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EMPLOYES — STATE, COUNTY, MUNICIPAL OR SCHOOL — PUBLIC LAW 729 — 77TH CONGRESS — CHAPTER 578 — 2d SESSION — H.R. 7565 — DOES NOT CONFER AUTHORITY UPON ANY FEDERAL OFFICER OR AGENCY TO ISSUE ORDERS TO REGULATE OR ADJUST SALARIES OR WAGES OF SUCH EMPLOYES — SUCH SALARIES AND WAGES MAY BE INCREASED WITHOUT COMPLIANCE WITH REGULATIONS OF ECONOMIC STABILIZATION DIRECTOR — CODE OF FEDERAL REGULATIONS, TITLE 32, CHAPTER XVIII, SUBCHAPTER A, PART 4001, SECTIONS 4001.1 TO 4001.17 — APPROVED OCTOBER 27, 1942.

SYLLABUS:

Public Law 729-77th Congress-Chapter 578-2d Session-H. R. 7365, does not confer authority upon any Federal officer or agency to issue orders or regulations governing the adjustment of salaries or wages of state, county, municipal or school district employes, and consequently the salaries and wages of such employes may be increased without compliance with the regulations relating to wages and salaries issued by the Economic Stabilization Director and approved by the President, October 27, 1942, as Title 32, Chapter XVIII, Subchapter A, Part 4001, Sections 4001.1 to 4001.17, of the Code of Federal Regulations.

Columbus, Ohio, December 17, 1942.

Bureau of Inspection and
Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "Does the recent War Order of the Federal Government freezing salaries, prohibit the increasing of salaries of employes of municipalities, counties and school districts?"

Before considering the executive order of the President of the United States, providing for the stabilization of wages and salaries, and the regulations relating to wages and salaries issued by the Economic Stabilization Director, it is necessary to examine the legislation that led up to the issuance of such order and regulations.

The Act of Congress (Public Law 729 — 77th Congress — Chapter 578 — 2d Session — H.R. 7565), which authorized the President to issue a general order with respect to wage and salary stabilization, became effective October 2, 1942. Said Act, in so far as the same is pertinent hereto, reads as follows:

> " * * * That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.
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> Regulations of President; delegation of authority; suspension of provisions of Price Control Act.
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> Section 2. The President may, from time to time, promul-

gate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The president may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof. * * *

Limitations on actions with respect to wages and salaries.

Section 4. No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act, or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942: Provided, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war.

Control of wages and salaries; limitations of prohibition of payment of double time.

Section 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulation shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of its employees which is at the rate of $5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly s c h e d u l e d work week. * * *

Definitions of 'wages' and 'salaries'.

Section 10. When used in this act, the terms 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the

purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees.

Penalties.

Section 11. Any individual, corporation, partnership, or association willfully violating any provision of this act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment."

Acting under the authority of the above Act, the President of the United States, on October 3, 1942, issued Executive Order No. 9250, the material parts of which are as follows:

"TITLE I

Establishment of an Office
of Economic Stabilization

1. There is established in the office for Emergency Management of the Executive Office of the President an Office of Economic Stabilization at the head of which shall be an Economic Stabilization Director (hereinafter referred to as the Director).

2. There is established in the office of Economic Stabilization an Economic Stabilization Board with which the Director shall advise and consult. The Board shall consist of the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Chairman of the Board of Governors of the Federal Reserve System, the Director of the Bureau of Budget, the Price Administrator, the Chairman of the National War Labor Board, and two representatives each of labor, management, and farmers to be appointed by the President. The Director may invite for consultation the head of any other department or agency. The Director shall serve as Chairman of the Board.

3. The Director with the approval of the President, shall formulate and develop a comprehensive national economic policy relating to the control of civilian purchasing power, prices, rents, wages, salaries, profits, rationing, subsidies, and all related matters — all for the purpose of preventing avoidable increases in the cost of living, cooperating in minimizing the unnecessary migration of labor from one business, industry, or region to another, and facilitating the prosecution of the war. To give effect to this comprehensive national economic policy the Director shall have power to issue directives on policy to the Federal departments and agencies concerned.

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibilty of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

Title II

Wage and Salary Stabilization Policy

1. No increase in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases and decreases.

2. The National War Labor Board shall not approve any increase in the wage rates prevailing on September 15, 1942, unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards of living, to correct gross inequities, or to aid in the effective prosecution of the war.

Provided, however, that where the National War Labor Board or the Price Administrator shall have reason to believe that a proposed wage increase will require a change in the price ceiling of the commodity or service involved, such proposed increase, if approved by the National War Labor Board, shall become effective only if also approved by the Director.

