is no principle of law, or provision of Constitution, which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for adjudication of its validity, or which precludes the practice of splitting the trial for violations of administrative regulations by committing the determination of the issue of its validity to the agency which created it, and the issue of violation, to court which is given jurisdiction to punish violations.

[37] Constitutional Law 92 2355

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2354 Establishment, Organization, and Jurisdiction of Courts
92k2355 k. In general. Most Cited Cases
(Formerly 92k56, 106k518)

Criminal Law 110 113

110 Criminal Law
110IX Venue
110IX(A) Place of Bringing Prosecution
110k113 k. Offenses against United States. Most Cited Cases

War and National Emergency 402 1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k133.1, 402k133, 402k4)

Where the Emergency Price Control Act created the Emergency Court of Appeals with exclusive jurisdiction to determine validity of price regulations prescribed by Price Administrator and foreclosed any further or other considerations of the validity of a regulation as a defense to prosecution for violation of regulation, the act does not contravene the Sixth Amendment or work an unconstitutional legislative interference with the judicial power. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 961 et seq.; U.S.C.A.Const. Amend. 6.

[38] Constitutional Law 92 953

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k953 k. Delay in assertion of rights; laches. Most Cited Cases
(Formerly 92k43(1))

A constitutional right may be forfeited in criminal cases as well as in civil cases by the failure to make timely assertion of the rights before a tribunal having jurisdiction to determine it.

[39] Jury 230 14(1)

230 Jury
230II Right to Trial by Jury
230k14 Particular Actions and Proceedings
230k14(1) k. In general. Most Cited Cases

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Emergency Price Control Act of

1942, § 204(a–d), 50 U.S.C.A. Appendix, § 924(a–d); U.S.C.A. Const.Amend. 7.

[40] War and National Emergency 402 ⚿1217

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1216 Offenses Against Price Controls
402k1217 k. In general. Most Cited Cases
(Formerly 402k167.1, 402k167, 402k4)

Subject to the requirements of due process, Congress could make criminal the violation of a price regulation issued by administrative official under legislative authority. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq.

[41] Criminal Law 110 ⚿113

110 Criminal Law
110IX Venue
110IX(A) Place of Bringing Prosecution
110k113 k. Offenses against United States. Most Cited Cases
(Formerly 110k13)

Jury 230 ⚿35(1)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k35 Effect of Provision for Other Remedy
230k35(1) k. In general. Most Cited Cases

Where indictment charged violation of price regulation in district of trial and question whether accused committed the crime by willful disobedience of price regulation was properly submitted to jury, the accused were not denied the right to "trial by jury" even though they were not permitted to attack validity of the regulation, in view of other adequate opportunity to establish invalidity of the regulation. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.; U.S.C.A.Const.Amends. 6, 7.

War and National Emergency 402 ⚿1148

402 War and National Emergency
402II Measures and Acts in Exercise of Federal Power
402II(B) Particular Measures, Orders, and Regulations
402II(B)4 Price Control
402k1146 Constitutional and Statutory Provisions
402k1148 k. Validity. Most Cited Cases
(Formerly 402k104, 402k4)

Where the Emergency Price Control Act prescribed the method of achieving legislative inflation and laid down standards to guide Administrator's determination of both occasion for exercise of price-fixing power and particular prices to be established, the standards were sufficiently definite to enable Congress, the courts, and the public to ascertain whether the Administrator has conformed to those standards, and the act is not an unconstitutional "delegation of legislative power". Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 901 et seq., Inflation Control Act of 1942, § 1 et seq., 50 U.S.C.A.App. § 961 et seq.

****664 *417** Mr. Leonard Poretsky, of Boston, Mass., for petitioners.

Mr. Joseph Kruger, of Boston, Mass., for petitioner in No. 374.

Mr. William H. Lewis, of Boston, Mass., for petitioners in 375.

Mr. Charles Fahy, Sol. Gen., of Washington, D.C., for respondent.

Messrs. Maxwell C. Katz, Otto C. Sommerich and Benjamin Busch, of New York City, amici curiae.

***418** Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our decision are: (1) Whether

the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U.S.C.App.Supp. II, s 901 et seq., 50 U.S.C.A. Appendix, s 901 et seq., as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C.App.Supp. II, s 961 et seq., 50 U.S.C.A. Appendix, s 961 et seq., involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether s 204(d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by ss 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, s 204(d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of ss 4(a) and 205(b) of the Act by the willful sale of wholesale cuts of best at prices above the maximum prices prescribed by ss 1364.451—1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed.Reg. 10381 et seq. Petitioners have not availed themselves of the procedure set up by ss 203 ****665** and 204 by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be ***419** reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. When the indictments were found the 60 days period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. In particular petitioners offered evidence, which the District Court excluded as irrelevant, for the purpose of showing that the Regulation did not conform to the standards prescribed by the Act and that it deprived petitioners of property without the due process of law guaranteed by the Fifth Amendment. They specifically raised the question reserved in Lockerty v. Phillips, supra, whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals for the First Circuit affirmed, 137 F.2d 850, and we granted certiorari, 320 U.S. 730, 64 S.Ct. 190.

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in s 1(b) for its termination on June 30, 1943, unless sooner ***420** terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory act of October 2, 1942, it was extended to June 30, 1944.

Section 1(a) declares that the Act is 'in the interest of the national defense and security and necessary to the effective prosecution of the present war', and that its purposes are:

'to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, * * * and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of

values; * * *.'

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by s 2(a) and by s 1 of the amendatory Act of October 2, 1942, and Executive Order 9250, 50 U.S.C.A.Appendix, s 901 note, promulgated under it. 7 Fed.Reg. 7871. By s 2(a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.'

***421** The section also directs that

'So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal ****666** or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) * * * and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including * * *. Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.'

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries 'so far as practicable' on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, s 4 of Executive Order No. 9250, he has directed 'all departments and agencies of the Government' 'to stabilize the cost of living in accordance with the Act of October 2, 1942.'[FN1]

FN1 The parties have not discussed in briefs or on argument, and we do not find it necessary to consider, the precise effect of this direction to stabilize prices 'so far as practicable' at the levels obtaining on September 15, 1942, upon the standards laid down by Section 2(a) of the Act and the discretion which they confer on the Administrator.

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum ***422** prices for the sale at wholesale of specified cuts of beef and veal. As is required by s 2(a) of the Act, it was accompanied by a 'statement of the considerations involved' in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942,[FN2] and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

FN2 The use of the March 16-28, 1942, base period is explained by the fact that wholesale meat prices had already been stabilized at approximately that level by Maximum Price Regulation No. 169 as originally issued on June 19, 1942, 7 Fed.Reg. 4653, and by the General Maximum Price Regulation issued April 28, 1942, 7 Fed.Reg. 3153, which forbade the sale of most commodities at prices in excess of the highest price charged by the seller during March, 1942. The Statement of Considerations accompanying the latter, 2 C.C.H. War Law Service—Price Control, 42,081, explains in some detail the considerations impelling the Administrator to the conclusion that stabilization at the levels obtaining in March, 1942 would be fair and equitable and would effectuate the purposes of the Act; it considers the price levels prevailing during October 1-15, 1941, and gives reasons why price stabilization at those levels would not be practicable. The Statement of Considerations accompanying Maximum Price Regulation No. 169 as originally issued, 2 C.C.H War Law Ser-

vice—Price Control, 43,369A, refers to this discussion in explanation of the continuance of the use of March, 1942, levels as a base.

[1] 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 ***423** features of the Act later to be considered which are challenged on constitutional grounds.

[2] Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give ****667** due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in s 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in s 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

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. Compare Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; ***424**Hampton Jr. & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; Opp Cotton Mills v. Administrator, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624; National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

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 309, 60 S.Ct. at page 915, 84 L.Ed. 1263.

[3][4][5] The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ***425** ascertained from relevant data by a designated administrative agency, it

directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See Opp Cotton Mills v. Administrator, supra, 312 U.S. at pages 145, 146, 61 S.Ct. at pages 532, 533, 85 L.Ed. 624, and cases cited.

[6][7] Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say ****668** whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

[8][9][10][11] As we have said: 'The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function.' Currin v. Wallace, supra, 306 U.S. at page 15, 59 S.Ct. at page 387, 83 L.Ed. 441. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See Union Bridge Co. v. United States, 204 U.S. 364, 386, 27 S.Ct. 367, 374, 51 L.Ed. 523. Congress is not confined ***426** to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare McCulloch v. Maryland, 4 Wheat. 316, 413 et seq., 4 L.Ed. 579. It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. Hampton v. United States, supra, 276 U.S. pages 408, 409, 48 S.Ct. at pages 351, 352, 72 L.Ed. 624. Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

[12] The standards prescribed by the present Act, with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare Kiyoshi Hirabayashi v. United States, supra, 320 U.S. at page 104, 63 S.Ct. at page 1387, 87 L.Ed. 1774. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in Sunshine Anthracite Coal Co. v. Adkins, supra, or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in Dakota Cent. Tel. Co. v. State of South Dakota, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are 'reciprocally unequal and unreasonable', held valid in Field v. Clark, supra (143 U.S. 649, 12 S.Ct. 504, 36 L.Ed. 294).

***427** The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see Sunshine Anthracite Coal Co. v. Adkins, supra, and cases cited; or the power to approve consolidations in the 'public interest', sustained in New York Cent. Securities Corp. v. United States, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 48, 77 L.Ed. 138 (Compare United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208); or the power to regulate radio stations engaged in chain broadcasting 'as public interest, convenience or necessity requires', upheld in National Broadcasting Co. v. United States,

supra, 319 U.S. at page 225, 63 S.Ct. at pages 1013, 1014, 87 L.Ed. 1344; or the power to prohibit 'unfair methods of competition' not defined or forbidden by the common law, Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 54 S.Ct. 423, 426, 78 L.Ed. 814; or the direction that in allotting marketing quotas among states and producers due consideration**669 be given to a variety of economic factors, sustained in Mulford v. Smith, supra, 307 U.S. at pages 48, 49, 59 S.Ct. at page 652, 653, 83 L.Ed. 1092; or the similar direction that in adjusting tariffs to meet differences in costs of production the President 'take into consideration' 'in so far as he finds it practicable' a variety of economic matters, sustained in Hampton Jr. & Co. v. United States, supra (276 U.S. 394, 48 S.Ct. 349, 72 L.Ed. 624); or the similar authority, in making classifications within an industry, to consider various named and unnamed 'relevant factors' and determine the respective weights attributable to each, held valid in Opp Cotton Mills v. Administrator, supra.

II.

We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation under ss 4(a) and *428 205(b). Section 203(a) sets up a procedure by which 'any person subject to any provision of (a) regulation (or) order' may within 60 days after it is issued 'file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.' He may similarly protest later, on grounds arising after the expiration of the original sixty days. The subsection directs that within a reasonable time and in no event more than thirty days after the filing of a protest or ninety days after the issue of the regulation protested, whichever is later, 'the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.'

Section 204(c) creates a court to be known as the Emergency Court of Appeals consisting of United States district or circuit judges designated by the Chief Justice of the United States. Section 204(a) authorizes any person aggrieved by the denial or partial denial of his protest to file a complaint with the Emergency Court of Appeals within thirty days after the denial, praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part. The court may issue such an injunction only if it finds that the regulation, order or price schedule 'is not in accordance with law, or is arbitrary or capricious.' Subsection (b). It is denied power to issue a temporary restraining order or interlocutory decree. Subsection (c). The effectiveness of any permanent injunction it may issue is postponed for thirty days, and if review by this Court is sought upon writ of certiorari, as authorized by subsection (d), its effectiveness is further *429 postponed until final disposition of the case by this Court by denial of certiorari or decision upon the merits. Subsection (b).

Section 204(d) declares:

'The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, * * * of any price schedule effective in accordance with the provisions of section 206, * * * and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.'

In Lockerty v. Phillips, supra, we held that these provisions conferred on the Emergency Court of Appeals, subject to review by this Court, exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrator and that they withdrew such jurisdiction from all other courts. This was accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of **670 inferior federal courts, and the jurisdiction of all state

courts to determine federal questions, and to vest that jurisdiction in a single court, the Emergency Court of Appeals.

[13] The considerations which led us to that conclusion with respect to the equity jurisdiction of the district court, lead to the like conclusion as to its power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation. The provisions of s 204(d), conferring*430 upon the Emergency Court of Appeals and this Court 'exclusive jurisdiction to determine the validity of any regulation or order', coupled with the provision that 'no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation', are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

That such was the intention of Congress appears from the report of the Senate Committee on Banking and Currency, recommending the adoption of the bill which contained the provisions of s 204(d). After pointing out that the bill provided for exclusive jurisdiction of the Emergency Court and the Supreme Court to determine the validity of regulations or orders issued under section 2, the Committee said: 'The courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.' Sen.Rep. 931, 77th Cong., 2d Sess., p. 25. That the Committee, in making this statement, intended to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a criminal prosecution, is further borne out by the fact that the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves. H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H.R. 5479, pp. 4, 7, 8.

Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regulations*431 or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. Such we conclude is the correct construction of the Act.

III.

We come to the question whether the provisions of the Act, so construed as to deprive petitioners of opportunity to attack the Regulation in a prosecution for its violation, deprive them of the due process of law guaranteed by the Fifth Amendment. At the trial, petitioners offered to prove that the Regulation would compel them to sell beef at such prices as would render it impossible for wholesalers such as they are, no matter how efficient, to conduct their business other than at a loss. Section 4(d) declares that 'Nothing in this Act shall be construed to require any person to sell any commodity * * *.' Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss. But they argue that to impose on them the choice either of refraining from sales of beef at wholesale or of running the risk of numerous criminal prosecutions and suits for treble damages authorized by Sec. 205(e), without the benefit of any temporary injunction or stay pending determination by the prescribed statutory procedure of the Regulation's validity, is so harsh in its application to them as to deny them due process of law. In addition they urge the inadequacy of the administrative procedure and particularly of the sixty days period afforded by the Act within which to prepare and lodge a protest with the Administrator.

[14] In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a war-time emergency measure. The Act was adopted January*432 30, 1942, **671 shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act that there was grave danger of war-time inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by the war.

Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.

Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., pp. 23-5.

***433** [15] Congress sought to avoid or minimize these difficulties by the establishment of a single procedure for review of the Administrator's regulations, beginning with an appeal to the Administrator's specialized knowledge and experience gained in the administration of the Act, and affording to him an opportunity to modify the regulations and orders complained of before resort to judicial determination of their validity. The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction. The considerations which led to its creation are similar to, and certainly no weaker than, those which led this Court in Texas & P.R. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, and the long line of cases following it, to require resort to the Interstate Commerce Commission and the special statutory method provided for review of its decisions in certain types of cases involving railway rates. As with the present statute, it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. Bradley v. City of Richmond, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603; First Nat. Bank v. Board of Com'rs Weld County, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143.

[16] Petitioners assert that they have been denied that opportunity because the sixty days period allowed for filing a protest is insufficient for that purpose; because the procedure***434** before the Administrator is inadequate to ensure due process; because the statute precludes any interlocutory injunction staying enforcement of a price regulation before final adjudication of its validity; because the trial of the issue of validity of a regulation is excluded from the criminal trial for its violation; and because in any case there is nothing in the statute to prevent their conviction for violation of a regulation before they could secure a ruling on its validity. A sufficient answer to all these contentions is that petitioners have ****672** failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.

[17][18] For the purposes of this case, in passing upon the sufficiency of the procedure on protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously, we cannot pass upon action which might have been taken

on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes. Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U.S. 531, 545, 34 S.Ct. 359, 363, 58 L.Ed. 713; ***435**Hall v. Geiger-Jones Co., 242 U.S. 539, 554, 37 S.Ct. 217, 222, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann.Cas.1917C, 643; State of Minnesota v. Probate Court, 309 U.S. 270, 277, 60 S.Ct. 523, 527, 84 L.Ed. 744, 126 A.L.R. 530, and cases cited. Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. Natural Gas Co. v. Slattery, 302 U.S. 300, 309, 58 S.Ct. 199, 203, 82 L.Ed. 276; Anniston Mfg. Co. v. Davis, supra, 301 U.S. at pages 356, 357, 57 S.Ct. at page 825, 81 L.Ed. 1143; State of Minnesota v. Probate Court, supra, 309 U.S. at pages 275, 277, 60 S.Ct. at pages 526, 527, 84 L.Ed. 744, 126 A.L.R. 530. But upon a full examination of the provisions of the statute it is evident that the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process.

The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 U.S.C. s 307, 44 U.S.C.A. s 307. The penal provisions of the statute are applicable only to violations of a regulation which are willful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue.

[19] The sixty days period allowed for protest of the Administrator's regulations cannot be said to be unreasonably short in view of the urgency and exigencies of wartime price regulation.[FN3] Here the Administrator is required to act initially upon the protest within thirty days after it is filed or ninety days after promulgation of the challenged regulation, by allowing the protest wholly or in part, or denying it or setting it down for hearing. (Section 203(a). ***436** But we cannot say that the Administrator would not have allowed ample time for the presentation of evidence.[FN4] And under s 204(a) petitioners could have applied**673 to the Emergency Court of Appeals for leave to introduce any additional evidence 'which could not reasonably' have been offered to the Administrator or included in the proceedings before him, and could have applied to the Administrator to modify or change his decision in the light of that evidence.

FN3 For numerous instances in which comparable or shorter periods for resort to administrative relief as a prerequisite to proceeding in the courts have been held to be sufficient, see, e.g., Bellingham Bay, etc., Co. v. City of New Whatcom, 172 U.S. 314, 19 S.Ct. 205, 43 L.Ed. 460, (10 days); Campbell v. City of Olney, 262 U.S. 352, 43 S.Ct. 559, 67 L.Ed. 1021 (20 days); Wick v. Chelan Electric Co., 280 U.S. 108, 50 S.Ct. 41, 74 L.Ed. 212 (18 days); Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (60 days); Opp Cotton Mills v. Administrator, 312 U.S. 126, 657, 61 S.Ct. 524, 87 L.Ed. 624 (40 days).

FN4 Revised Procedural Regulation No. 1, 7 Fed.Reg. 8961, authorized by s 203(a), contain detailed provisions for extending the time for presentation of evidence when appropriate. ss 1300.30(c), 1300.33, 1300.35(a)(3).

