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FOOD DISTRIBUTION IN WARTIME*

By

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and

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On many fronts food fights for freedom. Our soldiers and sailors must be fed, our Allies sustained, and the people of liberated countries encouraged by removing from them the fear of starvation. Behind the lines, civilian workers must be kept strong, while at home the health of mothers and children must be preserved.

Thus are created demands for food unparalleled in our history. A soldier or sailor eats half again as much as the average civilian. Although the British and Russian diets are meager and monotonous compared to ours, these countries should have, if the basic needs of our armed forces and civilians can first be met, about ten percent of our total food production. The liberated peoples may be allotted only a minimum of food, but demands from this quarter will increase in proportion to our military successes.

Even if domestic demand were to remain normal, serious problems would exist. But, far from being normal, demands have tremendously increased. Randolph E. Paul, General Counsel of the Treasury Department, in an address before the Twenty-first Agricultural Outlook Conference in Washington, D. C., on October 18, 1943, stated that, during the current fiscal year, civilians will receive incomes of about $152,000,000,000, that, of this total, $21,000,000,000 will be taken by taxes, and that available supplies of consumer goods and services, at present ceiling prices, will account for close to $89,000,000,000, leaving $42,000,000,000 more to spend than there will be goods and services available for purchase. Aside from this, accumulated savings have, since 1940, been increased by $55,000,000,000 and of this increase $24,000,000,000 are in the form of currency and checking accounts. Those who have this money would like to spend much of it

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for food and, as a result, in spite of the fact that about as much is available for civilians as before the war,\(^1\) the present demand far exceeds the available supply.

Such is the background against which the problems of food production and distribution are projected. To the War Food Administration has been entrusted the task of increasing the available supply as much as possible and of making equitable distribution of what is produced. Through payments to increase production,\(^2\) support prices,\(^3\) crop loans,\(^4\) and other devices,\(^5\) the Administration, by means of its component agencies, seeks to attain goals even higher than those reached in the past two years.\(^6\)

But no matter how successful these efforts may be, we shall always, during the war years, need more food than we can produce. It is for this reason that food distribution bulks so large among the problems which the Administration faces.

The allocation of short supplies of food\(^7\) is a matter of magnitude and great complexity. The process, as far as American needs are concerned,\(^8\) begins with an apportionment by the War Food Administrator of all available supplies among the various claimants. In the performance of this task, the Administrator is aided by the advice of a Food Requirements and Allocations Committee of which the Director of Food Distribution is chairman. All United States agencies which are claim-

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1Available statistics indicate that approximately 13% of the food produced in 1943 will be needed for the armed forces. Another 10% is required for lend-lease and about 2% for other special needs. The remaining 75%, however, is about equal to the average amount of food produced in the United States during the period 1935 to 1939.


The War Food Administration, after a series of conferences with State and local agricultural officials, has established goals for production to be attained in 1944. The request is being made for the planting of 380,000,000 acres, which is 16,000,000 more than were planted in 1943 and represents the largest acreage in the history of the country. In order to attain these goals, twice as much new farm machinery will be available as in 1943 and three times as much as in 1942. The manufacture of spare parts for farm machinery will continue without restrictions. Fertilizer supplies will equal or exceed those of 1943. If the Congress directs the continuation of the current labor supply program, there may be available between 75 and 100,000 agricultural laborers imported from Mexico, Bahamas, and Jamaica. Thirty or forty thousand war prisoners, including former Italian war prisoners now on parole, should also be available for farm service in 1944.

5It is estimated that food production for 1943 is the greatest on record, equaling 132% of the production in the pre-war years 1935-1939. This is 5% greater than the previous record high level of 1942. 1944 production goals, as has been indicated, call for even greater food production than in 1943.

6As will be noted more extensively (at pages 9, 14, and 17), the exercise of the allocation power under Title III of the Second War Powers Act, 1942 (56 Stat. 176 (1942), 50 U.S.C. 1940 ed., Sup. II, War-Appendix, 633), is predicated on the imminence of a shortage in the supply of any material or facility resulting from the requirements for the defense of the United States.

7Prior to apportioning the amount of food allocated to American use, a framework for a general allocation of the world supply is furnished through the activities of the Combined Food Board which includes United Nations members and, as presently constituted, includes the War Food Administrator as the United States member and the Secretary of Agriculture as chairman. Executive Order 9392, October 28, 1943, 8 F.R. 14783.
ants for food are represented on the Committee. Included are the War and Navy Departments, the Office of Foreign Economic Administration, the War Shipping Administration, the Food Distribution Administration, the last two being parts of the War Food Administration. After the allocations, in terms of broad categories, are made, the actual procurement of the food is carried on by means of a number of inter-agency agreements which are not significant for the purpose of this discussion except as noted below.6

As far as the impact of government control on the general public is concerned, the allocation of food through Food Distribution Orders, and rationing10 and price fixing11 by the Office of Price Administration are of primary importance. Only activities of the first type will be considered here.