3. The National War Labor Board shall not approve a decrease in the wages for any particular work below the highest wages paid therefor between January 1, 1942 and September 15, 1942, unless to correct gross inequities and to aid in the effective prosecution of the war.

4. The National War Labor Board shall by general regulation, make such exemptions from the provisions of this title in the case of small total wage increases or decreases as it deems necessary for the effective administration of this Order.

5. No increases in salaries now in excess of $5,000 per year (except in instances in which an individual has been assigned to more difficult or responsible work), shall be granted until otherwise determined by the Director.

6. No decrease shall be made in the salary for any particular work below the highest salary paid therefor between January 1, 1942 and September 15, 1942 unless to correct gross inequities and to aid in the effective prosecution of the war.

7. In order to correct gross inequities and to provide for greater equality in contributing to the war effort, the Director is authorized to take the necessary action, and to issue the appropriate regulations, so that, insofar as practicable, no salary shall be authorized under Title III, Section 4 to the extent that it exceeds $25,000 after the payment of taxes allocable to the sum in excess of $25,000. Provided, however, that such regulations shall make due allowance for the payment of life insurance premiums on policies heretofore issued, and required payments on fixed obligations heretofore incurred, and shall make provision to prevent undue hardship.

8. The policy of the Federal Government, as established in Executive Order No. 9017 of January 12, 1942, to encourage free collective bargaining between employers and employees is reaffirmed and continued.

9. Insofar as the provisions of Clause (1) of section 302 (c) of the Emergency Price Control Act of 1942 are inconsistent with this Order, they are hereby suspended.

TITLE III

Administration of Wage and Salary Policy

1. Except as modified by this Order, the National War Labor Board shall continue to perform the powers, functions, and duties conferred upon it by Executive Order No. 9017, and the functions of said Board are hereby extended to cover all industries and all employees. The National War Labor Board shall continue to follow the procedures specified in said Executive Order.

2. The National War Labor Board shall constitute the agency of the Federal Government authorized to carry out the wage policies stated in this Order, or the directives on policy issued by the Director under this Order. The National War Labor Board is further authorized to issue such rules and regulations as may be necessary for the speedy determination of the propriety of any wage increases or decreases in accordance with this Order, and to avail itself of the services and facilities of such State and Federal departments and agencies as, in the discretion of the National War Labor Board, may be of assistance to the Board.

3. No provision with respect to wages contained in any labor agreement between employers and employees (including

the Shipbuilding Stabilization Agreements as amended on May 16, 1942, and the Wage Stabilization Agreement of the Building Construction Industry arrived at May 22, 1942), which is inconsistent with the policy herein enunciated or hereafter formulated by the Director shall be enforced except with the approval of the National War Labor Board within the provisions of this Order. The National War Labor Board shall permit the Shipbuilding Stabilization Committee and the Wage Adjustment Board for the Building Construction Industry, both of which are provided for in the foregoing agreements, to continue to perform their functions therein set forth, except insofar as any of them is inconsistent with the terms of this Order.

4. In order to effectuate the purposes and provisions of this Order and the Act of October 2, 1942, any wage or salary payment made in contravention thereof shall be disregarded by the Executive Departments and other governmental agencies in determining the costs or expenses of any employer for the purpose of any law or regulation, including the Emergency Price Control Act of 1942, or any maximum price regulation thereof, or for the purpose of calculating deductions under the Revenue Laws of the United States or for the purpose of determining costs or expenses under any contract made by or on behalf of the Government of the United States. * * *

TITLE VI

General Provisions

1. Nothing in this Order shall be construed as affecting the present operation of the Fair Labor Standards Act, the National Labor Relations Act, the Walsh-Healey Act, the Davis-Bacon Act, or the adjustment procedure of the Railway Labor Act.

2. Salaries and wages under this Order shall include all forms of direct or indirect remuneration to an employee or officer for work or personal services performed for an employer or corporation, including but not limited to, bonuses, additional compensation, gifts, commissions, fees, and any other remuneration in any form or medium whatsoever, (excluding insurance and pension benefits in a reasonable amount as determined by the Director); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees. 'Salaries' as used in this Order means remuneration for personal services regularly paid on a weekly, monthly or annual basis.

3. The Director shall, so far as possible, utilize the information, data, and staff services of other Federal departments and agencies which have activities or functions related to national economic policy. All such Federal departments and agencies shall supply available information, data, and services required by the Director in discharging his responsibilities.

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

5. The Director may perform the functions and duties and exercise the powers, authority, and discretion conferred upon him by this order through such officials or agencies, and in such manner, as he may determine. The decision of the Director as to such delegation and the manner of exercise thereof shall be final.