[20] Nor can we say that the administrative hearing provided by the statute will prove inadequate. We hold in Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, that in the circumstances to which this Act was intended to apply, the failure to afford a hearing prior to the issue of a price regulation does not offend against due process. While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs 'will not permit the fair and expeditious disposition of the protest'. s 203(a); Revised Procedural Regulation No. 1, s 1300.39, 7 Fed.Reg. 8961. In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process. The Act requires the Administrator to inform the protestant

of the grounds for his decision denying a protest, including all matters of which he has taken official notice. s 203(a). In view of the provisions for the introduction of further evidence both before and after the Administrator has announced his determination, we cannot say that if petitioners had filed a protest adequate*437 opportunity would not have been afforded them to meet any arguments and evidence put forward by the Administrator, or that if such opportunity had been denied the denial would not have been corrected by the Emergency Court.

[21][22] The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court. Compare White v. Johnson, 282 U.S. 367, 374, 51 S.Ct. 115, 118, 75 L.Ed. 388.[FN5]

FN5 Nor is the inconvenience to petitioners of being required to make their objection to the Administrator in Washington, D.C., sufficient to outweigh the public interest, in the circumstances of this case, in having a centralized, unitary scheme of review of the regulations. The protest procedure is designed to be conducted primarily upon documentary evidence. Sec. 203(a); Revised Procedural Regulation No. 1, ss 1300.29—1300.31, 1300.39. There would thus be no purpose in the personal presence of the protestant unless the protest were set for hearing by the Administrator, and in such a case the hearing may be held at any place designated by the Administrator and before a person designated by him. Id., ss 1300.39, 1300.42. The Emergency Court of Appeals is likewise authorized to 'hold sessions at such places as it may specify' and does in fact hold sessions throughout the country as needed. s 204(c); Rule 4(a) of its Rules of Procedure, 50 U.S.C.App. Supp. II following s 924, 50 U.S.C.A. Appendix following section 924.

[23] In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regulations*438 promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann.Cas. 764; Wilcox v. Consolidated Gas Co., 212 U.S. 19, 53, 54, 29 S.Ct. 192, 200, 53 L.Ed. 382, 48 L.R.A.,N.S., 1134, 15 Ann.Cas. 1034; Missouri Pac. R. Co. v. Tucker, 230 U.S. 340, 33 S.Ct. 961, 57 L.Ed. 1507; Oklahoma Operating Co. v. Love, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596. For as we have seen, s 4(d) specifically provides that **674 no one shall be compelled to sell any commodity, and the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act. Compare Wadley Southern R. Co. v. State of Georgia, 235 U.S. 651, 667—669, 35 S.Ct. 214, 220, 221, 59 L.Ed. 405.

The petitioners are not confronted with the choice of abandoning their businesses or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation's validity. It is true that if the Administrator denies a protest no stay or injunction may become effective before the final decision of the Emergency Court or of this Court if review here is sought. It is also true that the process of reaching a final decision may be time-consuming. But while courts have no power to suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity, we cannot say that the Administrator has no such power or assume that he would not exercise it in an appropriate case.

[24] The Administrator, who is the author of the regulations, is given wide discretion as to the time and conditions of their issue and continued effect. Section 2(a) authorizes him to issue such regulations as will effectuate the purposes of the Act, whenever, in his judgment, such action is necessary. Section 201(d) similarly authorizes him 'from time to time' to issue regulations when necessary and proper to effectuate the purposes of the Act. One of the objects of the protest provisions is to enable the Administrator more

fully to inform himself as to the wisdom *439 of a regulation through evidence of its effect on particular cases. In the light of that information he is authorized by s 203(a) to grant or deny a protest 'in whole or in part.' And s 204(a) authorizes the Administrator to modify or rescind a regulation 'at any time.'[FN6] Moreover s 2(a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days, 'establishing as a maximum * * * the price * * * prevailing with respect to any commodity * * * within five days prior to the date of issuance of such temporary regulations. * * *'

FN6 Revised Procedural Regulation No. 1 authorizes the filing at any time of a petition to amend a regulation, (s 1300.20) and authorizes the Administrator to treat a protest as a petition for amendment as well (s 1300.49).

[25][26] Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review. Hence we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process. Natural Gas Co. v. Slattery, supra, 302 U.S. at page 310, 58 S.Ct. at page 204, 82 L.Ed. 276.

[27] In any event, we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation would in the special circumstances of this case, involve a denial of constitutional right. If the alternatives, as Congress could have concluded, were war-time inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Compare *440 Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568, in which we held that the Fourteenth Amendment did not preclude a state from compelling the uncompensated destruction of private property in order to preserve important public interests from destruction.

[28][29][30] The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. Compare **675Scripps-Howard Radio, Inc., v. Federal Communications Comm., 316 U.S. 4, 10, 62 S.Ct. 875, 880, 86 L.Ed. 1229, and cases cited. Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. Meccano, Ltd., v. John Wanamaker, 253 U.S. 136, 141, 40 S.Ct. 463, 465, 64 L.Ed. 822; Rice & Adams Corp. v. Lathrop, 278 U.S. 509, 514, 49 S.Ct. 220, 222, 73 L.Ed. 480. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. Prendergast v. New York Tel. Co., 262 U.S. 43, 51, 43 S.Ct. 466, 469, 67 L.Ed. 853; Ohio Oil Co. v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 257, 73 L.Ed. 972.

[31] But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.[FN7] *441 Virginian R. Co. v. United States, 272 U.S. 658, 672, 673, 47 S.Ct. 222, 228, 71 L.Ed. 463; Petroleum Exploration v. Public Service Commission, 304 U.S. 209, 222, 223, 58 S.Ct. 834, 841, 842, 82 L.Ed. 1294; Dryfoos v. Edwards, D.C., 284 F. 596, 603, affirmed 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194; see Beaumont, S.L. & W.R. Co. v. United States, 282 U.S. 74, 91, 92, 51 S.Ct. 1, 7, 8, 75 L.Ed. 221. Compare State of Wisconsin v. State of Illinois, 278 U.S. 367, 418—421, 49 S.Ct. 163, 171—173, 73 L.Ed. 426. This is but another application of the principle, declared in Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789, that 'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'

FN7 Congress has sought to minimize the burden so far as would be consistent with the

public interest by providing expeditious procedure for the review, on protest and complaint, of a regulation's validity. Thus a protest must be filed within 60 days (s 203(a); the Administrator must take initial action on it within a reasonable time but not more than 30 days after its filing or 90 days after the issuance of the regulation (s 203(a); the complaint to the Emergency Court must be filed within 30 days (s 204(a); that Court is directed to 'prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction' (s 204(c); in order to promote that end as many judges as are needed may be designated to serve on it, it may sit in divisions, and may hold sessions at such places as it may specify (s 204(c), and in fact it does sit in various parts of the country as the convenience of the parties may require; under its rules it is 'always * * * open for the transaction of business' (Rule 4(a), 50 U.S.C.App., Supp. II following s 924, 50 U.S.C.A. Appendix following section 924); petitions for certiorari to review its decisions must be filed within 30 days (s 204(d); and this Court is directed to advance on the docket and expedite the decision of all cases from the Emergency Court (s 204(d). We cannot assume that the Administrator, who has a vital interest in the prompt and effective enforcement of the Act, would unreasonably delay action upon a protest; if he should, judicial remedies are not lacking, see Safeway Stores v. Brown, Em.App., 138 F.2d 278, 280.

[32] Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts ***442** could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.****676** Cf. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384.[FN8]

FN8 For other instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions, see: 1. Section 16 of the Judiciary Act of 1789, 1 Stat. 82, Judicial Code s 267, 28 U.S.C. s 384, 28 U.S.C.A. s 384, denying relief in equity where there is adequate remedy at law. 2. Section 5 of the Act of March 2, 1793, 1 Stat. 334, Judicial Code, s 265, 28 U.S.C. s 379, 28 U.S.C.A. s 379, prohibiting injunction of state judicial proceedings. 3. Act of March 2, 1867, 14 Stat. 475, 26 U.S.C. s 3653, 26 U.S.C.A. Int.Rev.Code, s 3653, prohibiting suits to enjoin collection or enforcement of federal taxes. 4. The Johnson Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. s 41(1), 28 U.S.C.A. s 41(1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates. 5. Act of Aug. 21, 1937, 50 Stat. 738, 28 U.S.C. s 41(1), 28 U.S.C.A. s 41(1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes. 6. Section 17 of the Act of June 18, 1910, 36 Stat. 557 and s 3 of the Act of Aug. 24, 1937, 50 Stat. 752, 28 U.S.C. ss 380 and 380a, 28 U.S.C.A. ss 380, 380a, requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining order by one judge only to prevent irreparable injury. 7. The Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. ss 101—115, 29 U.S.C.A. ss 101—115, regulating the issue of injunctions in labor disputes and prohibiting their issue 'contrary to the public policy' declared in the Act. In several cases such statutes were held to be merely declaratory of a previously obtaining rule for the guidance of judicial discretion. See e.g. In re State Railroad Tax Cases, 92 U.S. 575, 613, 23 L.Ed. 663 (Act of March 2, 1867); Matthews v. Rodgers, 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (Judicial Code s 267); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297, 63 S.Ct. 1070, 1072, 87 L.Ed. 1407 (Act of Aug. 24, 1937).

[33] Our decisions leave no doubt that when justified by compelling public interest the legislature may

authorize summary action subject to later judicial review of its validity. It may insist on the immediate collection of taxes. Phillips v. Commissioner, 283 U.S. 589, 595—597, 51 S.Ct. 608, 611, 75 L.Ed. 1289, and cases cited. It may take possession of property presumptively abandoned by its owner, prior to determination of *443 its actual abandonment, Anderson Nat. Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599. For the protection of public health it may order the summary destruction of property without prior notice or hearing. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195, 15 Ann.Cas. 276; Adams v. City of Milwaukee, 228 U.S. 572, 584, 33 S.Ct. 610, 613, 57 L.Ed. 971. It may summarily requisition property immediately needed for the prosecution of the war. Compare United States v. Pfitsch, 256 U.S. 547, 41 S.Ct. 569, 65 L.Ed. 1084. As a measure of public protection the property of alien enemies may be seized, and property believed to be owned by enemies taken without prior determination of its true ownership. Central Union Trust Co. v. Garvan, 254 U.S. 554, 556, 41 S.Ct. 214, 65 L.Ed. 403; Stoehr v. Wallace, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604. Similarly public necessity in time of war may justify allowing tenants to remain in possession against the will of the landlord, Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877. Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety. Kiyoshi Hirabayashi v. United States, supra; cf. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765. Measured by these standards we find no denial of due process under the circumstances in which this Act was adopted and must be applied, in its denial of any judicial stay pending determination of a regulation's validity.

IV.

[34] As we have seen Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration**677 of the validity of a regulation as a defense to a prosecution for its violation.

*444 [35][36][37] Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see Douglas v. City of Jeanette, 319 U.S. 157, 163, 63 S.Ct. 877, 881, 882, 87 L.Ed. 1324, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in Bradley v. City of Richmond, supra, and in Wadley Southern R. Co. v. State of Georgia, supra, 235 U.S. at pages 667, 669, 35 S.Ct. at pages 220, 221, 59 L.Ed. 405, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

[38] No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. State of Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; Barbour v. State of Georgia, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; Whitney v. People of State of California, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180, 86 A.L.R. 174. While this Court in its *445 discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis J. concurring in Whitney v. People of State of California, supra, 274 U.S. at page 380, 47 S.Ct. at page 650, 71 L.Ed. 1095, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Com-

pare Woolsey v. Best, 299 U.S. 1, 57 S.Ct. 2, 81 L.Ed. 3, with Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. ss 6(7), 10(1), 49 U.S.C.A. ss 6(7), 10(1); Armour Packing Co. v. United States, 209 U.S. 56, 81, 28 S.Ct. 428, 435, 52 L.Ed. 681; United States v. Adams Express Co., 229 U.S. 381, 388, 33 S.Ct. 878, 57 L.Ed. 1237. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. United States v. Vacuum Oil Co., D.C., 158 F. 536, 539—541; Lehigh Valley R. Co. v. United States, 3 Cir., 188 F. 879, 887, 888. See also United States v. Standard Oil Co., D.C., 155 F. 305, 309, 310, reversed on other grounds, 7 Cir., 164 F. 376. Compare Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184, 196, 197, 33 S.Ct. 893, 895, 896, 57 L.Ed. 1446; Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., 284 U.S. 370, 384, 52 S.Ct. 183, 184, 76 L.Ed. 348. Similarly it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of those orders, United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263; ***446 **678**White v. Johnson, supra, 282 U.S. at pages 373, 374, 51 S.Ct. at page 118, 75 L.Ed. 388. See also Natural Gas Co. v. Slattery, supra, 302 U.S. at pages 309, 310, 58 S.Ct. at pages 203, 204, 82 L.Ed. 276.[FN9]

> FN9 Compare the provisions of the Packers and Stockyards Act, 7 U.S.C. ss 194 and 195, 7 U.S.C.A. ss 194, 195, and of the Commodity Exchange Act, 7 U.S.C. s 13a, 7 U.S.C.A. s 13a, imposing criminal sanctions, and those of the Federal Trade Commission Act as amended, 15 U.S.C. ss 45(g)-(l), 15 U.S.C.A. s 45(g—l), imposing heavy penalties, for violation of an administrative order which has become final by its affirmance upon the exclusive statutory method of review provided, or by the expiration of the time allowed for review without resort to the statutory procedure.

The analogy of such a procedure to the present, by which violation of a price regulation is made penal, unless the offender has established its unlawfulness by an independent statutory proceeding, is complete and obvious. As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity. And, as we have seen, petitioners fail to show that such is the necessary effect of the present statute, or that if so applied as to deprive them of an adequate opportunity to establish the invalidity of a regulation there would not be adequate means of securing appropriate judicial relief in the course either of the statutory proceeding or of the criminal trial. During the present term of court we have held that one charged with criminal violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940. Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346; and see Bowles v. United States, 319 U.S. 33, 63 S.Ct. 912, 87 L.Ed. 1194. We perceive no tenable ground for distinguishing that case from this.

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation ***447** may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be re-

viewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial.

[39][40][41] In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. Block v. Hirsh, supra, 256 U.S. at page 158, 41 S.Ct. at page 460, 65 L.Ed. 865, 16 A.L.R. 165. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the ***448** Administrator, was properly submitted to the jury. Cf. Falbo v. United States, supra.

Affirmed.

****679** Mr. Justice ROBERTS.

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the court. I am of opinion that the Act unconstitutionally delegates legislative power to the Administrator. As I read the opinion of the court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review is provided effectively to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. I proceed, therefore, to examine the statute.

The Powers Conferred.

When, in his judgment, commodity prices have risen, or threaten to rise, 'to an extent or in a manner inconsistent with the purposes' of the Act the Administrator may establish 'such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes' of the Act.

'So far as practicable' in establishing any maximum price he is to ascertain the prices prevailing in a specified period in 1941 but may use another period nearest to that specified because necessary data for the period specified is not available; and may make adjustments 'for such relevant factors as he may determine and deem to be of general applicability,' including several factors mentioned. Before issuing any regulation he shall 'so far as practicable' advise with representative members of the industry affected.

Any regulation may provide for adjustments and reasonable exceptions which, in the Administrator's judgment,***449** are necessary and proper to effectuate the purposes of the Act. If, in his judgment, such action is necessary or proper to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or hoarding in connection with any commodity (50 U.S.C.A.Appendix s 902, 50 U.S.C.A.Appendix s 902).

It will be seen that whether, and, if so, when, the price of any commodity [FN1] shall be regulated depends on the judgment of the Administrator as to the necessity or propriety of such price regulation in effectuating the purposes of the Act.

FN1 The Act gives the Administrator no power with respect to wages, and limits his powers as respects fishery commodities (50 U.S.C.A.Appendix, s 902(i), 50 U.S.C.A.Appendix, s 902(i)), and agricultural commodities (50 U.S.C.Appendix, s 903, 50 U.S.C.A.Appendix, s 903).

The Supposed Standards for the Administrator's Guidance.

The Act provides that any regulation or order must be 'generally fair and equitable' in the Administrator's judgment; but coupled with this injunction is another that the order and regulation must be such as, in the judgment of the Administrator, is necessary or proper to effectuate the purposes of the Act.

I turn, therefore, to the stated purposes to ascertain what, if any, limits the statute places upon the Administrator's exercise of his powers.

Section 1(a), 50 U.S.C.Appendix, s 901(a), 50 U.S.C.A.Appendix, s 901(a), states seven purposes, which should be set forth separately as follows:

'to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;'

In order to exercise his power anent this purpose the Administrator will have to form a judgment as to what stabilization means, and what are speculative, unwarranted and abnormal increases in price. It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict ***450** anyone of error of judgment in so classifying a given economic phenomenon.

'to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;'

To accomplish this purpose the Administrator must form a judgment as to what constitutes profiteering, hoarding, manipulation or speculation. As if the administrative****680** discretion were not sufficiently broad there is added the phrase 'other disruptive practices', which seems to leave the Administrator at large in the formation of opinion as to whether any practice is disruptive.

'to assure that defense appropriations are not dissipated by excessive prices;'

It is not clear—to me at least—what is the limit of this purpose. I can conceive that an honest Administrator might, without laying himself open to the charge of exceeding his powers, make any kind of order or regulation based upon the view that otherwise defense appropriations by Congress might be dissipated by what he considers excessive prices. How his exercise of judgment in connection with this purpose could be thought excessive it is impossible for me to say.

'to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;'

The Administrator's judgment that any price policy will tend to affect the classes mentioned in this purpose from what he may decide to be 'undue impairment of their standard of living' would seem to be so sweeping that it would be impossible to convict him of an error of judgment in any conclusion he might reach.

'to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the ***451** Federal, State, and local governments, which would result from abnormal increases in prices;'

Of course Congress might have included in the catalogue of beneficiaries churches, hospitals, labor unions, banks and trust companies and other praiseworthy organizations, without rendering the 'standard' any more vague.

'to assist in securing adequate production of commodities and facilities;'

Here is a purpose which seems, to some extent at least, to permit the easing of price restrictions; for it would appear that diminishment of price would hardly assist in promoting production. Thus the Administrator, and he alone, is to balance two competing policies and strike the happy mean between them. Who shall say his conclusion is so indubitably wrong as to be properly characterized as 'arbitrary or capricious'.

'to prevent a post emergency collapse of values;'

This purpose, or 'standard', seems to permit adoption by the Administrator of any conceivable policy. I have difficulty in envisaging any price policy in support of which some economic data or opinion could not be cited to show that it would tend to prevent post emergency collapse of values.

These seven purposes must, I submit, be considered as separate and independent. Any action taken by the Administrator which, in his judgment, promotes any one or more of them is within the granted power. If, in his judgment, any action by him is necessary or appropriate to the accomplishment of one or more of them, the Act gives sanction to his order or regulation.

Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy ***452** in the post war period. His judgment, founded as it may be, on his studies and

investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action.

I shall not repeat what I have said in Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641. I have there quoted the so-called standards prescribed in the National Industrial Recovery Act. Comparison of them with those of the present Act, and perusal of what was said concerning them in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, leaves no doubt that the decision is now overruled. There, as here, the 'code' or regulation, to become effective, had to be found by the Executive to 'tend to effectuate the policy' of the Act. (See footnote 3, p. 521.)

****681** The Administrator's Procedure.*

I have not yet spoken of the statutory provisions respecting the permissible procedure of the Administrator in imposing prices. Sec. 202(a), 50 U.S.C.Appendix, s 922(a), 50 U.S.C.A.Appendix, s 922(a) authorizes him to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order, or in the administration and enforcement of the Act and regulations, orders, and price schedules thereunder. The remaining subsections give him broad powers to compel disclosure of information. And he may take official notice of economic data and other facts, including facts found as a result of his investigations and studies (s 203(b), 50 U.S.C.Appendix, s 923(b), 50 U.S.C.A.Appendix, s 923(b).

Each regulation or order must be accompanied by a 'statement of the considerations involved' in its issue (s 2(a), 50 U.S.C.Appendix, s 902(a) 50 U.S.C.A.Appendix, s 902(a). This is not a statement or finding of fact. Webster defines a term 'consideration' as 'that which is, or should be, considered as a ground of opinion or action; motive; reason.' The citizen, ***453** therefore, is merely to be advised of the reasons for the Administrator's action.

How is he to proceed if he desires to challenge that action? The answer is found in s 203, 50 U.S.C.Appendix, s 923, 50 U.S.C.A.Appendix, s 923. Within a specified time after the issue of a regulation any person subject to any provision of it may file a protest 'specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.' The Administrator may receive statements in support of the regulations and incorporate them in his proceedings. Within a time fixed he must (1) grant or deny the protest in whole or in part, (2) note it for hearing, or (3) provide an opportunity to present further evidence. His is the choice.

If he denies the protest in whole or in part he must inform the protestant of the grounds upon which his decision was based and of any economic data or other facts of which he has taken official notice.

This, then, is the first opportunity the protestant has to know on what the Administrator has based his 'considerations' or reasons for action. As the Emergency Court of Appeals held in Lakemore Company v. Brown, 137 F.2d 355, 359:[FN2]

> FN2 In citing cases decided by that court, I do so with no thought that in construing the Act's provisions that court has erred. On the contrary, I cite its interpretations of the statute as supporting my views that, as properly construed, the Act is invalid.

'Thus, consistently with statutory requirements, the Administrator could have waited until he had entered his order denying the protest before informing the protestant of the economic data of which he had taken official notice and of the economic conclusions which he had derived therefrom and the other grounds upon which the denial was based.'

And it is to be observed that, after seeing the protestant's affidavits and the evidence, the Administrator may load the record with all sorts of material, articles, opinions, ***454** compilations, and what not—pure hearsay—subject to no cross-examination, to persuade the court that his order could, 'in his judgment', promote one of the 'purposes' of the Act.

Thus is the 'record' weighted against formal complaint in court.

Chatlos v. Brown, Em.App., 136 F.2d 490, Spaeth v. Brown, Em.App., 137 F.2d 669, and Bibb Manufacturing Co. v. Bowles, Em.App., 140 F.2d 459, amongst other cases, indicate the sort of da-

ta—although they do not exclude the use of other sorts—on which the Administrator seems to be accustomed, and to be entitled, to act. He need make no findings of fact.

The Court Review.

The protestant who is aggrieved by the denial or partial denial of his protest may, within a set time, file a complaint with a specially created Emergency Court of Appeals 'specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part.' The court is given exclusive jurisdiction and all other courts ****682** are forbidden to take jurisdiction to grant such relief. The court may set aside the order, dismiss the complaint, or remand the proceeding. Upon the filing and service of the complaint, the Administrator is to certify and file a transcript of such portion of the proceedings before him as are material to the complaint (s 204(a), 50 U.S.C.Appendix, s 924(a), 50 U.S.C.A.Appendix, s 924(a).

The section proceeds:

'No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not ***455** reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.'

It is not difficult to picture the plight of the protestant. The Administrator's statement of considerations, without more, constitutes proof in the cause.

In Montgomery Ward & Co. v. Bowles, Em.App., 138 F.2d 669, 670, the Administrator in his statement of considerations said that he took official notice of three propositions of the most general scope. No evidence in support of these or of any other facts upon which he relied was included in the transcript. The complainant suggested to the court the omission of pertinent matter, namely, the evidence in support of the propositions of which the Administrator said he took official notice, the evidence of various other assertions of fact in his opinion, and the particular facts and evidence upon which he based the conclusions expressed in his statement of considerations that 'the maximum prices established in this regulation are fair and equitable.' The Administrator objected to the suggestion and the court rejected it. It was held that the Act requires 'only a summary statement of the basic facts which justify the regulation.'

Referring to s 204(b), 50 U.S.C. Appendix, s 924(b), 50 U.S.C.A.Appendix, s 924(b), the court held that the requirement that the complainant must establish 'to the satisfaction of the court' that the regulation, order, or price schedule is not in accordance with law or is arbitrary or capricious throws upon the protestant ***456** the burden 'to bring forward and satisfactorily prove the invalidating facts', and added: 'Unless and until he does so the regulation is to be taken as valid and the existence of a state of facts which justify it is to be assumed without the necessity of proof thereof by the Administrator.'

The court added that the protestant is given means of carrying this burden by filing affidavits and other evidence, but omits to refer to the fact that these affidavits and other evidence must be addressed to the Administrator's order and his most general and sweeping statement of considerations, which merely means his reasons for making the order. These affidavits and this evidence under the procedure prescribed are to be put in before the protestant even knows what data the Administrator relied upon or sees the Administrator's opinion denying his protest. It is hardly necessary to dilate upon the burden thus placed on a protestant or the extent to which he is compelled to fill the record with what he may think relevant matter only to find that he has been shooting at straws. The court further adverted to the fact that the Act permits the protestant to state in detail in connection with his protest the nature and sources of any further evidence not subject to his control upon which he believes he can rely in support of the facts alleged in

his protest. Here again the protestant is under the same handicap. He must disclose all he has in mind to the Administrator before the Administrator****683** makes any disclosure to him of the facts and data upon which that official has relied.

Finally the court refers to the privilege given the protestant to file a brief with the Administrator and to 'request an oral hearing', without mentioning the facts that the brief can be addressed only to the reasons given in the statement of consideration, and that the Administrator is at liberty to deny the request.

A procedure better designed to prevent the making of an issue between parties can hardly be conceived.

***457** And the extent of the burden is further emphasized by what the Emergency Court of Appeals has said in Lakemore Co. v. Brown, supra:

'It is objected that the Administrator thus in effect has prejudged the case; that as witness, immune from cross-examination, he has rendered an opinion which concludes the matter which is before him as judge.

'This overlooks the fact that the Administrator, from the necessities of the case, does not come with a virgin mind to the consideration of a protest. He has previously performed the official act of issuing the regulation, the terms of which of course reflect his conclusions on many economic, administrative and legal questions. In this sense, he necessarily approaches consideration of a protest with certain 'preconceived notions'—to use complainant's phrase. It is the object of the protest procedure to give the Administrator a chance to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. What the Administrator did here was to lay his cards on the table in the protest proceedings, offering protestant an opportunity to play its trump cards, if it had any.

'Of course such statements of economic conclusions thus incorporated in the record are not 'evidence.' Section 204(a) requires the transcript of the protest proceedings, filed in this court, to 'include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice.' Insofar as any economic generalizations or conclusions formulated by the Administrator constitute indispensable steps in his process of reasoning in denying the protest, it is for this court to say whether they have any rational basis, in performance of our statutory duty to consider whether the regulation or order should be set aside in whole or in part as being 'arbitrary or capricious.' This is so, whether the Administrator includes such generalizations and conclusions***458** in his opinion accompanying the denial of the protest or, as in this case, incorporates them into the record of the protest proceedings at an earlier stage in order to afford protestant an opportunity for rebuttal.'

To this may be added what the Emergency Court said in Madison Park Corporation v. Bowles, 140 F.2d 316, 324:

'We do not decide that this Court should limit the application of the term 'generally fair and equitable' standards mentioned in the law and in discussions of its enactment while pending in Congress. It may be possible that a case will occur in which the effect of a regulation established by the Administrator clearly will be shown to be generally unfair and inequitable on grounds not mentioned. But in such a case the reasons must be clear and compelling. The Act provides the Administrator may establish such rents as in his judgment will be generally fair and equitable. Review in this Court is plainly limited. It may not substitute its judgment for the judgment of the Administrator, but may act in review only when it finds the regulation is not in accordance with law or is arbitrary and capricious. Thus if the Court finds any reasonable basis to support the view that the regulation deals fairly and equitably with the industry concerned, the regulation must stand.' (Italics in original.)

When these cumulative burdens placed upon the protestant who seeks review are fairly appraised it becomes apparent that he must carry an insupportable load, and that, in truth, the court review is a solemn farce in which the Emergency Court of Appeals, and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.

****684** No court is competent, on a mass of eco-

nomic opinion consisting of studies by subordinates of the Administrator, ***459** charts and graphs prepared in support of the studies, and economic essays gathered hither and yon, to demonstrate, beyond doubt, that the considerations or conclusions of the Administrator from such material cannot support the Administrator's judgment that what he has done by way of regulation or price schedule tends to prevent post war collapse of values, or to prevent dissipation of defense appropriations through excessive prices, or to prevent impairment of the standard of living of persons dependent on life insurance, or to prevent hardship to schools—to enumerate but a few of the stated purposes of the Act.

It is not surprising that, in the thirty-one cases decided by the Emergency Court of Appeals of which I have found reports, complaints have been dismissed in twenty-eight, and but three have been remanded to the Administrator for further proceedings.[FN3] Two of the three involved no question of merits under the statutory provisions.

FN3 Armour & Co. v. Brown, Em.App., 137 F.2d 233; Montgomery Ward & Co. v. Bowles, Em.App., 138 F.2d 669; Hillcrest Terrace Corp. v. Brown, Em.App., 137 F.2d 663.

The War Power.

The Emergency Court of Appeals in Taylor v. Brown, 137 F.2d 654, overruled a challenge to the constitutional validity of the Act's delegation of legislative power to the Administrator by invocation of the 'War Power' of Congress, the powers embodied in Article I, Section 8, of the Constitution 'to declare War', 'to raise and support Armies', 'to provide and maintain a Navy,' and 'to make all Laws which shall be necessary and proper for carrying into Execution' those powers. After showing, what needs no argument, that these powers of Congress are very different from those to be exercised in peace, the court then—without a sign that it realizes the great gap in the process—assumes that one of Congress' war powers is the power to transfer its legislative function to a delegate. By the ***460** same reasoning it could close this court or take away the constitutional prerogatives of the President as 'War measures'.

I am not sure how far this court's present opinion adopts the same view. There are references in it to the war emergency, and yet the reasoning and the authorities cited seem to indicate that the delegation would be good in peace time and in respect of peace time administration. And the Emergency Court of Appeals, in spite of its decision in Taylor v. Brown, supra, and its statement in Philadelphia Coke Co. v. Bowles, 139 F.2d 349, that, as the Act is an exercise of the war power and therefore does not deprive citizens of property without due process, has, nevertheless, weighed provisions of the Act as against the guaranty of the Fifth Amendment in Wilson v. Brown, 137 F.2d 348, and in Avant v. Bowles, 139 F.2d 702.

I am sure that my brethren, no more than I, would say that Congress may set aside the Constitution during war. If not, may it suspend any of its provisions? The question deserves a fair answer. My view is that it may not suspend any of the provisions of the instrument. What any of the branches of government do in war must find warrant in the charter and not in its nullification, either directly or stealthily by evasion and equivocation. But if the court puts its decision on the war power I think it should say so. The citizens of this country will then know that in war the function of legislation may be surrendered to an autocrat whose 'judgment' will constitute the law; and that his judgment will be enforced by federal officials pursuant to civil judgments, and criminal punishments will be imposed by courts as matters of routine.

If, on the contrary, such a delegation as is here disclosed is to be sustained even in peacetime, we should know it.

Mr. Justice RUTLEDGE, dissenting.

I agree with the Court's conclusions upon the substantive issues. But I am unable to believe that the trial afforded***461** the petitioners conformed to constitutional requirements. The matter is of such importance as requires a statement of the reasons for dissent.

****685** The Emergency Price Control legislation is unusual, if not unique. It is streamlined law in both substance and procedure. More than any other legislation except perhaps the Selective Service Act, 50 U.S.C.A.Appendix, s 301 et seq., in the combined effect of its provisions it attenuates the rights of affected individuals. The Congress regarded this as necessary, though it sought to preserve as much of individual right as it felt was consistent with control-

ling wartime inflation. To that judgment we owe all deference, saving only what we owe to the Constitution.

War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial tools adequate for the times' necessity. Inevitably some will be strange, if also life-saving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times could not be impaired. But not all are lost. War expands the nation's power. But it does not suspend the judicial duty to guard whatever liberties will not imperil the paramount national interest.

I.

Judged by normal peacetime standards, over-all nation-wide price control hardly has accepted place in our institutions. Notwithstanding the considerable expansion of recent years in this respect, the extension has been piecemeal. [FN1] Until now it has not enveloped the entire economy.[FN2] Whether control so extensive might be upheld in some emergency not created by war need not now be decided.***462** That it can be supported in the present circumstances and for the declared purposes there can be no doubt. It is enough, as the Court points out, that legal foundation exists in the nation's power to make war, as this has been given to Congress and the Chief Executive. Cf. Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.[FN3]

FN1 Cf., e.g., Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

FN2 Perhaps the nearest previous approach to control so extensive was in the National Industrial Recovery legislation.

FN3 Cf. note 18 infra.

The foundation has relevance for each of the issues. And generally it has significance for the application of peacetime precedents. Decisions made then with limitations, explicit or implied, not affected by influence of the war power and the conditions of a state of war, cannot be wholly conclusive in their limiting effect upon the exercise of war-making authority. Care must be taken therefore, in applying them, both to see that they are observed so far as the dominant necessity permits and to be equally sure they are not misapplied to hamstring essential authority.[FN4]

FN4 It goes without saying that whatever scope is allowed for operation of governmental authority in peace continues to be effective in war.

As it is with the substantive control, so it is with delegating legislative power. War begets necessities for this, as for imposing substantive controls, not required by the lesser exigencies of more normal periods. In this respect certainly there is as much room for difference as exists when Congress is dealing wholly with internal matters and when it is acting with the President about foreign affairs. Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255. Not only the broader power of Congress, but its conjunction in the particular delegation with the wider authority of the President, both as chief magistrate and as commander-in-chief, goes to sustain the greater delegation. Cf. Kiyoshi Hirabayashi v. United States, supra. But the present legislation, as the Court's opinion demonstrates,***463** does not go beyond the limits allowed by peacetime precedents in the substantive delegation.[FN5]

FN5 E.g., the administrator has no power to adopt codes of fair competition generally, such as was given under N.I.R.A. His principal function is single, to determine and make effective by regulation the maximum price at which a commodity may be sold. The task is vast and complex, in comparison with previously sustained price-fixing delegations, by virtue of the number of industries and items affected and the nation-wide scope of the authority. But the focus of the price-fixing function is narrow, although powerful, in its incidence upon a particular industry or operator.

****686** II.

My difficulty arises from the Act's procedural provisions. They too are unusual. That is true, though each save one has been used before, and sustained, in separate applications. No previous legislation has presented quite this combination of procedural devices.[FN6] In the combination, if in nothing more,

unique quality would be found. But there is more.

FN6 Cf. Judicial Review of Price Orders under the Emergency Price Control Act (1942) 37 Ill.L.Rev. 256, 263-264; and other materials cited infra notes 20, 21.

Congress sought to accomplish two procedural objectives. One was to afford a narrow but sufficient method for securing review and revision of the regulations. At the same time the Act created broad and ready methods for enforcement. The short effect of the procedure is to give the individual a single channel for questioning the validity of a regulation, through the protest procedure and the Emergency Court of Appeals, with review of its decisions here on certiorari. Section 204. On the other hand, the varied and widely available means for enforcement include criminal proceedings, suits in equity, and suits for recovery of civil penalties, in the federal district courts and in the state courts. Section 205(a), (b), (c). See also ***464**Section 205(d), (e), (f).[FN7] And in all these enforcement proceedings the mandate of Section 204(d) is that the court shall have no 'jurisdiction or power to consider the validity of' a regulation, order or price schedule. The statute thus affords the individual, to question a regulation's validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many. And in the enforcement proceedings the issues are cut down so that, in a practical sense, little else than the fact whether a violation of the regulation as written has occurred or is threatened may be inquired into.[FN8]

FN7 By Section 205(f)(1), (2) licensing authority is given to the administrator, with special provisions for suspension for not more than twelve months by proceedings in state, territorial or federal district courts.

FN8 It is conceded that questions concerning the validity of statutory provisions, as distinguished from regulations, remain determinable by enforcing courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., 24-25, and compare H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency on H.R. 5479, 77th Cong., 2d Sess., 4, 7-8.

Disparity in remedial and penal measures does not necessarily invalidate the procedure, though it has relevance to adequacy of the remedy allowed the individual.[FN9] Congress has broad discretion to open and close the doors to litigation. In doing so it may take account of the necessities presented by such a situation as it was dealing with here. To follow the usual course of legislation and permit challenge by restraining orders, injunctions, stay orders and the normal processes of litigation would have been, in this case, to lock the barn door after the horse had been stolen. There was therefore compelling reason for Congress to balance the scales of litigation unevenly, if only it did not go too far. In no other way could it protect the paramount national interest. If the result, within the permissible limits, is harsh or inconvenient for ***465** the individual, that is but part of the price he, with all others, must pay for living in a nation which ordinarily gives him so much of protection but in a world which has not been organized to give it security against events so disruptive of democratic procedures.

FN9 Cf. Parts IV, V, infra.

I have no difficulty with the provision which confers jurisdiction upon the Emergency Court of Appeals to determine the validity of price regulations or, if that had been all, with the mandate which makes its jurisdiction in that respect exclusive. Equally clear is the power of Congress to deprive the other federal courts of jurisdiction to issue stay orders, restraining orders, injunctions or other relief to prevent the operation of price regulations or to set them aside. So much may be rested on Congress' plenary authority to define and control the jurisdiction of the federal courts. Constitution, Article III, Section 2; Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. It may be taken too, for the purposes of this case, that Congress' power to channel enforcement of ***687** federal authority through the federal courts sustains the like prohibitions it has placed on the state courts.[FN10] Without more, the statute's provisions would seem to be unquestionably within the Congressional power. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638.