ORGANIZATION OF THE WAR FOOD ADMINISTRATION

On December 5, 1942, the President signed Executive Order 9280,12 vesting in the Secretary of Agriculture "full responsibility for and control over the Nation's food program." "Food" was defined in broad terms.13 Sweeping grants of authority with respect to assigning priorities and making allocations were contained in the order.14 Certain powers were delegated with respect to non-food materials and facilities necessary in carrying out the food program.15 Power was given to make allocations for civilian rationing at the consumer level through the Office of Price

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6See note 29 infra.
10Rationing activities are carried on by the Office of Price Administration. Its original authority with respect to the rationing of food stems from War Production Board Directive 1 issued January 24, 1942 (7 F.R. 562), as supplemented. Executive Order 9280, paragraph 4 (December 5, 1942, 7 F.R. 10179), provides for the issuance of directives by the Secretary of Agriculture (War Food Administrator) with respect to rationing. Since the issuance of that order, a number of directives have been issued by the administration to the Office of Price Administration. (Food Directives 1 and 3-9, 8 F.R. 827, 3469, 2005, 2251, 3469, 3471, 7093, and 9600.) By an inter-agency agreement, a division of authority has been reached between the Office of Price Administration and the War Food Administration with respect to rationing concerning matters left unsettled by the Executive Order. See note 11 infra.
11Price fixing by the Office of Price Administration is, of course, carried out under the terms of the Emergency Price Control Act of 1942, 56 Stat. 23 (1942), as amended by the so-called Economic Stabilization Act, approved October 2, 1942, 56 Stat. 765 (1942), 50 U.S.C. 1940 Sup. II, War-Appendix, 901-946, 961-974. The Office of Price Administration was created by Executive Order 8734, April 11, 1941, 6 F.R. 1017, as the Office of Price Administration and Civilian Supply. It was given its present name by Executive Order 8875, August 28, 1941, 6 F.R. 4483, and, finally, it was created as an independent agency of the Government by the Emergency Price Control Act of 1942, infra. The statutes just cited provide for limited participation by the Secretary of Agriculture (War Food Administrator) in connection with pricing agricultural commodities.
127 F.R. 10179.
13"As used herein, the term 'food' shall mean all commodities and products, simple, mixed, or compound, or complements to such commodities or products that are or may be eaten or drunk by either humans or animals, irrespective of other uses to which such commodities or products may be put, and at all stages of processing from the raw commodity to the product thereof in a vendible form for immediate human or animal consumption, but exclusive of such commodities and products as the Secretary shall determine. For the purposes of this Executive Order, the term 'food' shall also include all starches, sugars, vegetable and animal fats and oils, cotton, tobacco, wool, hemp, flax fiber, and such other agricultural commodities and products as the President may designate." (Paragraph 10).
14Executive Order 9280. 7 F.R. 10179, paragraph 1-b and c.
15Id. at paragraph 2,
The Office of the Administrator. This is composed of the War Food Administrator, the First Assistant Administrator, and two Assistant Administrators.

16Id. at paragraph 4. See also note 10 supra.

17E.g., the power to direct rationing of food, to make use of priorities and allocations, and to requisition. Executive Order 9280, 7 F.R. 10179.

18E.g., the division of supplies of food for food and industrial needs, the use of non-food materials and facilities, and the preparation of schedules of priorities for the domestic movement of food. Executive Order 9280, 7 F.R. 10179.

19Executive Order 9322, 8 F.R. 3807.

20Executive Order 9334, 8 F.R. 5423.

21A further order, Executive Order 9385, 8 F.R. 13783, effectuates certain changes with respect to foreign procurement which are not significant here.

22This organization was put into operation by a memorandum (Administrator's Memorandum No. 27) issued by the War Food Administrator on September 24, 1943.
Each of the Assistant Administrators is authorized to sign or approve all matters which the Administrator may sign or approve. A Special Assistant to the Administrator serves in a liaison capacity between the Administrator and State and local officials. Three Assistants to the Administrator, one of whom performs regulatory functions as defined in the "Schwellenbach Act," are also provided for.

(2) The Program Agencies. These agencies, which are the "operating" groups of the Administration, include the Food Production Administration, the Food Distribution Administration, the Commodity Credit Corporation, the Extension Service, the Office of Labor Supply, the Office of Materials and Facilities, the Office of Transportation, and the Office of War Board Services.

(3) The Service and Staff Agencies. Under this heading are included all the Service and Staff Agencies of the Department of Agriculture, including the Office of Budget and Finance, the Office of the Solicitor, and a number of others. Their services are utilized in general to the same extent as they were previously and are still employed by the Department of Agriculture.

As its name indicates, the Food Distribution Administration, under the supervision of its Director, as one of the program agencies of the Administration, is charged with immediate responsibility as to all programs of the War Food Administration relating primarily to food distribution. It assembles, analyzes, and correlates data obtained from the claimant agencies regarding their needs for food and relates such requirements to supply estimates. In this way it assists the Administrator in making the allocations of food previously referred to.

It also conducts, through the Federal Surplus Commodities Corporation, extensive procurement operations both on its own behalf and for military and lend-lease require-
ments. However, as has been indicated, its activities in connection with the distribution and allocation of food by means of orders and regulations are those which create the most significant legal problems from the standpoint of administrative law.

**Statutory Authority for Priority and Allocation Controls**

Since the use of priority and allocation controls constitutes such a powerful weapon in the arsenal of the Federal Government to attack problems of distribution of food, it is important to consider the function of priority and allocation orders and regulations and the statutory authority under which they are issued.

Priority regulations are used to achieve coordination between governmental and civilian requirements for critical materials or facilities from the point of view of time by granting preference ratings to deliveries of materials necessary for the fulfillment of war orders. Allocation orders are used to achieve distribution of critical materials or facilities so that war requirements will be filled first. The powers are complementary. There is nothing novel about the concepts to which the priority and allocation methods of control relate. When the Navy needs meat to supply a battleship waiting to go to sea, it is reasonable to fill the Navy's order before filling an order for meat placed by a group of civilians who want to use it for normal consumption. This illustrates the essential idea behind priority control.

