

11670-11675

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**PHILIP B. FLEMING, ADMINISTRATOR, OFFICE OF TEM-
PORARY CONTROLS, APPELLANT**

vs.

**DOROTHY F. BORDERS, No. 11670, MRS. A. C. SHALBERG,
No. 11672, MRS. RICHARD DAVIS, No. 11673, ADOLPH
NEUBERT, No. 11674, L. R. CHAMBERS, No. 11675,
GEORGE ROUSE, No. 11676, HERMAN HAGE AND ED-
WARD C. HAGE, No. 11677, J. R. JEFFERS, DOING
BUSINESS AS NORBLAD HOTEL, No. 11678, APPELLEES**

APPELLANT'S BRIEF

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(1)

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APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Housing Expeditor appeals from a final judgment of the United States District Court for the District of Oregon entered on March 6, 1947, dismissing certain actions brought in accordance with Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U. S. C. App. 901 et seq.) for violations of the Rent Regulation for Housing (10 F. R. 13528) prohibited by Section 4 (a) of said Act. Notice of appeal was filed on June 5, 1947 (R. 29, 38, 46, 54, 62, 71, 80, 88). Jurisdiction of the District Court was invoked under

Sections 205 (a), (c), and (e) of said Act (50 U. S. C. Sections 925 (a), (c), and (e), and the jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. A 225).

STATEMENT OF THE CASE

These actions, which have been consolidated by order of this court dated September 22, 1947 (R. 94-95), were instituted at various times from January 28, 1947 to February 12, 1947 by Philip B. Fleming, Administrator, Office of Temporary Controls in the District Court of the United States for the District of Oregon (R. 4, 36, 44, 52, 60, 68, 78, 86). The complaints all asked for injunctive relief and treble damages because defendants had violated the Rent Regulation. The defendants moved to dismiss these complaints on the grounds that: (a) plaintiff had no legal capacity to sue; (b) the complaint did not state facts sufficient to constitute a suit against the defendants in that plaintiff's cause of action was founded upon the Emergency Price Control Act of 1942, which had expired on June 30, 1946; and (c) the complaint did not state facts sufficient to state a cause of action in that the Emergency Price Control Act of 1942, as amended and extended, is unconstitutional (R. 10, 69).

Judge McColloch ordered that the causes be dismissed "for want of jurisdiction" on March 6, 1947 (R. 11). He made no statement of his reasons for dismissing these actions, but on February 15, 1947, in the similar case of *Fleming v. Findlay*, Civil No. 3437, not reported, he also dismissed the action "on jurisdictional grounds." He stated that:

I am dismissing this case which is one of several that have recently been filed so that the authority of General Fleming can be tested in an appellate court, if that is OPA's wish.

In his opinion, which is printed in the appendix hereto p. 19, he stated that General Fleming had no authority because he had not been confirmed by the Senate as Price Administrator. It may safely be assumed that Judge McColloch's opinion in the *Findlay* case furnishes the reason for his decision in the instant cases since he pointed out in the *Findlay* case that it was one of several such cases.

On August 25, 1947, this Court granted the application of Frank R. Creedon, Housing Expediter, to be substituted as party-appellant herein in the place and stead of Philip B. Fleming in all of these cases (R. 94-95).

SPECIFICATION OF ERRORS

1. The court below erred in dismissing these actions for want of jurisdiction

ARGUMENT

I

Fleming had authority to institute these cases

The desire of the court below to have General Fleming's authority to institute actions under the Emergency Price Control Act tested in an Appellate Court was satisfied in *Fleming v. Mohawk Wrecking & Lumber Co.*, 67 S. Ct. 1129, decided April 28, 1947. In that case the defendant argued that Fleming

could not be substituted for Paul Porter, in whose name the action had been commenced, because, *inter alia*, Fleming had not been confirmed by the Senate as Price Administrator. The Court rejected this contention and held that Fleming could be substituted, declaring (p. 1133):

To hold that an officer, previously confirmed by the Senate, must be once more confirmed in order to exercise the powers transferred to him by the President would be quite inconsistent with the broad grant of power given the President by the First War Powers Act. Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301, 302, 57 S. Ct. 478, 479, 480, 81 L. Ed. 659; *Brooks v. Dewar, supra*.

For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure, 28 U. S. C. A. following section 723 c.

In view of the Supreme Court's holding, the decision below was clearly erroneous.

Moreover, the recent appropriation by Congress for the Housing Expediter "to carry out the provisions of law and Executive Orders 9809 and 9841 relative to rent control" (Public Law 271, 80th Cong., Ch. 361,

1st Sess.)¹ is further evidence of Congressional intent that liabilities created prior to June 30, 1947, are not washed out after that date, and that Congress desired the Housing Expediter to proceed with suit to redress them (See too, *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. at p. 119).

Just as recognition in the appropriation provided by Public Law 20, 80th Congress, 1st Session, constituted "an acceptance or ratification by Congress of the President's action in Executive Order No. 9809" (*Fleming v. Mohawk Wrecking and Lumber Co.*, 67 S. Ct. 1129, 1133, footnote 10), so too recognition in the appropriation of Public Law 271, 80th Congress, 1st Session, constituted ratification by Congress of the President's action in Executive Order No. 9841 (12 F. R. 2645), which transfers the functions with respect to rent control to the Housing Expediter (Section 202

¹ "HOUSING EXPEDITER

"OFFICE OF RENT CONTROL

"Salaries and expenses, Office of Rent Control: For expenses necessary to carry out provisions of law and Executive Orders 9809 and 9841 relative to rent control, including personal services in the District of Columbia; services as authorized by section 15 of the Act of August 2, 1946 (Public Law 600), at rates not to exceed \$35 per diem for individuals; printing and binding; test rentals for enforcement purposes, authorization in each case to have prior approval of the Housing Expediter, or the Deputy Expediter, Rent Control, or the Regional Rent Administrator in the region in which the transaction is contemplated; hire of passenger motor vehicles; attendance at meetings of organizations concerned with rent control; and not to exceed \$175,000 for deposit in the Treasury for cost of penalty mail as required by the Act of June 28, 1944; \$18,074,000; * * *" (Public Law 271, 80th Cong., Ch. 361, 1st sess.)