FN10. The Moses Taylor, 4 Wall. 411, 18 L.Ed. 397; Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641; cf. Claflin v. Houseman, Assignee, 93 U.S. 130, 23 L.Ed. 833; Plaquemines Tropical Fruit Co. v. Hender-

son, 170 U.S. 511, 18 S.Ct. 685, 42 L.Ed. 1126.

Congress however was not content to create a single national tribunal, give it exclusive jurisdiction to determine all cases arising under the statute, and deny jurisdiction over them to all other courts.[FN11] It provided for enforcement***466** by civil and criminal proceedings in the federal district courts and in the state courts throughout the country.

FN11 This it might have done, subject only to the requirement that the procedure specified for the single competent court afford a constitutionally adequate mode for determining the issues. Myers v. Bethlehem Shipbuilding Corp., supra. In case criminal jurisdiction were conferred, observance of the requirements of Article III, s 2, and of the Fifth and Sixth Amendments concerning such trials would be required. Cf. text infra, Parts V, VI.

This, too, it could do, though only if adequate proceedings, in the constitutional sense, were authorized. And I agree that the enforcing jurisdiction would not be made inadequate merely by the fact that no stay order or other relief could be had pending the outcome of litigation. Confronted as the nation was with the imminent danger of inflation and therefore the necessity that price controls should become effective at once and continue so without interruption at least until invalidated in particular instances, Congress could require individuals to sustain, in deference to the paramount public interest, whatever harm might ensue during the period of litigation and until each had demonstrated the invalidity of the regulation as it affected himself.[FN12] Runaway inflation could not have been avoided in any other way. The lid had to go on, go on tight and stay tight. This necessity united with the general presumption of validity which attaches to legislation [FN13] and Congress' power to control the jurisdiction of the courts to sustain its denial of power to all courts, including the enforcing courts, the Emergency Court and this one,[FN14] to suspend operation of the regulations pending final determination of validity.

FN12 Cf. L'Hote v. New Orleans, 177 U.S. 587, 20 S.Ct. 788, 44 L.Ed. 899; Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194.

FN13 Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; United States v. Carolene Products Co., 304 U.S. 144, 152—154, 58 S.Ct. 778, 783, 784, 82 L.Ed. 1234.

FN14 By Section 204(b) of the Act, the effectiveness of a judgment of the Emergency Court enjoining or setting aside the regulation, in whole or in part, is postponed until the expiration of thirty days from its entry and, if certiorari is sought here within that time, the postponement continues until this Court's denial of the writ becomes final or until other final disposition of the case by this Court. By Section 204(d) the Emergency Court and this Court are given exclusive jurisdiction to determine the validity of the regulation and all other courts are denied 'jurisdiction or power to consider' this question and to stay, restrain, enjoin or set aside any provision of the regulation or its enforcement. The net effect is to deprive all courts of power to suspend operation of the regulation pending final decision on its validity and to keep it in force until a final judgment of the Emergency Court, or of this Court on review of its decision, becomes effective.

467** The crux of this case comes, as I see it, in the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny them 'jurisdiction or power to consider the validity' of the regulations for which enforcement is thus sought. This question which the Court now says 'presents no novel constitutional issue' was expressly and carefully reserved in Lockerty v. Phillips, supra. The prohibition*688** is the statute's most novel feature. In combination with others it gives the procedure a culminating summary touch and presents questions different from those arising from the other features.

The prohibition is unqualified. It makes no distinction between regulations invalid on constitutional

grounds and others merely departing in some respect from statutory limitations, which Congress might waive, or by the criterion whether invalidity appears on the face of the regulation or only by proof of facts. If the purpose and effect are to forbid the enforcing court to consider all questions of validity and thus to require it to enforce regulations which are or may be invalid for constitutional reasons, doubt arises in two respects. First, broad as is Congress' power to confer or withhold jurisdiction, there has been none heretofore to confer it and at the same time deprive the parties affected of opportunity to call in question in a criminal trial whether the law, be it statute or ***468** regulation,[FN15] upon which the jurisdiction is exercised squares with the fundamental law. Nor has it been held that Congress can forbid a court invested with the judicial power under Article III to consider this question, when called upon to give effect to a statutory or other mandate.

FN15 Cf. text infra, Part III, at notes 16, 17.

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.

III.

The idea is entirely novel that regulations may have a greater immunity to judicial scrutiny than statutes have, with respect to the power of Congress to require the courts to enforce them without regard to constitutional requirements.***469** At a time when administrative action assumes more and more of the law-making function,[FN16] it would seem the balance of advantage, if any, should be the other way. But there is none. The statute has impact upon individuals only through the regulations. They are in effect part of the Act itself, unless invalid. If invalid, they rule, just as the statute does, until set aside. And, in respect to constitutional requirements, they have no more immunity than the statute itself.[FN17]

FN16 There hardly can be question that whenever an administrative agency, acting within the discretion validly conferred upon it by Congress, promulgates a regulation or issues an order of general applicability it is 'making the law,' as effectively as is Congress when it enacts a specific prescription, by whatever name this may be called. United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563; Avent v. United States, 266 U.S. 127, 45 S.Ct. 34, 69 L.Ed. 202; United States v. Michigan Portland Cement Co., 270 U.S. 521, 46 S.Ct. 395, 70 L.Ed. 713.

FN17 Cf. the dissenting opinion of Mr. Justice Roberts. The notion that Congress somehow could cut off review of regulations for constitutional invalidity when it could not do so for statutes, of which suggestions appear in the legislative history and the briefs, was not adhered to in the oral argument as to regulations void on their face and is not tolerable when the effect would be to make the courts instruments for enforcing unconstitutional mandates. Cf. Part VI, infra.

Clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional****689** regulation. And it is conceded that Congress could not have compelled judicial enforcement of all price regulations, without regard to their validity, if it had not given opportunity for attack upon them through the Emergency Court or if that opportunity is inadequate. But because the opportunity is afforded and is deemed adequate in the unusual circumstances, at any rate for some of its purposes, and because it was not followed, the Court holds that criminal enforcement must be given and the enforcing court cannot consider the question of validity.

*470 If I understand it, the argument to sustain the conviction, in its broadest form, rests upon the proposition that Congress, by providing in one proceeding a constitutionally adequate mode for deciding upon the validity of a law or regulation, and requiring this to be followed within a limited time, can cut off all other right to question it and make that determination, or the failure to secure it in time, conclusive for all purposes and in all other proceedings. The proposition cannot be accepted in that broad form. To do so would mean, for instance, that if in this case a regulation had prescribed one maximum price for sales by merchants of one race or religion and a lower one for distributors of another, the judicial power of the United States would have to be exercised to convict the latter for selling at the formers' price, if they had not availed themselves of the limited review afforded by this Act. It hardly would be consistent with accepted ideas of due process or equal protection for any court to impose penalty or restraint in such a case. FN18 And I cannot imagine this Court as sustaining such a conviction or any other as imposing it.FN19

FN18 See note 17 supra. The unique circumstances involved in Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, confine that case to its facts, including the particular emergency with which legislation there under review had dealt, as respects the issue of equal protection.

FN19 Cf. notes 23, 33 infra.

The illustration is extreme and improbable of occurrence. But it serves to test the broad contention. Such a doctrine established as generally applicable would contain seeds of influence too dangerous for acceptance, more especially for the determination of criminal matters. No authority compels or enjoins this. And I am unwilling to give the idea adherence in particular applications without stating qualification which confines its possible effects *471 to situations where the gravest dangers to the nation's interest exist and cannot be escaped in any other way.

The question narrows therefore to the inquiry, in what circumstances and under what conditions may Congress, by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it by criminal processes? This question is the most important one in the case and demands explicit attention. 'It is easy enough to say that a party has enough of a remedy if statutory review of the order is available and if he does not choose to employ that procedure he should be foreclosed from raising elsewhere the questions that could have been raised in that proceeding.' FN20 But to make this easy assumption is at once to decide the rock-bottom issue and, in my opinion, one this Court has not determined heretofore with effects upon the criminal process like those produced in this case.FN21

FN20 McAllister, Statutory Roads to Review of Federal Administrative Orders (1940) 28 Calif.L.Rev. 129, 166.

FN21 Ibid. Cf. Judicial Review of Price Orders Under the Emergency Price Control Act (1942) 37 Ill.L.Rev. 256, 263; Stason, Timing of Judicial Redress from Erroneous Administrative Action (1941) 25 Minn.L.Rev. 560, 575, 576-581; Administrative Features of the Emergency Price Control Act (1942) 28 Va.L.Rev. 991, 998, 999; Reid and Hatton, Price Control and National Defense (1941) 36 Ill.L.Rev. 255, 283-284. For an analysis of litigation under this Act see Sprecher, Price Control in the Courts (1944) 44 Col.L.Rev. 34.

IV.

It is true that in a variety of situations and for a variety of reasons a person is foreclosed from raising issues, including some constitutional ones, where he has failed to exercise an earlier opportunity. Thus ordinarily issues cannot be raised on appeal which were not presented in *472 the **690 trial court. And a variant is that federal questions not raised in the state courts generally will not be considered here.FN22

FN22 The foreclosure may be founded upon notions of waiver, comity, putting an end to litigation, securing orderly procedure or the advantages of having available for consideration in the later stages the informed judgment of the trial tribunal, or some combination of these and other considerations. Cf. Stason, Timing of Judicial Review from Erroneous Administrative Action (1941) 25

Minn.L.Rev. 560, 576-581; Berger, Exhaustion of Administrative Remedies (1939) 48 Yale L.J. 980, 1006. And the rule against allowing collateral attack, where a judgment is involved, is relevant to the broad problem of foreclosure.

But such instances of foreclosure, whether legislative or judicial in origin, do not support the broader basis of argument in this case. Two things are to be emphasized. One is that the previous opportunity is in an earlier phase of the same proceeding, not as here a separate and independent one of wholly different character. In other words, the determination of guilt or other matter ultimately in issue is not cut up into two separate, distinct and independent proceedings in different tribunals, in which neither body has power to consider and decide all the issues, but each can determine them only in part. The other thing for stress is that the foreclosure by failure to take the earlier chance is not universally effective. And this is true particularly of constitutional questions, some of which may be raised at any time.[FN23] While Congress has plenary power to confer *473 or withhold appellate jurisdiction, cf. Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264, it has not so far been held, and it does not follow, that Congress can confer it, yet deny the appellate court 'power to consider' constitutional questions relating to the law in issue.

FN23 Commonly it is said that 'jurisdictional' questions, particularly concerning the court's power to deal with the subject matter, may be raised at any stage or in a collateral attack. And this seems to be true also of some other constitutional issues through challenge to judgments by habeas corpus proceedings long after the judgment has become final. Cf., e.g., Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676; Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Mooney v. Hollohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. Compare Revised Rules of the Supreme Court of the United States 27, paragraph 6; cf. Weems v. United States, 217 U.S. 349, 362, 30 S.Ct. 544, 547, 54 L.Ed. 793, 19 Ann.Cas. 705; Columbia Heights Realty Co. v. Rudolph, 217 U.S. 547, 30 S.Ct. 381, 54 L.Ed. 877, 19 Ann.Cas. 854; Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345; Mahler v. Eby, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549.

If the foreclosure is not always effective when the earlier phase of litigation is wholly judicial, it hardly should be when this consists of administrative or of both administrative and judicial proceedings, still less when these are civil in character and the later enforcement phase is criminal. In the enforcement of administrative orders the courts have been assiduous, perhaps at times extremely so,[FN24] to see that constitutional protections to the persons affected are observed. By trial and error, ways have been found to give the administrative process scope for effective action and yet to maintain individual security against abuse, especially in respect to constitutional rights.[FN25] The instances closest **691 to the problem here have provided for attaching penalties, including criminal sanctions, to violations of orders. But generally by one method or another means have been supplied for postponing their impact, at any rate irrevocably, until after the order's validity has *474 been established.[FN26] And in that effort this Court has joined.[FN27]

FN24 Compare Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033; Utah Fuel Co. v. National Bituminous Coal Comm., 306 U.S. 56, 59 S.Ct. 409, 83 L.Ed. 483; with Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638.

FN25 E.g., compare Federal Trade Commission v. Gratz, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993, with National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381; cf. also Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; Id., 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129; United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211. Compare note 24 supra; and see Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938.

FN26 Thus, in some cases review and en-

forcement are concentrated exclusively in the same court. Cf. National Labor Relations Act, 49 Stat. 449, 29 U.S.C. s 151 et seq., 29 U.S.C.A. s 151 et seq., giving the circuit courts of appeal exclusive jurisdiction to review and enforce the board's orders, to which no penalty attaches until the board has sought and obtained an order from the court for enforcement. With this done, there is no danger the individual will be sentenced for crime for failure to comply with an invalid order. And there is none that the court will be called upon to lend its hand in enforcing an unconstitutional edict or, for that matter, one merely in excess of statutory authority. Likewise, when there is provision for stay or suspension of the order pending determination of its validity, e.g., the Securities Act of 1933, 48 Stat. 81, 15 U.S.C. s 77i, 15 U.S.C.A. s 77i; the Securities Exchange Act of 1934, 48 Stat. 902, 15 U.S.C. s 78v, 15 U.S.C.A. s 78v; the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U.S.C. s 79x, 15 U.S.C.A. s 79x. And this is true where the enforcing court is not forbidden to consider the validity of the order, a prohibition entirely novel to the Emergency Price Control Act.

FN27 Cf. Wadley Southern Ry. v. Georgia, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405, and authorities cited. In notable instances, also, where no specific provision has been made for either judicial review or avoiding the irrevocable impact of possibly invalid administrative action, and review has not been expressly denied, the courts have been ready to find means for review and for averting the impact of the penalty until it has been had. E.g., Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A., N.S., 932, 14 Ann.Cas. 764; cf. Southern Ry. Co. v. Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260.

Whatever may be the limitations on judicial review in criminal proceedings under other administrative enforcement patterns,[FN28] no one of these arrangements goes as far as the combination presented by this Act. It restricts the individual's right to review to the protest procedure and appeal through the Emergency Court of Appeals. Both are short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down further by a short statute of limitations. Protest must be filed within the sixty-day period. After that time, no protest can be made and no review can be ***475** had, except upon grounds arising later. Section 203(a).[FN29] The only right is to submit written evidence and argument to the administrator. Section 203(c). There is none to present additional evidence to the court.[FN30] Necessarily there is none of cross-examination. No court can ****692** suspend the order unless or until a judgment of the Emergency Court invalidating it becomes final.[FN31] The penalties, civil and criminal, attach at once on violation and, it would seem, until the contrary is decided, with finality.[FN32] At any rate ***476** that is the statute's purport. In short, the statute as drawn makes not only the regulation but also the penalties immediately and fully effective without regard to whether protest is made, the protest proceeding is carried to conclusion, or what the conclusion may be, except, and this is by inference, that violation after the order finally is held invalid may not be punishable.

FN28 Cf. McAllister, op. cit. supra, note 20; and note 26 supra.

FN29 Apparently it is contemplated that the 'affidavits or other written evidence' submitted in support of the objections be filed with the protest, though later submissions may be made at times and under regulations prescribed by the administrator, or when ordered by the Emergency Court, or to that court when the administrator requests. Sections 203(a), 204(a). The administrator is authorized to permit filing of protest after the sixty days have expired solely on grounds arising after that time. Section 203(a). He is required to grant or deny the protest, in whole or in part, notice the protest for a hearing, or provide an opportunity to present further evidence, within thirty days after the protest is filed or ninety days after issuance of the regulation or order, or in the case of a price schedule ninety days from the effective date, whichever occurs later. Ibid.

FN30 Cf. note 29 supra. In the Emergency Court of Appeals, 'no objection to (the) reg-

ulation * * * and no evidence in support of any objection thereto, shall be considered * * * unless such objection' has been set forth in the protest or such evidence is in the transcript. Additional evidence can be admitted only if it was 'either offered to the Administrator and not admitted (by him) or * * * could not reasonably have been offered to * * * or included by the Administrator in such proceedings.' In that case it is to be presented to the administrator, received by him and certified to the court together with any modification he may make in the regulation. Where the administrator so requests, however, such additional evidence 'shall be presented directly to the court.' Section 204(a).

FN31 Cf. note 14 supra.

FN32 That is true whether the infraction occurs before or after the time for protest or appeal has passed and, it would seem, notwithstanding the protestant may proceed with all diligence. The statute makes no provision for relieving from its penal sanctions one who follows the protest procedure to the end in case the protest eventually is sustained, if meanwhile he disobeys the order. Punishment is not made dependent on or required to await the outcome of that proceeding. Rather, the enforcing court is commanded not to consider validity. The command is unqualified, unvarying and universal. It is cast in the compelling terms of 'jurisdiction.' Under the statute's provisions, it applies as much when trial and conviction occur before the Emergency Court's decision is final as afterwards.

This is the scope and reach of the statute. It is greater than any this Court heretofore has sustained.[FN33] It places *477 the affected individual just where the Court, speaking through Mr. Justice Lamar in Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 662, 35 S.Ct. 214, 218, 59 L.Ed. 405, said he could not be put: 'He must * * * obey what may finally be held to be a void order, or disobey what may ultimately be **693 held to be a lawful order.' Yet the Court holds this special proceeding 'adequate' and therefore effective to foreclose all opportunity for defense in a criminal prosecution on the ground the regulation is void.

FN33 Cf. Bradley v. Richmond, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603, which involved a state prosecution for violating a state law. In affirming the conviction this Court rejected the contention that the administrative determination on which prosecution rested was unconstitutional. But it would not follow from the fact a state might thus condition its criminal proceedings consistently with the Fourteenth Amendment's requirement of due process that Congress can do likewise for federal criminal trials. Cf. infra Part V. Wadley Southern Ry. Co. v. Georgia, supra, also involved a state suit for civil penalty for violation of a state administrative order, to which the limitations of the Sixth Amendment would not apply. The dicta which the Court regards as pointing to the validity of the procedure here do not sustain it, not only for this reason, but because the special procedure was different, did not purport to foreclose defense to enforcement if not followed, and expressly asserted that, if followed, penalty could be imposed only for violations taking place after the order was adjudicated valid, not beforehand. This case involves the very risk the Court there said could not be imposed.