On the other hand, if there is not enough steel to make both airplanes and automobiles for civilians, such steel as is available will be allocated to the construction of airplanes with the result that no civilian automobiles will be built. This is what happens when the allocation powers are used.

By use of the allocation powers critical materials or facilities are directed into designated channels of distribution which will more nearly reach the goals towards which the Congress has directed the President to aim in handling the distribution of war materials. By use of the priority powers, the President is authorized to determine the order of preference which will control the distribution of critical materials within those channels into which food and other materials have been turned by use of the allocation powers.

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29Procurement for the War and Navy Departments is carried on to a considerable extent through reciprocal arrangements by which the Federal Surplus Commodities Corporation procures certain foods for the armed services, while, in other cases, the services are the sole procurers for all governmental agencies. These arrangements have been entered into pursuant to the direction contained in Executive Order 9280, 7 F.R. 10179, to coordinate all Government food procurement and to make procurements in behalf of all Federal agencies or to assist them in procurement. The procurement of food for lend-lease purposes is carried on largely in behalf of the United Kingdom and the Union of Soviet Socialist Republics, although programs are also carried on for others of the United Nations.

30*Supra*, page 3.

What, then, are these goals which the Congress has told the President to attain?

The most important statutory authority with respect to priority and allocation control is that conferred upon the President by section 2(a) of the act entitled "An Act to Expedite National Defense, and for other Purposes", approved June 28, 1940, as amended.

With respect to priorities, this statute presently provides that, in the discretion of the President, deliveries of material under Army and Navy contracts shall "take priority over all deliveries for private account or for export." Priority may also be assigned to deliveries of material under other types of contracts. Under the statute, deliveries under any of the contracts or orders specified may be assigned priority over deliveries under any contract or order, and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority.

Two other statutes are of importance in this connection insofar as the procurement of critical materials, including food, under Army and Navy contracts is concerned. Section 120 of the National Defense Act of 1916 (39 Stat. 213 (1916), 50 U.S.C. 1940 ed. 80) authorizes the President, in time of war or when war is imminent, through the head of any Department of the Government, to place orders with persons (which includes individuals, firms, associations, companies, corporations, or organized manufacturing industries) for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such person. Compliance with orders so placed is made obligatory on the persons receiving them, and such orders are given precedence over all other orders and contracts. Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892 (1940), 50 U.S.C. 1940 ed., War-Appendix, 309) as amended, is substantially the same as the act just mentioned, except that the power granted to the President is to be exercised only "through the Secretary of War or the Secretary of the Navy" instead of "through the head of any Department of the Government", and the phrase "in time of war or when war is imminent" is omitted. Although the introductory language of these sections provides that the President may place orders with the specified persons for such products or materials as may be required and which are of the nature and kind usually produced or capable of being produced by the individuals or firms—language which would authorize the use of the granted authority in connection with orders other than those for the Army and for the Navy—this language is qualified by the portions of these two sections which make it clear that the statutes deal with arms or ammunition or any necessary supplies or equipment for the Army or Navy.

These are contracts or orders for the Government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled "An Act to promote the defense of the United States" (55 Stat. 31 (1941), 22 U.S.C. 1940 ed. 411 et. seq.); contracts or orders which the President deems necessary or appropriate to promote the defense of the United States; and subcontracts or suborders which the President deems necessary or appropriate to the fulfillment of any contract or order as specified in Section 2(a) of the Act.

As originally enacted, section 2(a) merely provided that, in the discretion of the President, deliveries under Army and Navy contracts should "take priority over all deliveries for private account or for export" (section 2(a) of the Act of June 28, 1940, 54 Stat. 676), but, under the amendment contained in the Act of May 31, 1941, 55 Stat. 236, additional authority was granted to the President to assign priority to deliveries of material also with respect to deliveries under three other classes of contracts or orders. See note 34 supra.
With respect to the power to allocate, the statute under consideration presently provides that—

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

In exercising the power to allocate critical materials or facilities, including food, the Congress has thus empowered the President, whenever he is satisfied as to the imminence of shortages under the stated conditions, to allocate supplies in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. These are the goals to which the channels containing allocated foods must lead. They are the standards which must guide the President in allocating food.

DELEGATION OF AUTHORITY BY PRESIDENT TO EXERCISE FOOD PRIORITY AND ALLOCATION CONTROL

The President has issued a series of Executive Orders delegating his power under these acts. The first delegation was by Executive Order 8629, in which the President created the Office of Production Management within the Office for

36The President was first authorized to use the power to allocate by the amendment added by the Act of May 31, 1941, 55 Stat. 256, which provided that "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary and appropriate in the public interest and to promote the national defense." The subsequent amendment to this section added by Title III of the Second War Powers Act, 1942 (Act of March 27, 1942, 56 Stat. 176), is of particular importance in connection with the power to allocate, because it extended the allocation power to include facilities as well as materials. In addition, that portion of the sentence as originally enacted relating to the allocation power and reading "... the President may allocate such material in such manner and to such extent as he shall deem necessary and appropriate in the public interest and to promote the national defense" was changed by the Second War Powers Act so as to read "... the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary and appropriate in the public interest and to promote the national defense." (Emphasis supplied)

37infra, pages 14 and 17, where the conditions under which the President is authorized to act are discussed more extensively.