6. The Director, if he deems it necessary, may direct that any policy formulated under this Order shall be enforced by any other power or authority which may be provided by any of the laws of the United States.

7. The Director, who shall be appointed by the President, shall receive such compensation as the President shall provide, and within the limits of funds which may be made available, may employ necessary personnel and make provisions for supplies, facilities and services necessary to discharge his responsibilities."

It will be noted that neither the Act nor the above Order in express terms brings within its application salaries paid by a state or subdivision thereof.

However, the regulations relating to wages and salaries issued by the Economic Stabilization Director and approved by the President, October 27, 1942, as Title 32, Chapter XVIII, Subchapter A, Part 4001, Sections 4001.1 to 4001.17, of the Code of Federal Regulations, must also be considered.

Sections 4001.3 and 4001.5, which deal with the authority of the National War Labor Board and the authority of the Commissioner of Internal Revenue respectively, in connection with the adjustment of wages and salaries, read as follows:

Section 4001.3.

"The Board shall, subject to the provisions of sections 1, 2, 3, 4, 8, and 9 of Title II of Executive Order No. 9250, of October 3, 1942, have authority to determine whether any —

(1) Wage payments, or

(2) Salary payments to an employee totaling in amount

not in excess of $5,000 per annum where such employee

(a) in his relations with his employer is represented by a duly recognized or certified labor organization, or

(b) is not employed in a bona fide executive, administrative or professional capacity are made in contravention of the Act, or any rulings, orders or regulations promulgated thereunder. Any such determination by the Board, made under rulings and order issued by it, that a payment is in contravention of the Act, or any rulings, orders, or regulations promulgated thereunder, shall be conclusive upon all Executive Departments and agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulation, either heretofore or hereafter enacted or promulgated, including the Emergency Price Control Act of 1942 or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of determining costs or expenses under any contract made by or on behalf of the United States. Any determination of the Board made pursuant to the authority conferred on it shall be final and shall not be subject to review by The Tax Court of the United States or by any court in any civil proceedings."

Section 4001.5.

"The Commissioner shall have authority to determine, under regulations to be prescribed by him with the approval of the Secretary of the Treasury, whether any salary payments other than those specified in subparagraph (2) of Section 4001.3 of these regulations are made in contravention of the Act, or any regulations or rulings promulgated thereunder. Any such determination by the Commissioner, made under such regulations, that a payment is in contravention of the Act or any rulings or regulations promulgated thereunder, shall be conclusive upon all Executive Departments and agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulations, either heretofore or hereafter enacted or promulgated, including the Emergency Price Control Act of 1942 or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of determining costs or expenses under any contract made by or on behalf of the United States. Any determination of the Commissioner made pursuant to the authority conferred on him shall be final and shall not be subject to review by The Tax Court of the United States or by any court in any civil proceedings. No increase in a salary rate approved by the Commissioner shall result in any substantial increase of the level of costs or shall furnish the basis either to increase price ceilings of the commodity or service involved or to resist otherwise justifiable reductions in such price ceilings."

Under the above regulations, the National War Labor Board has jurisdiction over the adjustment of salaries up to and including $5,000 a year, except for those employes employed in a bona fide executive, administrative or professional capacity who are not represented by duly recognized or certified labor unions, the adjustment of the salaries of such latter employes being under the jurisdiction of the Commissioner of Internal Revenue.

Section 4001.7 of said regulations reads as follows:

> "In the case of a salary rate of $5,000 or less per annum existing on the date of the approval of these regulations by the President and in the case of a salary rate of more than $5,000 per annum existing on October 3, 1942, no increase shall be made by the employer except as provided in regulations, rulings, or orders promulgated under the authority of these regulations. Except as herein provided, any increase made after such respective dates shall be considered in contravention of the Act and the regulations, rulings, or orders promulgated thereunder from the date of the payment if such increase is made prior to the approval of the Board or the Commissioner, as the case may be.
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> In the case, however, of an increase made in accordance with the terms of a salary agreement or salary rate schedule and as a result of —
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> (a) individual promotions or reclassifications,
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> (b) individual merit increases within established salary rate ranges,
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> (c) operation of an established plan of salary increases based on length of service,
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> (d) increased productivity under incentive plans,
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> (e) operation of a trainee system, or
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> (f) Such other reasons or circumstances as may be prescribed in orders, rulings, or regulations, promulgated under the authority of these regulations, no prior approval of the Board or the Commissioner is required. No such increase shall result in any substantial increase of the level of costs or shall furnish the basis either to increase price ceilings of the commodity or service involved or to resist otherwise justifiable reductions in such price ceilings."