Other instances relied on by the Court involve only civil, not criminal consequences, or distinguishable instances of criminal prosecution, and therefore have no conclusive bearing here. As the Court seems to recognize, the question now presented was not presented or considered in Armour Packing Co. v. United States, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681, or in United States v. Adams Express Co., 229 U.S. 381, 33 S.Ct. 878, 57 L.Ed. 1237. And it was not involved or determined in the cited decisions, either here or in the inferior federal courts, dealing with carriers who violate tariffs framed and filed by themselves and thereby become subject to penalty. The same is true of the cases holding that threatened criminal prosecution for violation of administrative orders cannot be enjoined.

In these decisions, none of the statutes for-

bade the enforcing court 'to consider the validity' of the orders, none afforded a special proceeding so summary as that provided here, and only United States v. Vacuum Oil Co., D.C., 158 F. 536, raised a constitutional question relevant here. Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346, involved a different procedure and a different and more urgent problem. Compare Part VII infra. It may be doubted the decision's effect is to preclude the enforcing court from examining constitutional questions affecting the order's validity.

This is no answer. A procedure so summary, imposing such risks, does not meet the requirements heretofore considered essential to the determination or foreclosure of issues material to guilt in criminal causes. It makes no difference that petitioners did not follow the special procedure. The very question, posed in the Court's own terms, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide. Unless it is decided, the question of adequacy, in any sense heretofore received, has not been determined, or an entirely new conception of adequacy has been approved.

***478** V.

But there is a deeper fault, even if we assume what neither the statute nor the Court's opinion today justifies, that a potential offender who successfully challenges the constitutionality of a regulation or begins a challenge on constitutional grounds in the Emergency Court at any time before or during the criminal prosecution, cannot be convicted, at least until after final decision that the order is valid. There still remain those cases where he has either challenged unsuccessfully in the Emergency Court or has not challenged at all. In them the would-be offender is subject to criminal prosecution without a right to question in the criminal trial the constitutionality of the regulation on which his prosecution and conviction hinge. And this seems to be true without distinction as to the character of the ground on which he seeks to make the issue. To say that this does not operate unconstitutionally on the accused because he has the choice of refraining from violation or of testing the constitutional questions in a civil proceeding beforehand entirely misses the point. The fact is that if he violates the regulation he must be convicted, in a trial in which either an earlier and summary civil determination or the complete absence of a determination forecloses him on a crucial constitutional question. In short, his trial for the crime is either in two parts in two courts or on only a portion of the issues material to guilt in one court. This may be all very well for some civil proceedings. But, so far as I know, criminal proceedings of this character never before have received the sanction of Congress or of this Court. That, like many other criminals, an offender here can be punished for making the wrong guess as to the constitutionality of the regulation, I have no doubt. But that, unlike all other criminals, he can be convicted on a trial in two parts, one so summary and civil and the other criminal ***479** or, in the alternative, on a trial which shuts out what may be the most important of the issues material to his guilt, I do deny.

The Sixth Amendment guarantees to the accused 'in all criminal prosecutions * * * the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.' By Article III, Section 2, 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.' And, by the same section, 'The judicial Power,' which is vested in the supreme and inferior courts by Section 1, 'shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * * under their Authority.'

By these provisions the purpose hardly is to be supposed to authorize splitting up a criminal trial into separate segments, with some of the issues essential to guilt triable before one court in the state and district where the crime was committed and others, equally essential, triable in another court in a highly summary civil proceeding held elsewhere, or to dispense with trial on them because that proceeding has not been followed.[FN34] If the validity of the ***480** order, on constitutional or other grounds, has any ****694** substantial relationship to the petitioners' guilt, and it cannot be denied that it does, the short effect of the procedure is to chop up their trial into two separate, successive and distinct parts or proceedings, in each of which only some of the issues determinative of guilt can be tried, the two being connected only by the thread of finality which runs from the decision of the

first into the second. The effect is to segregate out of the trial proper issues, whether of law or of fact, relating to the validity of the law for violation of which the defendants are charged, and to leave to the criminal court only the determination of whether a violation of the regulation as written actually took place and whether in some other respect the statute itself is invalid. If Congress can remove these questions, it can remove also all questions of validity of the statute or, it would seem, of law.

> FN34 Nor, according to accepted notions of the criminal process, has it ever been contemplated that some of the issues of fact should be provable by confrontation of witnesses and others by written evidence only, when other evidence is or may be available. If, for instance, Congress should define an act as a crime, but should require that in the trial issues relating to the validity of the law furnishing the basis for the charge should be proven only by affidavit, though others by the normal processes of proof, the proceeding hardly could be held to comport with the kind of trial the Constitution, and more particularly the Sixth Amendment requires. And if Congress should go further and provide for determination of the issues triable only by affidavit in a court or other body sitting elsewhere than in the state and district of the crime, with other issues triable before a court with a jury empanelled there, but with that court compelled to give finality to the other's findings against the accused, the departure from constitutional requirements would seem to be only the more obvious. This is not far in effect, if it is at all, from what has been done here.

The consequences of this splitting hardly need further noting. On facts and issues material to validity of the regulation the persons charged are deprived of a full trial in the state or district where the crime occurs, even if the Emergency Court sits there, as it is not required to do. Their right to try those constitutional issues both of fact and of law on which a criminal conviction ultimately will hinge, is restricted rigidly to the introduction of written evidence before the administrator in a proceeding barely adequate, even under special circumstances like these, to meet the requirements of due process of law in civil proceedings. The court which makes the decision on these issues cannot consider the facts constituting the violation. It has no power to pass judgment of guilty or not guilty upon the whole of the evidence. It can only pronounce ***481** the law valid or invalid in a setting wholly apart from any charge of crime, from the facts alleged as its commission, and from the usual protections which surround its trial.

On the other hand the special tribunal's judgment, rendered it may be on disputed facts as well as law, becomes binding against the accused, in the later proceeding. He cannot then dispute it, regardless of whether meanwhile the facts have changed[FN35] or new and additional evidence has been discovered and might be tendered with conclusive effect, if it were admissible. He can tender no evidence on what may be the most vital issue in his case and one, it may likewise be, that the evidence then available would sustain overwhelmingly. The trial court must shut its eyes to all such offers of proof and, moreover, to any such issue of law.

> FN35 His only remedy is to begin a new protest proceeding (s 203(a)), which is not only as limited in character as the original one, but under the administrator's procedural regulations must be 'filed within * * * sixty days after the protestant has had, or could reasonably have had, notice' of the changed facts. Revised Procedural Regulation 1, s 1300.26. Cf. notes 29, 30 supra.

VI.

A procedure so piecemeal, so chopped up, so disruptive of constitutional guaranties in relation to trials for crime, should not and, in my judgment, cannot be validated, as to such proceedings, under the Constitution. Even war does not suspend the protections which are inherently part and parcel of our criminal process. Such a dissection of the trial for crime could be supported, under our system, only upon some such notions as waiver and estoppel or res judicata, whether or not embodied in legislation.[FN36] These too are strange and inadequate vehicles for trying whether ****695** the citizen has been guilty of criminal conduct. They bar defense, while keeping prosecution open, before it begins. ***482** Res judicata, by virtue of a judgment in some prior civil proceeding, where different constitutional guaranties relating to the mode and course of trial have play, has not done

duty heretofore to replace either proof of facts before a jury or decision of constitutional questions necessary to make up the sum of guilt in the criminal proceeding itself. Congress can invade the judicial function in criminal cases no more by compelling the court to dispense with proof, jury trial or other constitutionally required characteristics than it can by denying all effect of finality to judicial judgments. Cf. Schneiderman v. United States, 320 U.S. 118, concurring opinion at pages 167, 168, 63 S.Ct. 1333, at pages 1356, 1357, 87 L.Ed. 1796. And while, as noted above, notions of waiver and estoppel have had place in criminal proceedings to an extent not wholly defined, in some instances harshly and artificially,[FN37] they have not had effect heretofore to enable Congress to force a waiver of defense upon the individual by offering a choice between two kinds of trial, neither of which satisfies constitutional requirements for criminal trials. Certainly when the consequences are so novel and far reaching as they may be under this procedure, both for the individual and for the judicial system, these conceptions should not be given legal establishment to bring them into being.

FN36 Cf. note 22 supra.

FN37 Compare Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; with Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263; Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435.

To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake. The question is not merely whether the protest proceeding is adequate in the constitutional sense for some of the purposes pertinent to that proceeding. It is rather what effect shall be given to the civil determination in the later and entirely different criminal trial. It is whether, by substituting that civil proceeding for decision of basic issues in the criminal trial itself, Congress can foreclose ***483** the accused from having them decided in that trial and thereby deprive him of the protections in trial guaranteed all persons charged with crime and thus of full and adequate defense. It is not the equivalent of that sort of defense to force one to initiate a curtailed civil suit or to cut him off shortly from all defense on the issues allocated to it, if he does not do so. Again, the question is not merely whether the individual can waive his constitutional trial of the issue of validity. It is rather whether Congress can force him to do so in the manner attempted and, beyond this, whether he and Congress together, in the combined effects of what they do, can so strip the criminal forum of its power and of its duty to abide the law of the land. And if the issue is further whether Congress can do this in some situations, respecting some issues, under more usual safeguards, the question requires attention to these important limitations.[FN38]

FN38 Cf. note 41 infra.

The procedural pattern is one which may be adapted to the trial of almost any crime. Once approved, it is bound to spawn progeny. If in one case Congress thus can withdraw from the criminal court the power to consider the validity of the regulations on which the charge is based, it can do so for other cases, unless limitations are pointed out clearly and specifically. And it can do so for statutes as well. In short the way will have been found to avoid, if not altogether the power of the courts to review legislation for consistency with the Constitution,[FN39] then in part at least their obligation to observe its commands and more especially the guaranteed protections of persons charged with crime in the trial of their causes. This is not merely control or definition of jurisdiction. It ***484** is rather unwarranted abridgement of the judicial power in the criminal process, unless at the very least it is confined specifically to situations where the special ****696** proceeding provides a fair and equal substitute for full defense in the criminal trial or other adequate safeguard is afforded against punishment for violating an order which itself violates or may violate basic rights. So much should not be accomplished merely by giving to the failure to take advantage of opportunity for summary civil determination, coupled with a short statute of limitations upon its availability, the effect of a full and final criminal adjudication. To do this hardly observes the substance of 'adequacy' in criminal trials.

FN39 Cf. McLaren, Can a Trial Court of the United States Be Completely Deprived of the Power to Determine Constitutional Questions? (1944) 30 A.B.A.J. 17.

From what has been said it seems clear that Congress cannot forbid the enforcing court, exercising the criminal jurisdiction, to consider the constitutional validity of an order invalid on its face. Any other view would permit Congress to compel the courts to enforce unconstitutional laws. Nor, in my opinion, can Congress forbid consideration of validity in all cases, if it can in any, where the invalidity appears only from proof of facts extrinsic to the regulation. Again the racial or religious line is obvious and pertinent. If, for instance, one charged criminally with violating the regulation should tender proof it was being enforced in a manner to deny him the equal protection of the laws, because of his racial or religious connections, it is difficult to believe the evidence could be excluded consistently with the judicial obligation. The Constitution does not make judicial observance or enforcement of its basic guaranties depend on whether their violation appears from the face of legislation or only from its application to proven facts. Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397; Yick Wo v. Hopkins, 118 U.S. 356, 373, 374, 6 S.Ct. 1064, 1072, 1073, 30 L.Ed. 220; United States v. Carolene Products Co., 304 U.S. 144, 152—154, 58 S.Ct. 778, 783, 784, 82 L.Ed. 1234.

For legislation not void on its face, a presumption of constitutionality attaches and remains until it is proven ***485** invalid or so in operation. In such cases there is no unfairness, nor any invasion of the court's paramount obligation, in requiring one who would avoid the regulations' impact to show they are not what they appear to be or that they are made to operate otherwise than as they purport or were intended. But it is one thing to say that burden must be borne within the enforcement proceeding itself and another to say it must be carried entirely outside it. To require the defendant to prove invalidity in such a situation in the criminal trial itself, upon a showing of violation of the statute, is wholly permissible. But for the court to be unable to receive tendered evidence which might disclose the statute's invalid character and effect, is quite different. Certainly, under the circumstances of this case, it would seem to be as much a violation of individual right and as much an invasion of the judicial function for Congress to command the court not to receive the evidence, regardless of its character or effect, as for it to direct the court to enforce a law or an order void on its face.

VII.

To sanction conviction of crime in a proceeding which does not accord the accused full protection for his rights under the Fifth and Sixth Amendments, and which entails a substantial legislative incursion on the constitutionally derived judicial power, if indeed this ever could be sustained, would require a showing of the greatest emergency coupled with an inability to accomplish the substantive ends sought in any other way. No one questions the seriousness of the emergency the Price Control Act was adopted to meet. And it has been urged with great earnestness that the nation's security in the present situation requires that the statute's procedure, followed in this case, be sustained to its full extent.

That argument would be more powerful if enforcement of the statute, and thus maintenance of price control, were ***486** dependent upon accepting every feature. No doubt to impose the criminal sanction as has been done in this case implements the enforcement process with the deterrent effects which usually accompany that sanction. But neither its use nor enforcement of the statute's substantive prohibitions requires that the criminal court shall not consider the validity of the regulations.

With the arsenal of other valid legal weapons available, there can be no lack of speedy and effective measures to secure compliance. The regulations are effective until invalidated. They cannot be suspended by any court, pending final decision here, if the last source of relief is sought. All ****697** the armory of equity, and with it the sanctions of contempt, are available to keep the regulations in force and to prevent violations, at least until decision here is sought and had that the regulations are invalid. The same weapons are available to enforce them permanently if they are found valid. Apart from defense when charged with crime, the individual's only avenue of escape, and that not until final decision of invalidity has been made, is by protest and appeal through the single route prescribed. Finally, in addition to all this, the dealer may be punished for crime if he violates the regulation wilfully and cannot show it is invalid either in his defense or by securing a judgment to this effect through the protest procedure. In either case, in view of the statute's curtailment of his substantive rights and the consequent increase in the burden of proving facts sufficient to nullify the regulation,[FN40] his chance for escape ***487** becomes remote, to say the least. In view of all these resources and advantages, the asser-

tion hardly is sustained that enforcement requires also depriving the accused of his opportunity for full and adequate defense in his criminal trial.

FN40 That burden is heavy, as this case illustrates. Petitioners attacked the regulation's constitutionality on the ground that, by compelling them to sell at prices less than cost, it deprived them of their property without due process of law. And, on the same ground, they urged the regulation violates the statute's requirement that the price fixed allow margins which are 'generally fair and equitable.' But the Fifth Amendment does not insure a profit to any given individual or group not under legal compulsion to render service, where doing so would contravene an enacted policy of Congress sustainable on a balance of public necessity and private hardship. Cf. the Court's opinion herein and authorities cited; also Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641. And in this case both the statute's basic purpose and its terms, as well as the legislative history, cf. Sen.Rep. No. 931, 77th Cong., 2d Sess. 15, show that Congress intended to forbid only a price so low that the trade in general, not merely some individual dealers or groups, could not have the margin prescribed. Bowles v. Willingham, supra. Petitioners' offers of proof, in this respect, which the trial court rejected, went only to show that they, or at most the meat wholesalers of Boston, could sell beef only at a loss. Harsh as this may seem in individual instances, it was Congress' judgment that the interests of dealers who could not operate profitably at a level of prices permitting a fair margin generally to the trade, would have to give way, in the acute prevailing circumstances, to the paramount national necessity of keeping prices stabilized and that judgment, by virtue of those circumstances, was for Congress to make. Accordingly the tendered proof hardly was sufficient to raise an issue of confiscation giving ground for setting aside the regulation.

It is likely that by far the greater number of challenges would arise on grounds of supposed confiscation, in which this burden would have to be met. Once it is made clear just what that burden is, the fear hardly seems justified that enforcement would swamp the agency with litigation. In any event the remedy for that would be by providing a more adequate enforcing staff, not by cutting off defense to criminal prosecutions based on invalid orders.

War requires much of the citizen. He surrenders rights for the time being to secure their more permanent establishment. Most men do so freely. According to our plan others must do so also, as far as the nation's safety requires. But the surrender is neither permanent nor total. The great liberties of speech and the press are curtailed but not denied. Religious freedom remains a ***488** living thing. With these, in our system, rank the elemental protections thrown about the citizen charged with crime, more especially those forged on history's anvil in great crises. They secure fair play to the guilty and vindication for the innocent. By one means only may they be suspended, even when chaos threatens. Whatever else seeks to dispense with them or materially impair their integrity should fail. Not yet has the war brought extremity that demands or permits them to be put aside. Nor does maintaining price control require this. The effect, though not intended, of the provision which forbids a criminal court to 'consider the validity' of the law on which the charge of crime is founded, in my opinion, would be greatly to ****698** impair these securities. Hence I cannot assent to that provision as valid.

Different considerations, in part at any rate, apply in civil proceedings. FN41 But for the trial of crimes no procedure***489** should be approved which dispenses with trial of any material issue or splits the trial into disjointed segments, one of which is summary and civil, the other but a remnant of the ancient criminal proceeding.

FN41 Cf. concurring opinion in Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641. Limitations applicable solely to criminal proceedings fall to one side. Giving the decision in the special proceeding, or failure to seek it after reasonable opportunity, the effect of res judicata in later civil proceedings does not therefore deprive the party affected of opportunity for full and adequate defense in his criminal trial, where not only his rights of property, but his liberty or his life may be

at stake.

However widely the character of the special remedy may be varied to meet different urgencies, with consequences of foreclosure for civil effects, the foreclosure of criminal defense should be allowed, if at all, only by a procedure affording its substantial equivalent, in relation to special constitutional issues and in such a manner that the failure to follow it reasonably could be taken as an actual, not a forced waiver. Thus, possibly foreclosure of criminal defense could be sustained, when validity turns on complex economic questions, usually of confiscatory effects of legislation, and proof of complicated facts bearing on them. But, if so, this should be only when the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings, so that, if followed, the party would have a substantial equivalent to defense in a criminal trial. And the opportunity should be long enough so that the failure to take it reasonably could be taken to mean that the party intends, by not taking it, to waive the question actually and not by forced surrender. So safeguarded, the foreclosure of such questions in this way would not work a substantial deprivation of defense.

In respect to other questions, such as the drawing of racial or religious lines in orders or by their application, of a character determinable as well by the criminal as by the special tribunal, in my opinion the special constitutional limitations applicable to federal criminal trials, and due enforcement of some substantive requirements as well, require keeping open and available the chance for full and complete defense in the criminal trial itself.

The judgment should be reversed.

I am authorized to say that Mr. Justice MURPHY joins in this opinion.

U.S. 1944.
Yakus v. U. S.