38See NATIONAL BROADCASTING CO. v UNITED STATES, 319 U.S. 190 (1943) (preliminary print), 63 Supreme Court Reporter 997, 1009, 1011, 1013 (1943), in which the Supreme Court of the United States upheld the criterion contained in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. 1940 ed. 151 et. seq., which governs the exercise of the licensing power of the Federal Communications Commission. The Court stated that "... the touchstone provided by Congress was the 'public interest, convenience, or necessity', a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit'."

39PANAMA REFINING CO. v RYAN, 293 U.S. 388 (1935), and SCHECHTER POULTRY CO. v UNITED STATES, 295 U.S. 495 (1935).

40January 7, 1941, 6 F.R. 191.
Emergency Management. This Executive Order also established a Priorities Board within the Office of Production Management which administered the original system. Executive Order 8629 was amended by Executive Order 8875, which created a Supply Priorities and Allocations Board within the Office for Emergency Management. This Board was directed to assign priorities and make allocations of materials, since, by this time, the President had, by the Act of May, 1941 (55 Stat. 236), been authorized to exercise allocation control as well as priority control. Executive Order 8875 also abolished the Priorities Board of the Office of Production Management which had been created by Executive Order 8629.

By Executive Order 9024, the President established the War Production Board, transferred the administration of the priority and allocations powers to its Chairman, and abolished the Supply Priorities and Allocations Board. Shortly thereafter, by Executive Order 9040, the Office of Production Management was abolished and its personnel, records, property, and funds were transferred to the War Production Board. In the same order, the President, for the first time during World War II, delegated to the Chairman of the War Production Board the authority vested in the President by Section 120 of the National Defense Act of 1916.

The President imposed further duties upon the War Production Board by Executive Order 9125, by delegating authority to exercise the additional powers conferred upon the President by Title III of the Second War Powers Act, 1942. By this time, the Office of Price Administration had been established under the Emergency Price Control Act of 1942, and Executive Order 9125 authorized the Chairman of the War Production Board to delegate to the Office of Price Administration such of his powers with respect to priorities and rationing as he might deem necessary or appropriate for the effective prosecution of the war.

Until the issuance of Executive Order 9280, the War Production Board was thus vested with exclusive authority to exercise food priority and allocation control.

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41August 28, 1941, 6 F.R. 4483.
42January 16, 1942, 7 F.R. 329.
43January 24, 1942, 7 F.R. 527.
44See note 32 supra.
45April 7, 1942, 7 F.R. 2719.
46See note 36 supra.
47See note 11 supra.
48"Rationing" is simply that phase of allocation concerned with the distribution of goods to consumers. The basic general rationing powers of the Office of Price Administration are derived from War Production Board Directive 1 (7 F.R. 562), as supplemented, and from Food Directives 1 and 3-9 (8 F.R. 827, 3469, 2007, 2530, 2251, 3471, 7093 and 9600) of the Secretary of Agriculture and the War Food Administrator. See notes 10 and 11 supra. Priority and allocation powers are also exercised by other Departments and agencies: the Secretary of the Interior (Food Directive 2, 8 F.R. 1777 and 3280); the Office of Defense Transportation (Executive Order 8989, December 18, 1941, 6 F.R. 6725; Executive Order 9136, May 2, 1942, 7 F.R. 3349; Executive Order 9214, August 5, 1942, 7 F.R. 6097; and Executive Order 9294, January 4, 1943, 7 F.R. 221); the Solid Fuels Administration for War (Executive Order 9332, April 19, 1943, 8 F.R. 5355); and the Petroleum Administration for War (Executive Order 9276, December 2, 1942, 7 F.R. 10091 and Executive Order 9310, March 23, 1943, 8 F.R. 3687).
49December 5, 1942, 7 F.R. 10179.
As a result of the last mentioned Executive Order, however, it has already been noted that the Secretary of Agriculture (now the War Food Administrator) was vested with full responsibility for and control over the Nation’s food program, including the authority to use the priority and allocation controls in connection with food.\(^5\)

**Priority and Allocation Orders and Regulations**

The activities of millions of Americans are controlled by priority and allocation orders and regulations dealing with the distribution of food. In the ordinary parlance of administrative law, they are quasi-legislative in nature. They are issued without prior notice and hearing although, in practice, committees composed of representatives of the industry affected are frequently called upon for advice before the orders and regulations are issued.

Food Distribution Regulation 1, issued March 6, 1943, as amended effective May 31, 1943,\(^52\) provides for preference ratings for the fulfillment of war procurement orders for food. Priority ratings may, under this regulation, be assigned to contracts, purchase orders, or deliveries by means of priority rating certificates or by other means. Food contracts placed by designated governmental agencies are termed "emergency orders." When specifically authorized, a priority rating may be extended to a supplier or sub-supplier of any person required to fill an emergency order. Emergency orders must be accepted and filled in preference to any other contracts or purchase orders for food.