(a) of Executive Order No. 9841, *supra*), and includes among such functions, authority “to institute, maintain * * * in his own name civil proceedings in any court * * * relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this Act” (Section 402 of Executive Order No. 9841, *supra*). (See appendix, p. 12.)

CONCLUSION

The judgment below should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

ED DUPREE,

Acting General Counsel,

HUGO V. PRUCHA,

Chief Litigation Unit,

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APPENDIX A

1. The pertinent portions of the Emergency Price Control Act of 1942, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App. Supp. V, 901 et seq., provide as follows:

SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947,² or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the Two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other

² Originally "June 30, 1943." On October 2, 1942, amended to read "June 30, 1944" (sec. 7 (a) of Stabilization Act of 1942, 56 Stat. 767). On June 30, 1944, amended to read "June 30, 1945" (sec. 101 of Stabilization Extension Act of 1944, 58 Stat. 632). On June 30, 1945, amended to read "June 30, 1946" (sec. 1 of Pub. Law 108, 79th Cong., 1st sess.). On July 25, 1946, amended to read "June 30, 1947" (sec. 1 of the Price Control Extension Act of 1946, Pub. Law 548, 79th Cong., 2d sess.).

obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 206 * * * or to offer, solicit, attempt, or agree to do, any of the foregoing.

SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is

based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. * * *

EXECUTIVE ORDER 9809 (11 F. R. 14281)

PROVIDING FOR THE DISPOSITION OF CERTAIN WAR AGENCIES

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, Title III of the Second

War Powers Act, 1942, section 201 (b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction

of the Price Administrator (including any such proceedings now pending).

3. * * *
4. * * *
5. * * *
6. * * *
7. * * *
8. * * *
9. * * *
10. * * *

11. The authority, records, property, and personnel which relate primarily to the functions redistributed by this order are transferred to the respective agencies in which functions are vested pursuant to the provisions of this order and the funds which relate primarily to such functions are transferred or otherwise made available to such respective agencies: *Provided*, That the Director of the Bureau of the Budget may in any case limit the records, property, personnel, and funds to be so transferred or made available to so much thereof as he deems to be required for the administration of the transferred functions. Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director of the Bureau of the Budget may direct and by such agencies as he may designate. All personnel transferred under the provisions of this order which the transferee agencies shall respectively find to be in excess of the personnel necessary for the administration of the functions transferred to such agencies by this order shall, if not retransferred under existing law to other positions in the Government, be separated from the service.

12. All prior Executive orders or parts thereof in conflict with this order are amended accordingly. All other prior orders, regulations, rulings, directives, and other actions relating to any function or agency transferred by this order or issued by any such agency shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

13. The provisions of this order shall become effective immediately except that the provisions of paragraph 10 hereof, and those of paragraph 11 to the extent that they relate to the functions referred to in paragraph 10, shall become effective on February 24, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE,

December 12, 1946.

EXECUTIVE ORDER 9841 (12 F. R. 2645)

TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

Whereas the Congress, in the Urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

Whereas it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

Now, therefore, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol

Act of 1947, section 201 (b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

Part I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated and disposition shall be made of its functions according to the provisions of this order.

Part II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of over-payments (but excluding

premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F. R. 5087, 5444) of the Office of Price Administration; and (3) the interpretation and application of price and subsidy regulations and orders which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6 (a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

Part III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2 (e) (a) (2) of the Emergency Price

Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

PART IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising Under Wartime Legislation," issued on the date of this order and effective June 1, 1947.

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be

transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN.

THE WHITE HOUSE,
April 23, 1947.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON

Civil No. 3437

PHILIP B. FLEMING, ADMINISTRATOR, OFFICE OF TEM-
PORARY CONTROLS, PLAINTIFF

vs.

MRS. T. A. FINDLAY AND REUBEN G. LENSKE,
DEFENDANTS

MEMORANDUM OPINION

I am dismissing this case which is one of several that have recently been filed so that the authority of General Fleming can be tested in an appellate court, if that is OPA's wish.

I am dismissing the case on jurisdictional grounds which are said always to justify a Court's acting on its own motion. I am dismissing it for the following specific reasons:

The Price Control Act was enacted in 1942. The Act put the national government into a domestic field never before entered. The field was entered as a war measure. The Act provided that the great new federal powers thus asserted should be exercised by an administrator appointed by the President "by and with the advice and consent of the Senate." Four Administrators were thus appointed and confirmed.

Now it is said and while still purported to exercise war powers, that the President can put these great—and to many under present conditions, questionable

powers—in the hands of an executive not confirmed nor to be confirmed by the Senate.

The President's action cannot be upheld, in my opinion, without doing violence to constitutional principle. Ours is a government of divided powers and the outstanding domestic problem of the hour is to restore constitutional equilibrium. It is being found more difficult, I think, to regain war powers than had been expected. I put my judgment and cast my influence in the present situation on the side of diminution of extraordinary executive power rather than on the side of expansion of it, for it is obvious if the President can appoint a price and rent administrator now without consulting the Senate, he could have done so at any time during the war.

Dated at Portland, Oregon, this 15th day of February 1947.

(S) CLAUDE MCCOLLOCH,
District Judge.