321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834, 28 O.O. 220

END OF DOCUMENT

27-LS0741\X
Nauman/Bullock
3/1/12

SENATE CS FOR CS FOR HOUSE BILL NO. 215( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES CHENAULT, Neuman, Fairclough, Johnson, Hawker, Olson, Feige, Millett, Thompson, Pruitt, Saddler, Tammie Wilson, Dick, Costello

A BILL

FOR AN ACT ENTITLED

"An Act relating to the judicial review of a right-of-way lease or other authorization for the development, construction, or initial operation, of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Gasline Development Corporation for a gas pipeline transportation corridor."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 38.34.050(c) is amended to read:

(c) Notwithstanding any contrary provision of law, the Department of Natural Resources shall grant the **Alaska Gasline Development Corporation, a subsidiary of the Alaska Housing Finance Corporation created under AS 18.56.086,** [ALASKA HOUSING FINANCE CORPORATION] a right-of-way lease under AS 38.35 for the gas pipeline transportation corridor **at no cost or rental fee** if

(1) [THE CORPORATION SUBMITS] a complete right-of-way lease application under AS 38.35.050 **is submitted**;

(2) the lease application is made the subject of notice and other

reasonable and appropriate publication requirements under AS 38.35.070; and

(3) the **Alaska Gasline Development Corporation** [CORPORATION] agrees to be bound by the right-of-way lease covenants set out in AS 38.35.120**, except for the covenants in AS 38.35.120(a)(1), (2), (5), and (7); notwithstanding AS 38.35.120(b), a right-of-way lease subject to this paragraph is valid and of legal effect**.

*** Sec. 2.** AS 38.35.100(d) is amended to read:

(d) The commissioner shall include in a conditional lease each requirement and condition of the covenants established under AS 38.35.120**, except that, for a lease entered into under AS 38.34.050(c), the covenants in AS 38.35.120(a)(1), (2), (5), and (7) may not be included**. The commissioner may also require that the lessee agree to additional conditions that the commissioner finds to be in the public interest. In place of the covenant established under AS 38.35.120(a)(9), the commissioner shall require the lessee to agree that it will not transfer, assign, pledge, or dispose of in any manner, directly or indirectly, its interest in a conditional right-of-way lease or a pipeline subject to the conditional lease, unless the commissioner, after considering the public interest and issuing written findings to substantiate a decision to allow the transfer, authorizes the transfer. The commissioner shall also require the lessee to agree not to allow the transfer of control of the lessee without the approval of the commissioner; as used in this subsection, "transfer of control of the lessee" means the transfer of 30 percent or more, in the aggregate, of ownership interest in the lessee in one or more transactions to one or more persons by one or more persons.

*** Sec. 3.** AS 38.35.120(a) is amended to read:

(a) **Except as provided in AS 38.34.050(c), a** [A] noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at $1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline

subject to the lease throughout its route both on state land obtained under the lease and on the other land; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Regulatory Commission of Alaska shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier; however, a lessee that owns or operates a natural gas pipeline

(A) subject to regulation either under the Natural Gas Act (15 U.S.C. 717 et seq.) of the United States or by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph;

(B) that is a North Slope natural gas pipeline (i) is required to operate as a common carrier only with respect to the intrastate transportation of North Slope natural gas, as that term is defined in AS 42.06.630, and (ii) is not required to operate as a common carrier as to a liquefied natural gas facility or a marine terminal facility associated with the pipeline, and is not otherwise required to perform its functions under the lease as a common carrier; for purposes of this subparagraph, "North Slope natural gas pipeline" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of North Slope natural gas, as defined by AS 42.06.630, for delivery, for storage, or for further transportation, and including all pipe, pump, or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control centers for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to carry out transportation, including an extension or

enlargement of the line;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Regulatory Commission of Alaska under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Regulatory Commission of Alaska;

(8) it will, at its own expense, during the term of the lease,

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any person other than another owner of the pipeline (including subsidiaries, parents, and affiliates of the owners), except to the extent that the commissioner, after consideration of the protection of the public interest (including whether the proposed transferee is fit, willing, and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property, and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold consent to the transfer, assignment, or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions, and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner, filing a copy in the office of the lieutenant governor, and mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation, or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or

undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction or operation of the pipeline.

*** Sec. 4.** AS 38.35.120(b) is amended to read:

(b) **Except as provided in AS 38.34.050(c), for** [FOR] a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at $1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of AS 38.35.110 - 38.35.140. **Except as provided in AS 38.34.050(c), an** [AN] oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

*** Sec. 5.** AS 38.35.200 is amended by adding new subsections to read:

(c) Except as provided for an applicant under (a) of this section, notwithstanding any contrary provision of law, an action or decision of the commissioner or other state officer or agency concerning the issuance or approval of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation, a subsidiary created by the Alaska Housing Finance Corporation under AS 18.56.086, that uses a right-of-way subject to this chapter may not be subject to judicial review, except that a claim alleging the invalidity of this subsection must be brought within 60 days after the effective date of this Act, and a claim alleging that an action will deny rights under the Constitution of the State of Alaska must be brought within 60 days following the date of that action. A claim that is not filed within the limitations established in this subsection is barred. A complaint under this subsection must be filed in superior court, and the superior court has exclusive jurisdiction. Notwithstanding AS 22.10.020(c), except in conjunction with a final judgment on a claim filed under this subsection, the superior court may not grant injunctive relief, including a temporary restraining order, preliminary injunction, permanent injunction, or stay against the issuance of a necessary right-of-

way, permit, lease, certificate, license, or other authorization for the development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation, a subsidiary created by the Alaska Housing Finance Corporation under AS 18.56.086. In this subsection, "natural gas pipeline" means all the facilities of a total system of pipe for transportation of natural gas for treatment or conditioning, delivery, storage, or further transportation, and including all pipe, pump and compressor stations, station equipment, and all other facilities used or necessary for an integral line of pipe to carry out the transportation of the gas.

(d) An appeal of a permitting decision by the Department of Environmental Conservation under AS 46.03 or AS 46.14 that is made under authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency is not included in the actions or decisions described in (c) of this section.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION AND LEGISLATIVE INTENT. It is the intent of the legislature that a right-of-way lease subject to AS 38.34.050(c), as amended by sec. 1 of this Act, AS 38.35.100(d), as amended by sec. 2 of this Act, AS 38.35.120(a), as amended by sec. 3 of this Act, and AS 38.35.120(b), as amended by sec. 4 of this Act, that is entered into between the commissioner of natural resources and the Alaska Gasline Development Corporation, a subsidiary of the Alaska Housing Finance Corporation created under AS 18.56.086, before the effective dates of secs. 1 - 4 of this Act be amended as soon as practicable after the effective dates of secs. 1 - 4 of this Act to conform to the requirements of AS 38.34.050(c), as amended by sec. 1 of this Act, AS 38.35.100(d), as amended by sec. 2 of this Act, AS 38.35.120(a), as amended by sec. 3 of this Act, and AS 38.35.120(b), as amended by sec. 4 of this Act.

*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes shall change the catch lines of

(1) AS 38.34.050 from "Cooperation and access to information" to "Cooperation; information sharing; permits, use of state resources, and leases"; and

(2) AS 38.35.200 from "Judicial review of decisions of commissioner on

application" to "Judicial review."

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 2, 2012

SUBJECT: Change of title of HB 215 in the other body
(Work Order No. 27-LS0741\X)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Donald M. Bullock Jr.
Legislative Counsel

Enclosed is a draft SCS CSHB 215( ) that will require a title change in the Senate.

Please advise the sponsoring committee to request a final version of the enclosed concurrent resolution to waive the Uniform Rules that prohibit a title change in the second body.

If I may be of further assistance, please advise.

DMB:plm
12-142.plm

Enclosures

27-LS1428\A
Nauman/Bullock
3/1/12

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 215, relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 215, relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor.

MEA
MATANUSKA ELECTRIC ASSOCIATION

March 13, 2012

Senator Hollis French
716 W. 4th Avenue, Suite 500
Anchorage, AK 99501-2133

Subject: HB 215

Dear Senator French:

Matanuska Electric Association (MEA) provides electrical service to 57,000 households, businesses, schools and government facilities in a service territory spanning Eagle River to Trapper Creek (south to north) and Big Lake to Sheep Mountain (west to east). A long term opportunity for MEA customers is the prospect of a new power generation facility located in the northern end of the Mat-Su Borough near Talkeetna. In planning for a 15 to 20-year timeline, MEA will require natural gas from the AGDC's bullet line delivered to the northern sector of our service territory to lower electric power costs and increase reliability of service in that area.

While the ASAP project does not contemplate any gas off-take along its route, the current State-granted rights-of-way do contain provisions to assure that in the future such service could be requested. Unfortunately, HB 215 would retroactively remove the RCA requirement to adjudicate connection requests (AS 38.35.120(a)5). This would likely eliminate any possibility for MEA access to this pipeline. MEA would have objected during the DNR hearings held before granting the existing rights-of-way if there was no guarantee of future access.

MEA's concerns were previously communicated to Mr. Fauske at a public hearing in Anchorage. We believe that good public policy warrants requiring all pipelines to provide access to our citizens with RCA as the adjudicating agency, if necessary.

Sincerely,

Evan J. Griffith
General Manager

Z:\JOE\2012\MEA Correspondence\H. French 3-13-12 HB215.docx

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 215**
Fiscal Note Number
Publish Date

Identifier (file name) HB215-DNR-SPCO-12-23-11
Title JUDICIAL REVIEW OF PIPELINE PROJECT/ROW
Sponsor Rep. Chenault
Requester Senate Judiciary

Dept. Affected Natural Resources
Appropriation Administration & Support
Allocation Pipeline Cooridnator's Office
OMB Component Number 1191

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note has been updated to the SLA 2012 form.

Prepared by Mike Thompson
Division Pipeline Coordinator's Office
Approved by Daniel S. Sullivan
Department of Natural Resources

Phone 257-1330
Date/Time 12/23/11 12:00 AM
Date 12/23/2011

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way.

There would be no fiscal impact on the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 215(JUD)**
Fiscal Note Number:
Publish Date:

Identifier (file name): HB215CS-DOR-AHFC-12-15-11
Title: AK. Gasline Development Corp. / Gas Pipeline Fund
Sponsor: Representative Chenault
Requester: (S) Judiciary

Dept. Affected: Revenue
Appropriation: AK Housing Finance Corp
Allocation: AK Gasline Development Corp.
OMB Component Number: 2986

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated fiscal note to reflect current fiscal year.

Prepared by: Dave Harbour, Director External Affairs — Phone: 907-277-4488
Division: Alaska Gasline Development Corporation — Date/Time: 12/15/11 10:50 AM
Approved by: Dan Fauske, President — Date: 12/15/2011
Alaska Gasline Development Corporation

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 215(JUD)

Analysis

HB 215 relates to judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land. No additional resources or staff is expected; therefore, there is no fiscal impact to the corporation.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 215**
Fiscal Note Number:
Publish Date:

Identifier (file name): HB215CS(JUD)am-LAW-CIV-12-13-11
Dept. Affected: Law
Title: An Act relating to the judicial review of right-of-way lease or the development or construction of an oil or gas pipeline.
Appropriation: Civil
Allocation: Oil, Gas & Mining
Sponsor: Representative(s) Chenault
Requester: (S) Judiciary
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 12/13/11 11:15AM
Approved by: John J. Burns, Attorney General — Date: 12/13/2011
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way. HB 215 would also create an exemption to the common carrier requirements of AS 38.35 in favor of the Alaska Housing Finance Corporation for the lease of a gas line right-of-way.

Alaska State Legislature

State Capitol, Room 208
Juneau, Alaska 99801-1182
Phone: 907-465-3779
Fax: 907-465-2833
Toll Free: 800-469-3779

145 Main St. Loop
Second Floor
Kenai, Alaska 99611
Phone: 907-283-7223
Fax: 907-283-7184

REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE

MEMORANDUM

TO: Senator Hollis French, Chair
Senate Judiciary Committee

FROM: Representative Mike Chenault
Speaker of the House

DATE: April 12, 2011

~~RE: Request for Hearing-Committee Substitute for House Bill 215 (JUD) am~~

Please consider this request to schedule House Bill 215: *Judicial Review of Pipeline/ROW,* before your committee at your earliest possible convenience. Back-up for the legislation will be sent to your committee aide shortly.

Thank you for your consideration of my request.

Representative_Mike_Chenault@legis.state.ak.us

Alaska State Legislature

State Capitol, Room 208
Juneau, Alaska 99801-1182
Phone: 907-465-3779
Fax: 907-465-2833
Toll Free: 800-469-3779

145 Main St. Loop
Second Floor
Kenai, Alaska 99611
Phone: 907-283-7223
Fax: 907-283-7184

REPRESENTATIVE MIKE CHENAULT

SPEAKER OF THE HOUSE

SPONSOR STATEMENT

COMMITTEE SUBSTITUTE for HOUSE BILL 215 (JUD) am

"An Act relating to judicial review of a right-of-lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing Finance Corporation for a gas pipeline transportation corridor."

The objective of House Bill 215 is to prohibit the filing of lawsuits that have the potential to delay construction of in-state gaslines. The provisions under House Bill 215 modify current statute and the provisions only apply to state land rights-of-way. Claims may be filed only by an applicant, a competing applicant or a person who has a direct financial interest affected by the lease of a right-of-way. The requests for judicial review must be filed within 60 days of the publication of notice for a right-of-way lease application. Judicial review may only be granted for claims challenging the validity of the statute or challenging a denial of rights under the state constitution. Any claim will be barred unless it is filed within the 60 day time frame. The Department of Environmental Conservation, under the Clean Water and Clean Air Acts, is exempted from the provisions pertaining to judicial review.

All claims are to be filed in Alaska Superior Court which will have exclusive jurisdiction to determine the proceeding. The court will not have the jurisdiction to grant any injunctive relief with the exception of an issuance of a final judgment.

This legislation is modeled after the Trans-Alaska Pipeline legislation, 43 USC, Chapter 34, that was adopted by Congress in 1973 (43 USC, Chapter 43, Sec. 1652 (d).) Similar legislation to House Bill 215 was passed by the Alaska State Legislature in 1973, Senate Bill 3, related to the TAPS line.

The bill also allows the Alaska Gasline Development Authority (AGDC) to move from a common carrier requirement to a contract carrier option. This change is necessary to pursue a successful open season and project financing for an in-state gasline.

Representative_Mike_Chenault@legis.state.ak.us

Alaska State Legislature

State Capitol, Room 208
Juneau, Alaska 99801-1182
Phone: 907-465-3779
Fax: 907-465-2833
Toll Free: 800-469-3779

145 Main St. Loop
Second Floor
Kenai, Alaska 99611
Phone: 907-283-7223
Fax: 907-283-7184

REPRESENTATIVE MIKE CHENAULT
SPEAKER OF THE HOUSE

SECTIONAL ANALYSIS

COMMITTEE SUBSTITUTE for HOUSE BILL 215 (JUD) am: "*An Act relating to the judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land; and relating to the lease of a right-of-way by the Alaska Housing finance Corporation for a gas pipeline transportation corridor.*"

Section 1: Amends AS 38.34.050(c), Cooperation and access to information. Adds language that excludes covenants found in AS 38.35.120(a) (1), (2) and (5) from the covenants required to be included in the lease. These covenants refer to a common carrier pipeline which is not applicable to the AGDC (Alaska Gasline Development Corporation) proposal. The AGDC gas pipeline proposal is to be that of a contract carrier. Without the removal of the specific covenants, AGDC will be impacted in its ability to finance the project.

Also adds language that a right-of-way lease is valid and of legal effect notwithstanding AS 38.35.120(b). This allows AGDC to continue its work through the summer under the assumption that AGDC has the ability to operate under this take or pay approach.

Section 2: Amends AS 38.35.100(d), Decision on application. Conforming language to note the changes found in Section 1.

Section 3: Amends AS 38.35.120(a), Covenants required to be included in lease. Conforming language to note the changes found in Section 1.

Section 4: Amends AS 38.35.120(b), Covenants required to be included in lease. Conforming language to note the changes found in Section 1.

Section 5: Amends AS 38.35.200(a), Judicial review of decisions of commissioner on application. Adds language that is intended to limit the ability of those with objections to natural gas pipeline construction to stop necessary projects. Allows a competing applicant or a person with a direct financial interest affected by the lease of a right-of-way to raise an objection within 60 days of the application or 60 days after the effective date of this legislation. Allows an applicant standing to seek judicial review anytime in the process.

Representative_Mike_Chenault@legis.state.ak.us

Section 6: Adds a new subsection to AS 38.35.200, Judicial review of decisions of commissioner on application. This subsection (c) is modeled after the Trans-Alaska Pipeline Authorization Act provision to foreclose lawsuits against any phase of development and/or construction. This subsection only allows those who have standing to bring about an action alleging that an action will deny rights under the state Constitution or challenging the invalidity of this section. The complaint must be filed in a state Superior Court and the court may not grant injunctive relief with the exception of a final judgment. Exempts an appeal of a permitting decision by the Department of Environmental Conservation under AS 46.03 (Environmental Conservation) and AS 46.14 (Air Quality Control) that is delegated to the department by the Environmental Protection Agency.

Section 7: Amends uncodified law by adding a new section for Revisor's Instructions. Changes the catch line of AS 38.35.200 from "Judicial review of decisions of commissioner on application" to "Judicial review."

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 215**
Fiscal Note Number
Publish Date

Identifier (file name) HB215-DNR-SPCO-12-23-11
Title JUDICIAL REVIEW OF PIPELINE PROJECT/ROW
Sponsor Rep. Chenault
Requester Senate Judiciary

Dept. Affected Natural Resources
Appropriation Administration & Support
Allocation Pipeline Cooridnator's Office
OMB Component Number 1191

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note has been updated to the SLA 2012 form.

Prepared by Mike Thompson — Phone 257-1330
Division Pipeline Coordinator's Office — Date/Time 12/23/11 12:00 AM
Approved by Daniel S. Sullivan — Date 12/23/2011
Department of Natural Resources

(Revised 11/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way.