Pursuant to Executive Order 9280 (paragraph 9), eight food directives have been issued to the Office of Price Administration,\(^8\) and one has been issued to the Secretary of the Interior authorizing these agencies to exercise the priority and allocation powers with respect to designated foods.\(^5\)

Allocation control with respect to specific commodities has been exercised, during 1943, by the issuance of 91 Food Distribution Orders by the Secretary of Agriculture and the War Food Administrator, and by the issuance of approximately 140 orders by the Director of Food Distribution pursuant to authority conferred upon him. These orders regulate the handling of many commodities and facilities and deal with them in a variety of ways. They may, however, be classified into three groups: (1) orders which contain restrictions on deliveries, inventories, sales, purchases, processing, production, or some combination of these; (2) orders which contain provisions requiring particular commodities to be set aside or reserved to

\(^{41}\)Initial planning for priority control was done by the Office of Coordination of Defense Purchases, established by the President in the National Defense Advisory Commission, 5 F.R. 2446 (1940).

\(^{51}\)Supra, pages 3 - 6.

\(^{52}\)8 F.R. 2816, 7213.

\(^{53}\)It is pursuant to these directives that the Office of Price Administration is presently rationing the distribution of food to consumers. See notes 10, 11, and 49 supra.

\(^{54}\)See notes 10, 11, and 49 supra.
provide a stockpile to fill war orders; and (3) orders which contain both provisions, imposing one or more types of restrictions mentioned in group (1) and provisions directing the commodities concerned to be set aside or reserved for the purposes indicated in group (2).

Illustrative of the orders in the first category is Food Distribution Order 1, issued December 29, 1942, effective January 18, 1943, as amended.65 This order contains a variety of restrictions with respect to the delivery, processing, and sale of bread.66 The set-aside and reservation orders which comprise the second group of allocation orders are well illustrated by Food Distribution Order 2, issued January 5, 1943, effective February 1, 1943, as amended,67 which requires producers and authorized receivers of butter to set aside, for governmental requirements, such amount of butter produced by them as may be prescribed by the Director of Food Distribution.68 In a series of orders, the Director has fixed the percentage of butter which must be set aside from time to time for delivery to fill war orders.69 Representative of the third class of orders is Food Distribution Order 10, issued January 21, 1943, effective January 22, 1943, which contains restrictions on the delivery of rice and requires persons subject to the order to set aside certain rice for sale to governmental agencies.70 Set-aside and reservation orders have been issued to make certain that there will be a supply of particular commodities from which governmental requirements may be filled. Most of the Food Distribution Orders which merely contain restrictions on the use, delivery, inventory, purchase, or sale of a particular commodity have provisions exempting from the restrictions transactions involved in contracts with designated governmental agencies.71

657 F.R. 11105, 8 F.R. 828, 1177, 2913, 8387, and 16777.

66Other examples of orders of this class are Food Distribution Order 3, as amended (citrus fruit juice), 8 F.R. 255, 828, 1303, 3337; Food Distribution Order 7, as amended (sugar), 8 F.R. 904, 10605; Food Distribution Order 11, as amended (milk), 8 F.R. 1090, 4751, 5698, 9102; Food Distribution Order 13, as amended (cream), 8 F.R. 1479, 11835; Food Distribution Order 17, as amended (raisin variety grapes) 8 F.R. 1706, 5793, 8795, 12042; and Food Distribution Order 79, as amended (milk and cream distribution), 8 F.R. 12426, 13283.

678 F.R. 253, 5697.

68Other examples of orders of this class are Food Distribution Order 6 (citrus fruit), 8 F.R. 511; Food Distribution Order 15, as amended (cheddar cheese), 8 F.R. 1704, 5698; Food Distribution Order 16, as amended (dried fruit), 8 F.R. 175, 11019; Food Distribution Order 22, as amended (canned and processed foods), 8 F.R. 2243, 6397; and Food Distribution Order 54 (dried skim milk), 8 F.R. 7210.

69Director Food Distribution Order 2.1 (percentage to be set aside in May, June, and July), 8 F.R. 5698; Director Food Distribution Order 2.2 (percentage of butter to be set aside during August, September, and October), 8 F.R. 9904.

698 F.R. 1076, 1707, 9863, and 14785. Other examples of this class are Food Distribution Order 14 (peanut oil), 8 F.R. 1704 (revoked); Food Distribution Order 40 (shell eggs), 8 F.R. 3563 (terminated); Food Distribution Order 41 (liquid, dry, and frozen eggs), 8 F.R. 3564 (terminated); Food Distribution Order 71 (turkeys), 8 F.R. 10703 (terminated); Food Distribution Order 75, as amended (livestock slaughter and meat delivery), 8 F.R. 11119, (partially suspended).

70Food Distribution Order 19, as amended (spices), 8 F.R. 1827, 8916, authorizes the Director of Food Distribution to establish quotas for restricted spices, and prohibits any person subject to the order from exceeding his quota. However, he may, without charge to his quota, use restricted spices if such use is for an order or contract with the Army, Navy, Marine Corps, or Coast Guard of the United States, or with other designated governmental agencies.
Each of the allocation orders dealing with food is issued in accordance with the statutory standards contained in Section 2(a) of the Act of June 28, 1940, as amended. The shortage mentioned in the statute may be actual or imminent. The President (and the War Food Administrator under the delegation to him) is broadly authorized, when he is satisfied that defense requirements for a commodity will result in a shortage in supply of the commodity for defense, for private account, or for export, to allocate the commodity involved as stated in the statute. He may, as has been shown to be the case, allocate food in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. It is because of this language that it is impossible to adapt the allocation technique to the widely different circumstances and conditions surrounding the supply and distribution of particular commodities. For example, Food Distribution Order 25, effective February 27, 1943, issued with reference to cocoa beans and cocoa products, prohibits a person from processing more cocoa beans than his quota thereof determined by the Director of Food Distribution and prohibits the use of any material produced from cocoa beans in manufacturing designated novelty items. This allocation has been prescribed for this commodity, in view of the shortage of cocoa beans in the channels of distribution for military, civilian, and export requirements, as necessary and appropriate in the public interest and to promote the national defense.

