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IN TRIBUTE TO JACK HYMAN, DEFENSE COUNSEL FOR PRICE CONTROL

DAVID F. CAVERS*

Perhaps, when one has completed a quarter century of teaching and scholarship, he should be judged wholly upon that record and what he had done in the preceding years, whether for good or ill, should no longer be the object of scrutiny. If, however, such a rule were to be invoked in the case of Professor Jacob Hyman, the result would be to conceal from view an achievement that not only must have enriched his entire academic career but also has suddenly become pertinent to perplexities that currently confront the nation. It should be recorded here.

What I am alluding to is Professor Hyman's brilliant service in the Court Review Division of the Office of Price Administration during World War II. At all times one of the principal lawyers of the Division, he became its head with the rank of Associate General Counsel upon the resignation of Nathaniel L. Nathanson, another lawyer of outstanding ability and also a law teacher and scholar of distinction. During the greater part of the War, I bore to these able lawyers and their staffs a relationship not unlike that of house counsel to outside counsel serving a corporation beset by multiple legal problems. As Assistant and later Associate General Counsel for Price, I was one of the staff of lawyers drafting and interpreting the regulations which the Court Review was charged with defending. From this perspective, I cannot bear witness to the day-to-day problems with which the Division had to cope, but I do have a vivid appreciation of the importance of its performance.

Six months ago, a reference to the accomplishments of Jack Hyman¹ in 1942-46 would have seemed simply indulgence in the resurgent taste for nostalgia. Today, however, we find ourselves obliged to consider whether a temporary freeze of prices can be extended and transformed into a workable system of price regulation that will allow a peacetime economy flexibility enough to

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1. OPA veterans find it very hard to refer to him as "Professor" or "Dean." Only "Jack" seems appropriate in this context.

function effectively until inflationary pressures subside. Moreover, those of us who are lawyers must also ask whether that feat can be performed without the sacrifice of the rule of law.

Obviously these questions cannot be accorded conclusive answers on the basis of World War II experience for plainly conditions today are different in many important respects. However, those who neither were exposed to World War II controls at first hand nor have had occasion to study them since may be surprised to learn that, in a very short span of time, the nation succeeded in creating a procedural mechanism that, though subjected to great stress, was able to function consistently with both due process and effective control. Since Jack Hyman played a key role in the operation of that mechanism, a brief description is in order.

Under the authority of the Emergency Price Control Act of 1942, the Price Administrator was empowered to issue regulations setting maximum prices for goods and services and maximum rentals for housing. Not long after the law's enactment, the Administrator issued the General Maximum Price Regulation freezing prices and then issued a succession of more specific regulations dealing with the prices of particular industries or products, usually on a nation-wide basis. These regulations, often embodying complex formulas, came to total in the hundreds and were supplemented by a much larger number of individual adjustment orders to relieve hardship cases.

If only a tiny fraction of the millions of sellers—and landlords—subject to price and rent regulations had been free to seek injunctions against their enforcement, the whole control operation would have been brought to an abrupt halt under a barrage of restraining orders. Aware of this risk, however, the draftsmen of the Price Control Act had specified that a person aggrieved by a regulation had to register his objection by a protest proceeding in the OPA itself. Moreover, if the Administrator denied the protest, the protestant's sole remedy was to carry his case to the Emergency Court of Appeals (a court—initially—of three judges appointed from the federal bench to hear only price and rent control cases). Originally, the court could not stay enforcement proceedings while it passed on protests, but this power was granted to it by statute in 1943.

The effect of these provisions was to funnel into OPA's Court Review Division all the legal objections to price and rent

control regulations raised by the myriad of discontented sellers and landlords throughout the nation. There the Division lawyers had to test the economic bases of the regulations against the protestants' complaints, doing so in the light of the pricing and rent standards developed by the Price and Rent Departments. Economic data had to be assembled, arrayed, and analyzed. The conflicting positions had to be examined for reasonableness in the light of industry conditions and for consistency with the statute and the agency's standards. Moreover, if, on the Division's recommendation or despite it, the Administrator refused to grant the relief sought, his denial of the protest had to be defended before the Emergency Court of Appeals where most of the cases were argued by Division lawyers.

How tremendous this operation became is evidenced by figures presented by OPA General Counsel Richard H. Field when the OPA was barely halfway through its existence. As of March 31, 1944, 3,608 protests had been filed and had led to 1,918 denials and 745 grants of relief. By the end of 1946, 389 cases had been taken to the Emergency Court of Appeals. OPA's defense was amazingly successful. In only 29 of these cases were regulations or orders set aside, though 24 more cases were remanded for further proceedings.²

I do not know how many of the cases in the Emergency Court were argued by Jack Hyman, but I am sure their number and significance were substantial. The quality of his arguments was impressive, and we soon learned that the able judges on the court³ were duly impressed. However, I suspect that the importance of the Court Review Division's work was even greater in the agency than in the courtroom.

The legal staff of the Price Division—the "price lawyers," as they were known—was constantly beset by pressures to approve price increases that were impossible to reconcile with OPA's price standards. Our position was often one that could be maintained

2. These data are derived from Nathanson, *The Emergency Court of Appeals*, in PROBLEMS IN PRICE CONTROL: LEGAL PHASES pt. I, at 4 (OPA, Office of Temporary Controls, H. Mansfield ed. 1947). This volume is one of a series of historical reports on the conduct of the OPA's price, rent, and rationing programs which form a valuable storehouse of knowledge concerning many aspects of that huge operation.

3. It included Judge (later Chief Justice) Vinson of the Court of Appeals of the District of Columbia and Judges Calvert Magruder and Maris, later Chief Judges of the First and Third Circuits respectively.

within the Office only by invoking the task of the Court Review Division in dealing with protests and appeals to the Emergency Court. The Division's function brought home to us the fact that, with the Division, we were sustaining the rule of law in the exercise by government of administrative powers on an unprecedented scale. If we had not had both the criticism and the support of Court Review and of lawyers of the stature and understanding of Jack Hyman, we might well have failed in our endeavor.

In the present crisis, the possibility of recreating the Emergency Court of Appeals to review cases arising under projected price regulations is now being envisaged. The court would be an important, perhaps an indispensable, feature of such a control program. However, it could discharge its function effectively only if the agencies appearing before court could recruit counsel of the capacity of Jack Hyman.