There would be no fiscal impact on the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **HB 215**
Fiscal Note Number
Publish Date

Identifier (file name) HB215CS(JUD)am-LAW-CIV-12-13-11
Title An Act relating to the judicial review of right-of-way lease or the development or construction of an oil or gas pipeline.
Sponsor Representative(s) Chenault
Requester (S) Judiciary

Dept. Affected Law
Appropriation Civil
Allocation Oil, Gas & Mining
OMB Component Number 2091

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by Eileen Donahue, Division Operations Manager
Division Administrative Services
Phone 465-5427
Date/Time 12/13/11 11:15AM

Approved by John J. Burns, Attorney General
Department of Law
Date 12/13/2011

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 215

Analysis

Current Alaska statutes limit challenges of pipeline right-of-way leasing decisions to lease applicants, competing applicants and persons with a direct financial interest who raise an objection within 60 days a right-of-way lease application is noticed; and restrict the grounds for judicial review to procedural errors. HB 215 would amend existing statutes to impose the same limits on judicial review, including the requirement to raise an objection within 60 days of notice of the initial lease application, to all permitting and licensing decisions associated with development and construction of a pipeline that uses a state right-of-way. HB 215 would also create an exemption to the common carrier requirements of AS 38.35 in favor of the Alaska Housing Finance Corporation for the lease of a gas line right-of-way.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **CSHB 215(JUD)**
Fiscal Note Number
Publish Date

Identifier (file name) HB215CS-DOR-AHFC-12-15-11
Title AK. Gasline Development Corp. / Gas Pipeline Fund
Sponsor Representative Chenault
Requester (S) Judiciary

Dept. Affected Revenue
Appropriation AK Housing Finance Corp
Allocation AK Gasline Development Corp.
OMB Component Number 2986

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated fiscal note to reflect current fiscal year.

Prepared by Dave Harbour, Director External Affairs — Phone 907-277-4488
Division Alaska Gasline Development Corporation — Date/Time 12/15/11 10:50 AM
Approved by Dan Fauske, President — Date 12/15/2011
Alaska Gasline Development Corporation

(Revised 8/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 215(JUD)

Analysis

HB 215 relates to judicial review of a right-of-way lease or the development or construction of an oil or gas pipeline on state land. No additional resources or staff is expected; therefore, there is no fiscal impact to the corporation.

MONTY D. MOORE, Appellant, v. STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES; and AMERICAN COPPER & NICKEL CO., INC., Appellees.

Supreme Court No. S-8624, No. 5209

SUPREME COURT OF ALASKA

992 P.2d 576*; *1999 Alas. LEXIS 158*; *147 Oil & Gas Rep. 215*; *30 ELR 20218

November 26, 1999, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,. Superior Court No. 3AN-97-3992 CI. Sigurd E. Murphy, Judge pro tem.

DISPOSITION: The superior court's decision AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, company that located and recorded mining claims on state-selected federal land, appealed an order of the Superior Court, Third, Judicial District (Alaska), which upheld decision of appellee, commissioner of state natural resource agency, to void the mining claims.

OVERVIEW: Appellant acquired mining rights on federal land the State had selected under the Alaska Statehood Act, Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 341-42 (1958) prior to the federal government's approval of the land selection. Appellant did not challenge appellee's determination that it was not qualified to do business in Alaska because it failed to register with the appropriate state agency. The court concluded that appellant acquired mining rights at the time of location, rather than an ephemeral claim in waiting, because the State had a present, substantial interest in state-selected lands prior to approval by the federal government. Appellee's decision to void appellant' mining rights was correct because appellee acted within its authority, was entitled to find that appellant was not qualified to conduct business in Alaska and thus not qualified to acquire mining rights under *Alaska Stat. § 38.05.190(a)*.

OUTCOME: Order affirmed because appellant acquired mining rights at time of location, not an ephemeral claim in waiting, and since appellant was not qualified to conduct business in the state, appellant was not qualified to acquire mining rights.

COUNSEL: Thomas E. Meacham, Anchorage, for Appellant.

Lawrence Z. Ostrovsky, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska, Department of Natural Resources.

Joseph J. Perkins, Jr. and Barbara F. Fullmer, Guess & Rudd P.C., Anchorage, for Appellee American Copper & Nickel Company, Inc.

JUDGES: Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

OPINION BY: CARPENETI

OPINION

[*576] OPINION

CARPENETI, Justice.

I. *INTRODUCTION*

Pacific Rainier, Inc. (PRI) located and recorded mining claims on state-selected federal land. At the time, the federal government had not conveyed the land. Upon determining [**2] that PRI was not qualified to do business in Alaska, and thus not allowed to acquire min-

ing rights in this state, the Commissioner of the Department of Natural Resources voided PRI's claims. The superior court upheld the commissioner's decision. The president [*577] of PRI, Monty D. Moore, appealed to this court, arguing that a locator on state-selected federal lands does not acquire mining rights voidable by the state because the state has no rights to convey until the federal government tentatively approves the transfer. In addition, Moore argues that such rights accrue by operation of law upon tentative approval by the federal government, and under Alaska law he has two years after that approval to qualify to do business in Alaska and thus acquire the rights. We disagree. Because a locator acquires mining rights at the time of location, and the commissioner properly voided the rights PRI acquired, we affirm.

II. *FACTS & PROCEEDINGS*

In early 1996, PRI located and recorded certificates of location under state law [1] to more than 200 mining claims and prospecting sites on land north of Denali Highway near Paxson. The locations were made on federal land that the state had [**3] selected pursuant to Section 6 of the Alaska Statehood Act; [2] however, the federal government had not yet "tentatively approved" [3] the state's land selection or transferred patent.

1 *See AS 38.05.185-275.*

2 Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 341-42 (1958), *reprinted in* 48 U.S.C.A. note preceding § 21 (West 1987).

3 The act of issuing tentative approval constitutes the formal transfer of land management authority from the United States to the State of Alaska regarding any particular Statehood Act land selections. *See id.*:

> Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands . . . .

Later that year, American Copper & Nickel Company, Inc. (ACNC), a company claiming to have located, staked, and recorded [**4] many of PRI's locations before PRI had, informed the Division of Mining that PRI was not a corporation qualified to do business in Alaska and therefore was not qualified to acquire exploration and mining rights under Alaska law. ACNC requested that the division resolve the issue as soon as possible because the conflicting claims were causing investors to withhold financing for ACNC's drilling program. [4] Shortly thereafter, the division director nullified and voided PRI's claims on the grounds brought forward by ACNC.

4 ACNC indicated that the United States Bureau of Land Management had given ACNC permission to conduct drilling on the state-selected lands. The state concurred. Prior to conveyance from the United States to the state, a locator may obtain permits to drill from the federal land manager and other permitting authorities with the state's concurrence. *See* Alaska National Interest Lands Conservation Act § 906(k)(1), *43 U.S.C.A. § 1635(k)(1) (West 1986)*; *see also 11 Alaska Administrative Code 86.115(a)* (1999).

[**5] Moore appealed this decision to the Commissioner of the Department of Natural Resources (commissioner) and ACNC intervened. [5] Moore argued, among other things, that no rights were transferred from the state to PRI that were presently voidable by the state because PRI's selections were on federal lands. As such, he contended, the state had no mining rights to convey at the time of location, and thus there were no rights to void. Moore further asserted that under Alaska law, he had two years after the federal government tentatively approved the state's land selection to qualify to do business in Alaska and to obtain the mining rights to the locations.

5 On appeal before this court, ACNC raises for the first time the claim that Moore is not the locator or owner of the claims in question, and lacks standing to assert claims on behalf of PRI. Moore responds that because he is the president and the sole shareholder of PRI, this court should hold that he has standing to defend the corporation's interests in administrative and judicial proceedings. Alternatively, Moore argues that ACNC has waived this issue because it failed to raise it below. Moore's latter contention is correct; failure to raise the issue of capacity to sue below results in a waiver of that defense. *See Jackson v. Nangle, 677 P.2d 242, 250 n.10 (Alaska 1984)* (citations omitted).

[**6] In March 1997, the commissioner upheld the division director's decision, primarily on the basis that PRI was not qualified to engage in business in Alaska. In addition, the commissioner held that mining rights can be established on state-selected lands prior to [*578] tentative approval by the federal government, and that such claims are subject to Alaska mining laws. The commissioner upheld this decision on reconsideration. Moore then appealed to the superior court, which affirmed the decision.

This appeal followed.

III. *STANDARD OF REVIEW*

This case raises questions of law concerning the application of state mining laws. Because resolution of these questions does not require agency expertise, we employ the substitution of judgment test. [6] However, we give "some weight" to any long-standing agency statutory interpretation. [7] On questions of law, the duty of this court "is to adopt the rule of law that is most persuasive in light of precedent, reason and policy." [8]

6 *See Handley v. State, Dep't Of Revenue, 838 P.2d 1231, 1233 (Alaska 1992).*

[**7]

7 *See Peninsula Marketing Ass'n v. State, 817 P.2d 917, 922 (Alaska 1991)* (citing *State, Dep't Of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268, 274 (Alaska 1983)).*

8 *Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1978).*

IV. *DISCUSSION*

A. *Statutory Framework*

Under Alaska law, mining rights on state lands are acquired through the process of "location." [9] This process entails the discovery and marking of the claim, the posting of a notice at the claim site, and the recording of a certificate of location. [10] Through location, a locator acquires a mining claim priority against subsequent locators to the selected claims. [11]

9 *See AS 38.05.195.*

10 *See 11 AAC 86.200*-215 (1996). In addition, there are annual rent and labor requirements. *See AS 38.05.210*-211; *see also 11 AAC 86.215*-221 (1999).

11 *See AS 38.05.275*, which provides in part:

> (a) Mining locations made on state land, including shoreland, tideland or submerged land, or state selected land . . . acquire for the locator mining rights . . . subject to existing claims and to any denial of or restriction in the tentative approval of state selection or patent of the land to the state.
>
> (b) In this section, "state selected land" . . . means land for which the state has filed a selection application with the United States under Sec. 6 of the Alaska Statehood Act, as amended, regardless of the validity or effect of the application, if the selection described in the application has not been rejected or relinquished . . . .

[**8] Locations may be made on state-selected lands prior to the federal government's actual conveyance of the land to the state. [12] State-selected land is land for which the state has filed a selection application with the United States under Section 6 of the Alaska Statehood Act, regardless of the validity or effect of the application, if the selection has not been rejected or relinquished. [13] However, because the state does not have management authority over the land until tentative approval, the location is made at the locator's risk. [14] Nevertheless, locators of claims on state-selected land still acquire prior rights against subsequent locators; these prior rights, upon the land's conveyance, mature [*579] into mining claims, leasehold locations, or prospecting sites. [15]

12 *See id.*; *see also 11 AAC 86.115* (1999), which provides in part:

> LOCATIONS ON STATE-SELECTED LAND.
>
> (a) A location made on state-selected land that has not been conveyed to the state by the federal government through tentative approval or patent is made at the locator's risk. Because the state does not have management authority over the land unless the selection has been conveyed and cannot authorize exploration work or mining until that time, the locator is responsible for obtaining any necessary permits from the federal land manager and other permitting authorities.
>
> (b) A location made on state-selected land in accordance with this chapter creates prior rights against subsequent locators and becomes a mining claim, leasehold location, or prospecting site when the federal government conveys the selection to the state through tentative approval or patent, whichever occurs first, unless the conveyance restricts or bars the location, or unless a state mineral closure is in effect on the date of conveyance. If a state leasing restriction is in effect on the date of conveyance, a location made before the conveyance is subject to that restriction. If the land is closed to mineral entry or restricted to leasing after the date of the conveyance, valid location that was made before the conveyance is unaffected.

[**9]

13 *See AS 38.05.275(b)*; *see also 11 AAC 86.115.*

14 *See 11 AAC 86.115.*

15 *See id.*

Finally, in order for a foreign corporation to locate a mining claim in Alaska, it must be qualified to do business in the state. [16] To qualify, a foreign corporation must obtain a certificate of authority by registering with the Alaska Department of Commerce and Economic Development. [17] However, an unqualified corporation that acquires an interest in exploration or mining rights by operation of law has two years to become qualified or to dispose of the interest to a qualified person. [18]

16 *See AS 38.05.190(a)(5).*

17 *See AS 10.06.705-735*; *see also 11 AAC 88.185(33).*

18 *See AS 38.05.190(b).*

B. *PRI Acquired Mining Interests That Were Properly Voidable by the State.*

PRI took the proper steps to locate claims and [**10] thus acquire mining rights on locations near Paxon. As previously discussed, these rights are in the nature of a priority against subsequent locators. [19] Because the claims were on state-selected land that had not been conveyed by the federal government, PRI was an "at-risk" locator whose priority rights were contingent upon the federal government's tentative approval of the land selection. [20]

19 *See AS 38.05.275.*

20 *See 11 AAC 86.115.*

However, when the Division of Mining learned that PRI was not qualified to do business in Alaska because it failed to register with the Department of Commerce and Economic Development, the division voided and nullified PRI's mining claim priority rights. This extinguished any current or future claim based upon the voided locations. Moore does not challenge the division's finding that PRI was not qualified to conduct business in Alaska. [21]

21 In Moore's appeals before the commissioner and before the superior court, he argued that the locations were made on behalf of Pacific Rainer Roofing, Inc., a corporation qualified to do business in Alaska, and not PRI. However, he has abandoned this argument on appeal before this court.

[**11] Nevertheless, Moore argues -- in spite of unambiguous statutory language to the contrary -- that the commissioner erred as a matter of law in holding: (1) that a locator on state-selected lands acquires mining rights at the time of location, which would be subject to nullification for the locator's failure to be qualified to do business in the state; and (2) that Moore would not acquire mining rights by operation of law when the federal government tentatively approved the state-selected lands, and thus have two years from that time to qualify to do business in the state. He contends that because the state has no property interest in state-selected federal lands until tentative approval, the state has no interest to presently convey. According to Moore, the state only conveys an "ephemeral option" to "stand in line," or a "claim in waiting," which becomes a mining right by operation of law upon tentative approval. Thus, Moore contends that upon tentative approval PRI would acquire an interest in mining rights by operation of law and would then have two years to become qualified or to dispose of this interest to a qualified person. [22] We disagree.

22 *See AS 38.05.190(b).*

[**12] First, we note that Moore appears to be dissecting the right of priority against subsequent locators out of the "bundle of sticks" comprising mining rights. However, a priority right is intertwined within that bundle. For this reason, Moore's argument is fatally flawed. If there is no mining right for the state to void, there is no mining right for the state to convey, including a mining claim priority contingent upon the ultimate conveyance of the land. Thus, Moore's locations on state-selected land would be worthless. In reality, the term "mining rights" is used both in *AS 38.05.275(a)* and in *AS 38.05.190* and it means the same thing in both sections. Moore would have acquired "mining rights" under subsection 275(a) on state-selected land except that subsection [*580] 190(a) prohibits corporations not qualified to do business in Alaska from acquiring "mining rights." Since Moore's acquisition of "mining rights" would have been by location, not by operation of law, the operation of law exception of subsection 190(b) does not apply.

Second, the state does in fact have conveyable property interests in state-selected land prior to tentative approval by the federal government, albeit interests [**13] contingent upon that approval. The United States Supreme Court has held that where a state follows all of the appropriate selection procedures to perfect its land selection claims, it generally acquires vested rights in the selected land at the time of selection. [23] To this end, the Court stated:

It is . . . well settled that a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government and that his right to a legal title is to be determined as of that time, and also that this rule is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the government holds it in trust for him. But it is said that, as the selection is subject to the approval of the Secretary of the Interior, no right can become vested, nor

equitable title be acquired, thereunder, unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty [**14] of ascertaining whether the selector is acting within the law, in respect of both the lands relinquished and the land selected, and of approving or rejecting the selection accordingly. [24]

23 *See Wyoming v. United States, 255 U.S. 489, 497, 65 L. Ed. 742, 41 S. Ct. 393 (1921)*; *Payne v. New Mexico, 255 U.S. 367, 371, 65 L. Ed. 680, 41 S. Ct. 333 (1921).*

24 *Payne, 255 U.S. at 371.*

Alaska case law also supports the proposition that the state acquires present, conveyable rights in lands selected by the state prior to tentative approval or conveyance by the federal government. In *Sabo v. Horvath*, [25] we held that a grantor who had not yet received his patent under the Alaska Homesite Act [26] nevertheless had a sufficient interest to convey the land by quitclaim deed. [27] We reasoned that Congress's silence on the issue of alienability in the Act was "quite significant" because Congress "knew how specifically to [**15] prohibit alienation." [28] We stated that though "various other events were necessary prior to the issuance of patent," the grantor had "complied with a substantial portion of his obligation under the statute and regulations. . ." and the "mere fact that steps remained [to be taken] before issuance of [a] patent . . ." did not preclude "the existence of an alienable right, where there has been basic compliance with the statutory demands." [29] Our reasoning in *Sabo* applies here.

25 *559 P.2d 1038 (Alaska 1976).*

26 *43 U.S.C.A. § 687a (West 1986).*

27 *See Sabo*, 559 P.2d at 1042.

28 *Id.*

29 *Id.*

Like the Homesite Act, the Statehood Act does not expressly prohibit the creation of *any* third-party interests in state-selected land prior to tentative approval by the federal government. [30] The state may not execute conditional leases or make conditional sales of such [**16] selected lands, but it is not expressly prohibited from establishing priority rights in third-persons through location. [31] Moreover, upon selection of lands, the state has complied substantially with applicable laws and regulations. Generally, all that remains to be done is a land survey, as well as review and approval by the federal government. [32] The rights the state acquires do not ensure tentative approval or ultimate transfer of [*581] these lands, but they are more than mere expectancies. The state itself would have to take some action before it would lose the right to patent of selected land. [33]

30 *See* Alaska Statehood Act, Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 341-42 (1958), *reprinted in* 48 U.S.C.A. note preceding § 21 (West 1987).

31 *See id.*

32 *See id.*

33 *See id.*

In sum, the state has a present, substantial interest in state-selected lands prior to tentative approval by the federal government. Moreover, state [**17] law expressly grants prior rights to locators against subsequent locators on state-selected lands. [34] Recorded certificates of location memorialize an appropriation of a valuable property right from the state. [35] These rights become mining claims when the federal government conveys the selection to the state. [36] It is incorrect to assert these rights are merely "ephemeral claims in waiting." Rather, they are present, contingent rights in real property which may ripen, by successive steps, into a patent. [37] "Each of [the] steps, including the issuance of the patent, relates back and includes the original and primary location." [38] Thus, PRI, as a locator of state-selected lands, acquired mining rights at the time of location.

34 *See AS 38.05.275*; *see also 11 AAC 86.115(b).*

35 *See AS 27.10.050*; *AS 38.05.195.*

36 *See AS 27.10.050*; *AS 38.05.195.*

37 *See Kile v. Belisle, 759 P.2d 1292, 1294 n.9 (Alaska 1988)* (holding state claimant had no possessory interest in location on state-selected land where the conveyance had not received tentative approval from BLM, but rather had gained priority rights against subsequent locators that matured into a right of exclusive possession upon BLM's tentative approval); *see also Garside v. Norval*, 1 Alaska 19, 23 (D. Alaska 1888).