**Enforcement of Priority and Allocation Controls**

Food Distribution Orders and Regulations may be enforced by both judicial and administrative methods. Section 2(a) of the Act of June 28, 1940, as amended, provides that any person who willfully violates the Act or any order or regulation issued thereunder is guilty of a misdemeanor and subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both (Sec. 2 (a) (5)). The same statute also vests jurisdiction in Federal courts to entertain actions to enforce any liability or duty created by, or to enjoin any violation of, the Act or any orders or regulations issued thereunder (Section 2 (a) (6)).

Violations of the priority and allocation orders and regulations issued by the War agencies have given rise to the use of special types of allocation orders called "suspension orders" because, as the name implies, they prevent persons against whom they are directed from doing what, otherwise, they might lawfully do with the material or facility involved. The material which may be the subject of a wartime regulation—and, consequently, of a suspension order—may be any food or non-food commodity or product, including a service or facility. The War Food

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62See note 33 supra.
63Supra, pages 13 and 14.
64F.R. 2529.
65See note 33 supra.
Administrator is, of course, primarily concerned with orders relating to food, and other Governmental agencies issue suspension orders dealing with non-food materials and facilities.66

A type of suspension order was used in World War I as an effective administrative sanction at a time when there were no adequate court remedies to effectuate wartime regulations. In World War I, there was no general statute, comparable to Section 2(a) of the Act of June 28, 1940, as amended,67 authorizing the use of a system of priority ratings, permitting allocations of critical materials, and providing for judicial sanctions as an aid to enforcement. As a result of such lack of authority, the injunctive procedure was not available to enforce priority ratings assigned to procurement orders placed by the Federal Government to meet its war needs. However, a weapon was devised to meet the situation. Two important statutes were enacted which gave the Government the right to control the flow of transportation and the use of fuel.68 By using its powers to withhold fuel and transportation facilities from persons refusing to abide by its wartime procurement orders, the Government was enabled to secure compliance. This technique proved successful in World War I.69 In the present war, authority to issue suspension orders, is derived from the specific statutory authority70 to use priority and allocation orders to assure the fulfillment of wartime demands.

Each of the Food Distribution Orders allocating food in one or more of the ways heretofore discussed71 is promulgated in view of the imminence of a shortage in a particular food commodity or facility available in the channels of distribution. Each of the orders allocates a given food commodity or facility in such manner, upon such conditions, and to such an extent as is deemed necessary, by

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66 The War Production Board has issued approximately 450 suspension orders; the Office of Price Administration has issued approximately 4,000 suspension orders; the Petroleum Administrator for War has issued two suspension orders. As of December 21, 1943, the War Food Administrator had issued nine suspension orders. Food Distribution Order 27, as amended (8 F.R. 2784), provided (this order was superseded by Food Distribution Order 75, 8 F.R. 11119) that no person could slaughter livestock for the delivery of meat without a permit. In a number of instances, permits of violators of this order were revoked. This too constituted an exercise of the power to allocate food, and the revocation proceedings were closely akin to suspension order proceedings. Suspension orders have been issued by the War Food Administrator in matters involving violations of Food Distribution Orders governing the allocation of frozen dairy foods, including ice cream, meat, bread, milk, cream, and tea. For typical suspension orders see Re Silver Crown Ice Cream Products Corporation, Suspension Order Docket No. FDA-NE-65, 8 F.R. 11608, and Re Deems Ice Cream Corporation, Suspension Order Docket No. FDA-NE-64, 8 F.R. 13551.

67 See note 33 supra.

68 The Food and Fuel Act of 1917, 40 Stat. 276, the so-called "Lever Act", gave the War Industries Board power to regulate production, selling, and distribution of fuel; and the Act of August 10, 1917, 40 Stat. 272, gave the President power to direct priority in transportation by any common carrier by railroad or otherwise. See also, the National Defense Act of 1916, 39 Stat. 213, authorizing the President, through the heads of Departments, to place orders for such products as might be required and making orders so given obligatory, and giving them precedence over all other orders and contracts (see note 32 supra); and the Navy Purchase Act of 1917, 39 Stat. 1193, containing similar provisions respecting naval supplies.


70 Supra, pages 6 - 9.

71 Supra, pages 12 - 15.
the War Food Administrator, in the public interest and to promote the national defense. Realistically, this means that data regarding the available supply and prospective demands (for defense, for private account, and for export) with respect to a particular commodity has been analyzed, and that the War Food Administrator has allocated, or directed the distribution of, that food commodity in such a way as will make it possible for the commodity (or facility) to be used more effectively in the prosecution of the war.72

Unless every person subject to allocation orders obeys them, it is inevitable that the effort to mobilize the food resources of this nation for fighting the war will not be successful and that the priority and allocation controls necessary to achieve total victory will break down. Consequently, a suspension order, directed against a person who manifests no disposition to abide by the necessary priority and allocation controls embodied in a wartime order or regulation, is an appropriate means of diverting the scarce food, which is the subject of the order or regulation, from his hands. In short, allocation involves not only the affirmative act of directing food to uses or persons regarded as of importance to the war effort but also the negative act of prohibiting the diversion of scarce food materials to wasteful or unimportant uses or untrustworthy persons.