Section 4001.14, which deals specifically with salaries and wages of public employes, reads as follows:

> "These regulations shall be applicable to any salary or wages paid by the United States, any State, Territory or possession, or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, except where the amount of such salary or wages is fixed by statute."

In view of the above language we may at once dismiss from our consideration the salaries of public employes which are fixed by statute. It does not follow, however, that salaries paid to county, municipal and school district employes which are not fixed by statute may not lawfully be increased without approval of the National War Labor Board or Commissioner of Internal Revenue, even though the above quoted section from the regulations of the Economic Stabilization Director in explicit terms recites that such salaries come within the application of such regulations.

While the distinction drawn between salaries fixed by statute and those not so fixed is somewhat irrelevant to your question, as will be later demonstrated, I am nevertheless constrained to give pause at this point and indulge in a consideration of the validity of such discrimination.

With respect thereto, it must be recognized at the outset that Congress cannot abdicate its power to make laws, or delegate this power to any other department of government. The inhibition against the delegation of legislative power by Congress is set forth in Article I, section 1 of the Federal Constitution in the following language:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Under our government, legislative powers and administrative powers are quite distinct and in the recognition of this distinction lies the difference between government by legislation and government by bureaucracy.

It is only with respect to matters of detail within the policy and standards established by a statute that administrative officers may lawfully exercise discretion. Where the statute sufficiently indicates the legislative policy, the administrative details may be left to some agency to carry out.

This principle is well stated in the oft quoted language of the Ohio Supreme Court:

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."
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> Cincinnati, W. & Z. R. Co. v. Clinton County, I Ohio St. 77.

With respect to the limitations which circumscribe the exercise of delegated powers by an administrative agency, it was held in the case of Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446:

> "Regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently defined by statute, and when found to be within the framework of such policy."

In said case it was likewise declared by Mr. Chief Justice Hughes, who delivered the opinion of the court:

> " * * * The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislaitve power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

If Congress, in the instant case, had declared a legislative policy to include within the provisions of the Act salaries and wages of public employes, and, in order to effectuate the purpose of the Act, had delegated powers to the President and Economic Stabilization Director under

which executive orders and regulations could lawfully be issued, the exercise of such powers so delegated would be lawful only when kept within the limitations fixed by Congress.

The Act, as above observed, contains no express provision regarding salaries or wages of public employes. Obviously, therefore, nothing therein provides for a classification of such salaries. It must be conceded that classification of salaries is a matter of policy which necessarily involves a discussion as to what the law shall be in such respect and is therefore a prerogative belonging exclusively to Congress. How, then, can an administrative officer, who in the exercise of the power delegated to him is required to remain within the definite policy fixed by Congress, lawfully establish a policy which Congress, in its legislative discretion, failed to establish?

Let it not be understood that it is my contention that an administrative officer may not exercise discretion. The mere fact that such an officer is granted discretion in the exercise of the powers which are administrative in nature does not render the delegation thereof invalid. However, if the power involved is purely legislative in character, the exercise thereof by an administrative officer is invalid.

Moreover, an examination of the Act and regulations issued thereunder fails to reveal any pertinent reason for the classification of wages and salaries paid to public employes. If a distinction bearing any conceivable relation to the object sought to be accomplished by such classification exists, I have been unable to detect it.

If the increase of wages and salaries which are not fixed by statute will have a deleterious effect on the cost of living, it is difficult to understand why wages and salaries fixed by statute would not have a similar effect. If the stabilization of wages and salaries not fixed by statute is necessary or conducive to the effective prosecution of the war, how can it be logically argued that wages and salaries fixed by statute require no regulation?

It certainly cannot be assumed or presumed that the classification was arbitrarily and captiously made. What then is the reason therefor? It might be that Economic Stabilization Director regarded an attempt to regulate salaries fixed by statute as a usurpation of power reserved to the states.

In regard thereto, I think it can safely be said that if the adjustment of salaries of public employes which are fixed by statute lies without the domain of the United States, the adjustment of such salaries which are not fixed by statute is likewise beyond the province of our Federal government. Whether the Legislature fixes the salaries of public employes in specific amounts or delegates to executive or administrative officers the power to fix such salaries would make no difference. In either event, the fixing and adjusting of such salaries is an attribute of sovereignty which the Legislature in its discretion may exercise directly or within proper bounds delegate to administrative officers.

It therefore appears that the power assumed by the Economic Stabilization Director in discriminating between salaries fixed by statute and those not so fixed, exceeded that delegated to him and consequently it is difficult to perceive how such regulation can be regarded as valid.