[**18]

38 *Garside*, 1 Alaska at 23.

Because the commissioner, acting within his authority, [39] was entitled to find that PRI was not qualified to conduct business in Alaska and thus not qualified to acquire mining rights under *AS 38.05.190(a)*, his decision voids and nullifies PRI's mining rights.

39 *See AS 38.05.020.*

C. *The Superior Court Did Not Abuse Its Discretion in Awarding Costs and Attorney Fees.*

Moore also argues that because the superior court erred in its determination that the state and ACNC had

prevailed on the merits, it erred in awarding costs and attorney fees against PRI. Because we affirm the decisions of the commissioner and lower court, we affirm the award of attorney fees.

V. *CONCLUSION*

The commissioner was correct in finding that a locator on state-selected land acquired mining rights at the time of location. These rights were susceptible to nullification [**19] for the locator's failure to qualify to locate mining claims in the state. We therefore AFFIRM the superior court's decision.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 15, 2011

SUBJECT: Review of CSHB 215(FIN) am (Work Order No. 27-LS0741\E.A)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Donald M. Bullock Jr.
Legislative Counsel

You asked for a review of CSHB 215(FIN) am (bill) to identify constitutional or statutory conflict. You specifically want to know how *Moore v. State*[1] may apply to the bill.

Local or special legislation.

Sections 1 - 4 of the bill relate to covenants in AS 38.35.120(a) that the Alaska Housing Finance Corporation (AHFC) would not be bound to agree to as a condition of receiving a right-of-way lease. The covenants in AS 38.35.120(a) were enacted by the legislature and the bill would make several of those covenants inapplicable to a lease entered into with AHFC. Carving out an exception to AHFC raises a question under art. II, sec. 19, Constitution of the State of Alaska, as to whether the exclusion unique to AHFC makes the bill a "local or special act" that is contrary to the prohibition. A general Act that excludes the same covenants for any gas pipeline could avoid the "local or special" question. The fact that AHFC is a public corporation and government instrumentality[2] may be a factor considered by the court if faced with a challenge under art. II, sec. 19.

Another factor that may be considered under a challenge under art. II, sec. 19, is the policy expressed in AS 38.35.010(a) of the Right-of-Way Leasing Act. AS 38.35.010(a) reads as follows:

> (a) The natural resources of this state in crude oil and natural gas and in its land for transportation of these resources and their products by pipeline toward markets both in and out of the state are capable of making a significant contribution to the general welfare of the people of this state.

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[1] 553 P.2d 8 (Alaska 1976).

[2] AS 18.56.020.

> It is the policy of this state that the development, use, and control of a pipeline transportation system be directed to make the maximum contribution to the development of the human resources of this state, the increase in the standard of living for all of its residents, the advancement of existing and potential sectors of its economy, the strengthening of free competition in its private enterprise system, and the careful protection of its incomparable natural environment.

That policy, considered along with the enactment of ch. 7, SLA 2010, which created the Joint In-State Gasline Development Team in AHFC,[3] expresses the state policy to develop an in-state pipeline and have that project developed by AHFC.

In *Baxley v. State*,[4] the Alaska Supreme Court considered an Act that provided relief to a legislative enactment that gave effect to modifications of four state oil and gas leases in the Northstar Oil Field.[5] The Court concluded that the Act was not special legislation, "[b]ecause the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes[.]"

AHFC would not be required to agree to the covenants from which it is excluded under the bill. Considering the state policy expressed in AS 38.35.010 and the enactment of AS 38.34 (that requires AHFC to develop a gas pipeline project), it is likely that a court would find that the favorable treatment of AHFC in the bill relates to legitimate state purposes. It is reasonable to expect that a court would find that bill does not violate art. II, sec. 19, Constitution of the State of Alaska.

Standing and the limitations on actions relating to the right-of-way lease.

Sections 5 and 6 of the bill amend AS 38.35.200. Currently, AS 38.35.200 limits standing to object to a right-of-way lease, the period in which an objection must be raised, and the issues relating to the issuance of the right-of-way lease that are subject to judicial review.[6] The period for raising an objection is 60 days after the commissioner of

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[3] AS 38.34.030.

[4] 958 P.2d 422 (Alaska 1998).

[5] 958 P.2d at 424.

[6] Sec. 38.35.200. Judicial review of decisions of commissioner on application. (a) An applicant or competing applicant or a person who has a direct financial interest affected by the lease who raises objections within 60 days of the publication of notice under AS 38.35.070 are the only persons with standing to seek judicial review of a decision of the commissioner under AS 38.35.100.

(b) The only grounds for judicial review of a decision of the commissioner are

natural resources (commissioner) publishes notice that an application for a right-of-way lease has been received under AS 38.35.070.

In *Moore v. State*, the case you mentioned in your request, the Alaska Supreme Court stated, "Whether a party has standing to obtain judicial resolution of a controversy depends on whether the party has sufficient personal stake in the outcome of the controversy."[7] The plaintiffs in *Moore*, who for the most part were commercial fishermen, claimed that they would be adversely affected if oil exploration and production were to be allowed in Kachemak Bay. The court concluded that the plaintiffs' interest in the outcome is essentially economic, and, "As such, it clearly meets the injury-in-fact requirement for standing."[8] Under the decision in *Moore*, the direct financial interest requirement for standing in the present AS 38.35.200 and in the proposed amended version may be satisfied by a person whose livelihood may be affected by a right-of-way lease or an action related to that lease. To secure standing, a person must raise the required objection with 60 days after the notice of an application has been published.

Section 5 of the bill limits standing to the same persons as in current law -- a competing applicant, a person that has a direct financial interest affected by the lease, and the applicant. The bill moves the placement of the naming of the applicant so that the amended AS 38.35.200(a) makes the 60-day period to object applicable to the competing applicant and the person with the directly affected financial interest, but removes the applicant from the requirement to raise an objection during the 60-day limitation period. This is logical because the basis for the applicant's appeal may not arise until the commissioner's decision on the application.

Section 5 further amends AS 38.35.200(a) by adding judicial review of "**an action described in (c) of this section**." Under the amended language, an applicant is not subject to the limitations in AS 38.35.200(c), which is added by sec. 6 of the bill. However, a competing applicant or a person with the affected direct financial interest must make an objection within the 60-day period described in AS 38.35.200(a) to have standing to seek judicial review. Although other provisions of law may provide for appeals of a state commissioner or agency action described in AS 38.35.200(c), the subsection is, after making an exception for the applicant under AS 38.35.200(a), prefaced with the phrase "notwithstanding any contrary provision of law. . . ." If a

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(1) failure to follow the procedures set out in this chapter; or

(2) abuse of discretion so capricious, arbitrary, or confiscatory as to constitute a denial of due process. (Sec. 1 ch. 72 SLA 1972; am. Sec. 19 ch. 3 FSSLA 1973)

[7] *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

[8] 553 P.2d at 24.

conflicting law is applicable but does not have a similar "notwithstanding" limitation, the conflict likely would be resolved in favor of the limitations in AS 28.35.200(c).

There may be an access to the courts issue raised if an action that is the basis for a person to seek judicial review is not reasonably foreseen during the 60-day period. The impacted person may still try to access the courts and challenge the 60-day period to acquire standing as barring access to the courts. Whether a court would set aside the 60-day period to acquire standing is difficult to predict; the outcome may depend on the issue that is presented and the alleged risk or harm.

In any case, the amended AS 38.35.200 is an incentive for anyone with even the remotest possibility of being affected by a right-of-way lease or an action related to that lease to raise an objection to preserve standing.

Applicability of art. VIII, sec. 10 of the Alaska constitution.

Article VIII, sec. 10, Constitution of the State of Alaska, prohibits leases of state lands "without prior public notice and other safeguards of the public interest as may be prescribed by law." The Right-of-Way Leasing Act provides for public notice, a hearing, and findings by the commissioner of natural resources before granting a right-of-way lease application, in whole or in part.

AS 38.35.020 authorizes the commissioner to grant a noncompetitive right-of-way lease. The requirements that must be met to be eligible for a right-of-way lease are within AS 38.35, as well as the process for applying. A person seeking a right-of-way lease begins the process by filing an application[9] that is followed by the publication of a notice stating that an application has been received.[10] It is the publication of this notice that starts the 60-day period for raising an objection and it is during this 60-day period that a person must establish standing to pursue judicial review under AS 38.35.200, as amended by the bill.

Consistent with the requirements in art. VIII, sec. 10 of the constitution, by enacting AS 38.35.070 the legislature required prior public notice before the commissioner may approve a lease application. AS 38.35.080 requires a public hearing and requires the commissioner to prepare an analysis of the application, which is made available at least 30 days before the date set for the hearing.

After the hearing, AS 38.35.100 requires the commissioner to determine and make a written finding on an application as to whether "the applicant is fit, willing, and able to perform the transportation or other acts proposed in a manner that will be required by the

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[9] AS 38.35.050.

[10] AS 38.35.070.

present or future public interest." If the commissioner finds the application may be granted, the commissioner may grant the application in whole or in part. The limitations in AS 38.35.200 in current law limit standing to seek judicial review of a decision made under AS 38.35.100.

Article VIII, sec. 10 of the state constitution requires that no lease of state land "shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The legislature has prescribed that there be notice of a right-of-way application (AS 38.35.070), analysis and public hearing (AS 38.35.080), and a decision by the commissioner based on written findings (AS 38.35.100). Whether this process satisfies the requirements in art. VIII, sec. 10, is a question of law which thus far has not been addressed by the Alaska Supreme Court. Under AS 38.35.200(c), as added by the bill, a claim alleging the invalidity must be brought within 60 days after the effective date of the Act enacting the subsection, and a claim alleging that an action will deny rights under the state constitution must be brought within 60 days after the date of an action.

The limitations on bringing a claim under AS 38.35.200(c) are set by law; the equitable remedy of laches is not applicable. With regard to the defense of laches, which is discussed in the *Moore* case, the Alaska Supreme Court wrote:[11]

> The defense of laches is inapplicable to an action at law. Although this proposition has never been directly asserted by the court, this was our implicit conclusion in *State v. Alex*, 646 P.2d 203, 215 (Alaska 1982). Moreover, limiting the defense of laches to equitable actions is in accord with the case law of virtually every other jurisdiction. When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of the right.

In *Moore v. State*, the defendants raised the defense of laches, and were successful in obtaining summary judgment in their favor on that basis on the lower court.[12] The Supreme Court reversed after reviewing the timing of events in the lease sale, from the call for nominations, through the lease sale, the issuance of the leases, the issuance of the first permits in November 1974, and the filing of the plaintiff's suit in December 1974.[13] The court found that the plaintiffs were "not guilty of inexcusable delay" and sufficient prejudice had not been established on the record.[14]

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[11] *Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059, 1064 - 1065 (Alaska 1994) (footnotes omitted).

[12] 553 P.2d at 14.

[13] 553 P.2d at 14 - 16.

[14] 553 P.2d at 16.

Actions by the Department of Environmental Conservation.

In the course of considering HB 215, concern was expressed over the effect of limiting review of the actions in the proposed AS 38.35.200(c) on the authority delegated to the Department of Environmental Conservation by the United States Environmental Protection Agency. AS 38.35.200(d) was added in the House Judiciary Committee and was adopted in CSHB 215(JUD) to avoid this conflict.

This analysis may not be conclusive or address every issue raised by CSHB 215(JUD) am given the limited time available as the session ends. If you do hear the bill in your committee, you may wish to seek additional comments from the Department of Law, who would defend the enacted provisions of the bill.

If I may be of further assistance, please advise.

DMB:ljw
11-261.ljw

Sec. ⏩38.35.120⏪. Covenants required to be included in lease.

(a) A noncompetitive lease of state land for a right-of-way for an oil or natural gas pipeline valued at $1,000,000 or more may be granted only upon the condition that the lessee expressly covenants in the lease, in consideration of the rights acquired by it under the lease, that

(1) it assumes the status of and will perform all of its functions undertaken under the lease as a common carrier and will accept, convey, and transport without discrimination crude oil or natural gas, depending on the kind of pipeline involved, delivered to it for transportation from fields in the vicinity of the pipeline subject to the lease throughout its route both on state land obtained under the lease and on the other land; it will accept, convey, and transport crude oil or natural gas without unjust or unreasonable discrimination in favor of one producer or person, including itself, as against another but will take the crude oil or natural gas, depending on the kind of pipeline involved, delivered or offered, without unreasonable discrimination, that the Regulatory Commission of Alaska shall, after a full hearing with due notice to the interested parties and a proper finding of facts, determine to be reasonable in the performance of its duties as a common carrier; however, a lessee that owns or operates a natural gas pipeline

(A) subject to regulation either under the Natural Gas Act (15 U.S.C. 717 et seq.) of the United States or by the state or political subdivisions with respect to rates and charges for the sale of natural gas, is, to the extent of that regulation, exempt from the common carrier requirement in this paragraph;

(⏩B⏪) that is a North Slope natural gas pipeline (i) is required to operate as a common carrier only with respect to the intrastate transportation of North Slope natural gas, as that term is defined in AS 42.06.630, and (ii) is not required to operate as a common carrier as to a liquefied natural gas facility or a marine terminal facility associated with the pipeline, and is not otherwise required to perform its functions under the lease as a common carrier; for purposes of this subparagraph, "North Slope natural gas pipeline" means all the facilities of a total system of pipe, whether owned or operated under a contract, agreement, or lease, used by a carrier for transportation of North Slope natural gas, as defined by AS 42.06.630, for delivery, for storage, or for further transportation, and including all pipe, pump, or compressor stations, station equipment, tanks, valves, access roads, bridges, airfields, terminals and terminal facilities, including docks and tanker loading facilities, operations control centers for both the upstream part of the pipeline and the terminal, tanker ballast treatment facilities, fire protection system, communication system, and all other facilities used or necessary for an integral line of pipe, taken as a whole, to carry out transportation, including an extension or enlargement of the line;

(2) it will interchange crude oil or natural gas, depending on the kind of pipeline involved, with each like common carrier and provide connections and facilities for the interchange of crude oil or natural gas at every locality reached by both pipelines when the necessity exists, subject to rates and regulations made by the appropriate state or federal regulatory agency;

(3) it will maintain and preserve books, accounts, and records and will make those reports that the state may prescribe by regulation or law as necessary and appropriate for purposes of administration of this chapter;

(4) it will accord at all reasonable times to the state and its authorized agents and auditors the right of access to its property and records, of inspection of its property, and of examination and copying of records;

(5) it will provide connections, as determined by the Regulatory Commission of Alaska under AS 42.06.340, to facilities on the pipeline subject to the lease, both on state land and other land in the state, for the purpose of delivering crude oil or natural gas, depending on the kind of pipeline involved, to persons (including the state and its political subdivisions) contracting for the purchase at wholesale of crude oil or natural gas transported by the pipeline when required by the public interest;

(6) it shall, notwithstanding any other provision, provide connections and interchange facilities at state expense at such places the state considers necessary if the state determines to take a portion of its royalty or taxes in oil or natural gas;

(7) it will construct and operate the pipeline in accordance with applicable state laws and lawful regulations and orders of the Regulatory Commission of Alaska;

(8) it will, at its own expense, during the term of the lease,

(A) maintain the leasehold and pipeline in good repair;

(B) promptly repair or remedy any damage to the leasehold;

(C) promptly compensate for any damage to or destruction of property for which the lessee is liable resulting from damage to or destruction of the leasehold or pipeline;

(9) it will not transfer, assign, or dispose of in any manner, directly or indirectly, or by transfer of control of the carrier corporation, its interest in a right-of-way lease, or any rights under the lease or any pipeline subject to the lease to any person other than another owner of the pipeline (including subsidiaries, parents, and affiliates of the owners), except to the extent that the commissioner, after consideration of the protection of the public interest (including whether the proposed transferee is fit, willing, and able to perform the transportation or other acts proposed in a manner that will reasonably protect the lives, property, and general welfare of the people of Alaska), authorizes; the commissioner shall not unreasonably withhold consent to the transfer, assignment, or disposal;

(10) it will file with the commissioner a written appointment of a named permanent resident of the state to be its registered agent in the state and to receive service of notices, regulations, decisions, and orders of the commissioner; if it fails to appoint an agent for service, service may be made by posting a copy in the office of the commissioner, filing a copy in the office of the lieutenant governor, and mailing a copy to the lessee's last known address;

(11) the applicable law of this state will be used in resolving questions of interpretation of the lease;

(12) the granting of the right-of-way lease is subject to the express condition that the exercise of the rights and privileges granted under the lease will not unduly interfere with the management, administration, or disposal by the state of the land affected by the lease, and that the lessee agrees and consents to the occupancy and use by the state, its grantees, permittees, or other lessees of any part of the right-of-way not actually occupied or required by the pipeline for the full and safe utilization of the pipeline, for necessary operations incident to land management, administration, or disposal;

(13) it will be liable to the state for damages or injury incurred by the state caused by the construction, operation, or maintenance of the pipeline and it will indemnify the state for the liabilities or damages;

(14) it will procure and furnish liability and property damage insurance from a company licensed to do business in the state or furnish other security or undertaking upon the terms and conditions the commissioner considers necessary if the commissioner finds that the net assets of the lessee are insufficient to protect the public from damage for which the lessee may be liable arising out of the construction or operation of the pipeline.

(⏭b⏮) For a right-of-way lease granted under this chapter for an oil or natural gas pipeline valued at $1,000,000 or more to be valid and of legal effect, it must contain the terms required to be inserted under the provisions of AS 38.35.110 - 38.35.140. An oil or natural gas pipeline right-of-way lease granted under this chapter that does not contain the required terms is null and void and without legal effect and does not vest any interest in state land or any authority in the carrier granted the lease.

(c) The commissioner may insert in any right-of-way lease other reasonable provisions and conditions required by the public interest.

(d) The lease will also contain terms and conditions that are reasonably necessary to obligate the lessee, to the extent reasonably practicable, to

(1) prevent conflicts with other existing uses of the land involving a superior public interest;

(2) protect state and private property interests;

(3) prevent any significant adverse environmental impact, including but not limited to the erosion of the surface of the land, and damage to fish and wildlife and their habitat;

(4) restore and revegetate during the term and at termination of the lease; and

(5) protect the interests of individuals living in the general area of the right of way who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.

(e) In the event the commissioner proposes to offer a lease or leases to two or more lessees for the same pipeline, the commissioner may include terms in the lease or leases which establish

the limit of the obligations and liabilities of each lessee arising under this chapter or under the lease or leases.