Since the issuance of a suspension order constitutes an exercise of the priority and allocation powers, it is not legally necessary to issue such an order, notwithstanding clear evidence of a violation of a food order or regulation. It may develop for example, that the violator is the sole supplier of an important food commodity or facility in his community and that, if he were denied the right to handle the commodity, difficulty would be encountered in obtaining the material supplied by him elsewhere. In such a case, it would not be in the public interest or promote the war effort to suspend such an individual. Once it is realized that a suspension order is used to conserve scarce materials and not to punish an individual violator, it becomes clear why such an order need not follow every violation. Sometimes, it is more expedient to invoke the available criminal and civic sanctions by judicial proceedings.73

72Ibid.
73Supra, page 15.
Notice, hearing, and representation by council are common features of the procedure relating to the issuance of suspension orders by the war agencies exercising priority and allocation control, including the War Food Administrator.74

Notwithstanding the large number of suspension orders which have been issued during the present war, no appellate court has been called upon to adjudicate their validity. However, suspension orders have come before several United States District Courts with varying results.76

74Procedure relating to suspension orders resulting from violations of Food Distribution Orders is set forth in Procedural Regulation 1, 8 F.R. 16497. In general, the compliance program of the Food Distribution Administration has been regionalized, so that the five Regional Directors (8 F.R. 15764) are charged with securing obedience to Food Distribution Orders. The Regional Director initially determines whether to apply administrative sanctions or to invoke the judicial remedies provided by Sec. 2(a) of the Act of June 28, 1940, as amended (see note 33 supra). If it is decided to apply one of the judicial remedies, the Regional Attorney of the Office of the Solicitor, through the local representatives of the Department of Justice, institutes the necessary proceeding. If the Regional Director tentatively decides to issue a suspension order, a notice is served upon the person alleged to have violated the order (called "respondent"). The respondent may file an answer or request an oral hearing. Hearings are conducted by presiding officers designated from among the attorneys in the Office of the Solicitor (8 F.R. 14592). Notice of the time and place of hearing is served upon the respondent. Data and information pertaining to the alleged violation are adduced. The presiding officer may hear oral arguments and permit the filing of briefs. The record of the hearing is transmitted by the presiding officer to the Regional Director who may, upon the basis of record, dismiss the proceeding or recommend that a suspension order be issued. In the latter case, the record and the recommended order is submitted to the War Food Administrator (or the person designated by him) for signature, after which it is served upon respondent and published in the Federal Register. The respondent may apply for reconsideration, and the War Food Administrator (or the person he has designated for that purpose) may, at any time modify or revoke the suspension order upon a determination that it tends to interfere with the maintenance of an adequate supply and efficient distribution of food to meet war and civilian needs. The Director and the Deputy Director of Food Distribution have been authorized by the War Food Administrator to issue suspension orders (8 F.R. 15696, 14251).

In connection with orders administered through the Food Production Administration, a comparable procedure has been created but, due to the fact that the administration is not decentralized to the same extent as the Food Distribution Administration, the procedure does not provide for decentralized action with respect to dismissals.

76In the following cases, United States District Courts held that the suspension orders involved in the respective cases did not constitute a proper exercise of the priority and allocation powers: WILEMON v. BROWN (N.D. Texas 1943), 51 F. Supp. 978 (suit to enjoin enforcement of suspension order issued by the Office of Price Administration); B. SIMON HARDWARE ET AL v. NELSON (D.C. 1943), Civil Action No. 20660 (decision pendente lite in action to enjoin enforcement of suspension order issued by the War Production Board); J. E. SIMS v. E. H. TALBERT et al (E.D. S.C. 1943), Civil Action No. 1070 (action to enjoin enforcement of suspension order issued by the Office of Price Administration). In the following cases, the United States District Courts for the Southern District of Georgia, for the Southern District of New York, and for the Northern District of Illinois specifically upheld the validity of suspension orders as an exercise of the priority and allocation powers of the Federal Government: PERKINS v. BROWN (S.D. Ga. 1943), Civil Action No. 263 (action to enjoin enforcement of suspension order issued by the Office of Price Administration); MICHAEL PANTERIO d-b-a PARKSIDE SERVICE STATION v. PRENTISS M. BROWN (S.D. N.Y. 1943), Civil Action No. 23-43 (action to enjoin enforcement of suspension order issued by the Office of Price Administration); and JOLIET OIL CORPORATION v. BROWN (N.D. Ill. 1943), Civil action No. 45-C-1021 (action to enjoin enforcement of suspension order issued by the Office of Price Administration). In the following cases, the United States District Court for the District of Columbia, while not specifically passing upon the validity of suspension orders, refused to issue injunctions to enjoin the enforcement of suspension orders by the Office of Price Administration: PETERSON ET AL v. BROWN ET AL (D.C. 1943), Civil Action No. 18763, and SCHWARZMANN v. BROWN (D.C. 1943), Civil Action No. 18456. No written opinions were filed in the last two cases.
It is clear that Congress may, in the exercise of its war powers, authorize the use of priority and allocation controls with respect to critical war materials and facilities. In view of the broad powers conferred upon the Federal Government by the Constitution to wage war, it is also clear that Congress has the power to enact a statute under which the issuance of suspension orders is authorized. It is believed that the appellate courts will uphold the priority and allocation powers

76 The following cases discuss the war powers of the Federal Government: United States v. McIntosh, 283 U.S. 605, 622 (1931); Henderson v. Kimmel (D. Kan. 1942), 47 F. Supp. 635, 641; Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 426 (1934); The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870); Hirabayashi v. United States, 320 U.S. 81 (1943) (Preliminary print), 63 Supreme Court Reprint 1375 (1945); Ex Parte Quirin, 317 U. S. 1 (1942); Northern Pacific Ry. v. North Dakota, 250 U.S. 149 (1919); Ex Parte Milligan, 4 Wall. 2, 139 (U.S. 1866). See also, Constitution, Art. 1, paragraph 8, and Art. II.

77 The following cases were decided under, or involved, regulations issued pursuant to the priority and allocations powers conferred upon the President by Section 2(a) of the Act of June 28, 1940, as amended: Henderson v. Bryan (S. D. Cal. 1942), 46 F. Supp. 682 (court found that the tire rationing regulations of the Office of Price Administration were constitutional); Hamner v. United States (C.C.A. 5th, 1943), 134 F. (2d) 592 and Minker et al v. United States (C.C.A. 4th, 1943), 134 F. (2d) 402 (involving same Office of Price Administration tire rationing regulations as above); United States v. Pyramid Auto Sales, Inc., et al (E.D. N.Y. 1943), 30 F. Supp. 868 (involving War Production Board Order M-100 pertaining to the transfer of new commercial vehicles); United States v. Bert Bros. et al (D. Conn. 1943), 50 F. Supp. 590 (relating to slaughter quota provision of meat restriction order of the Office of Price Administration); United States v. Randall et al (E. D. N. Y. 1945), 50 F. Supp. 139 (Office of Price Administration regulation pertaining to the rationing of gasoline); United States v. Wright (D. Del. 1943), 48 F. Supp. 687 (Office of Price Administration sugar rationing regulations); Colonial Operating Corp. v. Hannon Sales & Service, Inc., 34 N.Y.S. (2d) 116 (1942) (involving restriction orders of the Office of Production Management prohibiting sale or manufacture of certain types of automobiles); Balio v. Utica General Truck Co., Inc., 38 N.Y.S. (2d) 85 (1942) (War Production Board Order M-100 prohibiting delivery of tractors); Freund v. Zephyr Laundry Machinery Co., 39 N.Y.S. (2d) 250 (1942) (L-91, War Production Board restriction order on the sale and distribution of laundry machinery); Swift v. Hale Pontiac Sales, Inc., 34 N.Y.S. (2d) 888 (1942) (Office of Price Administration rationing order restricting the sale of new automobiles); Jonas et al v. Blansid Realty Corp. et al, 39 N.Y.S. (2d) 89 (1942) (fuel rationing orders of the Office of Price Administration). The following cases were litigated under, or involved, statutes and regulations enacted or issued during World War I: Ross Lumber Co. v. Hughes Lumber Co. (C.C.A. 5th, 1920), 264 Fed. 757; Lawrenceburg Roller Mills Co. v. Charles A. Jones & Co. (Alabama 1920), 85 So. 719, and Atwater & Co. v. United States, 275 U.S. 188 (1927) (upheld allocation system and compulsory order under the Food and Fuel Act of 1917, 40 Stat. 276, the so-called "Lever Act"); Omnix Commercial Co., Inc. v. United States 261 U.S. 502 (1923) (recognized compulsory order under Section 120 of the National Defense Act of 1916, 39 Stat. 213, 50 U.S.C. 1940 ed. 80); Roxford Knitting Co. v. Moore & Tierney, Inc. (C.C.A. 5th, 1920), 265 Fed. 177, cert. den. 253 U.S. 498 (1920) (recognized both compulsory order and priority rating under Section 120 of the National Defense Act of 1916, supra); Highland v. Russell Car and Snow Plow Co., 279 U.S. 235, 261 (1929) (case involving the Food and Fuel Act of 1917, supra, the so-called "Lever Act," and an Executive Order thereunder fixing the price of coal); Mawhinney v. Milbrook Woolen Mills, Inc., 231 N.Y. 290, 132 N.E. 93, 97 (1921) (excluded manufacturer from completing a previously executed civil contract because he was engaged in performing a Government contract that had a priority); Jersey Ice Cream Co. v. Banner Cone Co., 204 Ala. 532, 86 So. 382 (1920) (Supreme Court of Alabama found that wartime food regulations which restricted the means and process of producing ice cream cones manufactured by plaintiff excused him from completing performance of his contract with defendant. See also, Alpern v. Huffman (D. Neb. 1943), 49 F. Supp. 337 (dealing with power to requisition).
conferred upon the President by Section 2(a) of the Act of June 28, 1940, as amended, as an authority to exercise this power by the Federal Government.

Priority and allocation controls could not be effectively used as weapons to attack the problems of food distribution if the public in general did not voluntarily accept them. In recognition of this fact, the war Food Administration—while using the judicial sanctions and administrative devices already described in cases of violations—depends, in large measure, on extensive campaigns of education and publicity concerning its various food distribution programs to secure compliance by all persons. The "Food Fights for Freedom" campaign, which recently received extensive publicity in the press and on the radio, is an outstanding example of this technique.

See note 33 supra.