I now return to a consideration of the validity of the regulation insofar as it purports to apply to salaries of public employes not fixed by statute. I have above pointed out that the Act itself contains no provision which makes regulations issued under authority thereof applicable to states or their subdivisions. Nor is there anything in the Act which relinquishes the determination of that question to the Economic Stabilization Director. While administrative rulings should be accorded the utmost respect, it must be remembered that they cannot enlarge the meaning of a statute. Administrative rulings cannot add to the language of the statute and bring within the operation thereof matters which the statute leaves untouched. Section 11 of the Act provides that any individual, corporation, partnership or association convicted of violating the Act shall be fined or imprisoned, or both. A subdivision of the state is neither an individual, corporation, partnership, nor an association. While it is true that cities and villages are sometimes referred to as municipal corporations or public corporations, it is quite obvious that municipalities are not within the meaning of the word "corporation" as the same appears in the Act.

It is a fundamental rule of statutory construction that words of a statute should be given the meaning commonly attributed to them. This rule should be invoked in all cases unless from the context of the act it is clear that the Legislature intended the word in question to have a different meaning. In the case before us there is nothing in the en-

tire statute which would in any way indicate that Congress intended that regulations made pursuant to the authority conferred by the Act should apply to cities or villages.

The United States District Court of Idaho, in considering the meaning of the word "corporation" when used in a statute, held:

> "Generally, the word 'corporations', when used in a statute does not include municipal corporations unless such construction is made imperative from the context of the statute."
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> Wilcox v. City of Idaho Falls, 23 F. Supp. 626.

In the case of Feemster v. The City of Tupelo, 121 Miss., 733, it is stated:

> "Ordinarily the term 'corporation' as used in a statute means private corporations."

See also City of Tyler v. Texas Employers' Association, 288 S. W. 409.

Furthermore, general words of a statute should not be construed to include the sovereign state or affect its rights unless the statute either in express terms includes the state or is written in such clear, unambiguous language so as to impel the inference that the state is included within its meaning. This well known doctrine has been enunciated by our Federal and state courts in many instances, as follows:

> "General language in statute does not apply to sovereign." California Iron Yards Co. v. Commissioner of Internal Revenue, 47 F. 2d 514.
>
> "Rights of government are never foreclosed except by statutory language clearly indicative of such purpose."
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> Liebes v. Commissioner of Internal Revenue, 63 F. 2d 870, 92 A.L.R. 938.
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> "General words of a statute will not include the government or affect its rights, unless that construction be clear and undisputable upon the text of the act."
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> C.C. Mass. 1821, U. S. v. Hoar, Fed. Cas. No. 15,373, 2 Mason, 311.
>
> C.C. Pa. 1871. U. S. v. Weise, Fed. Cas. No. 16,659, 2 Wall. Jr. 72, 14 Law Rep. 260, 4 Am. Law J., N.S. 88.

D.C. Pa. 1839, U. S. v. Hewes, Fed. Cas. No. 15,359, Crabbe, 307, 2 Law Rep. 329, 1. Liv. Law Mag. 545, 4 Pa. Law J. Rep. 358, 2 Am. Law J., N.S. 204.

"Political subdivisions of the government which may be included in the general wording of a statute are not affected thereby unless it is clearly and indisputably apparent from the context of the statute that political subdivisions were intended to be included."

Wilcox v. City of Idaho Falls, 23 F. Supp. 626.

Therefore, if it can be said that the words "individual", "corporation", "partnership", or "association", as the same appear in the penalty section of the Act, do not include a state or its political subdivisions, it is indeed difficult to perceive how it can be tenably argued that the other sections of the Act or any regulations made thereunder are applicable to the states or their political subdivisions. To assume such a position would be to say that Congress prohibited the increase of all wages and salaries whether paid by a body politic or not, and then provided that all those except the states and political subdivisions, who violated the Act, would be punished therefor. This of course is utterly ridiculous. Statutes should always be given a sensible and intelligent construction. Clearly, Congress cannot be presumed to have intended to enact a law producing such unreasonable and absurd consequences.

In view of the above, I must conclude that the general language contained in H. R. 7565 was not intended to include the states or their subdivisions, and that it was clearly the intention of Congress that the use of the word "corporation" in Section II of the Act was to be limited to private corporations and not to include municipal corporations.

It would therefore follow that any regulations made and issued under authority of said Act which attempt to bring within their operation the states or the political subdivisions thereof are without authority in law and consequently a nullity.

While the argument which is herein set out is in my opinion sufficient to impel the above conclusion, I think it should be pointed out that it might well be argued that such conclusion also finds support in the Constitution of the United States.

In this regard, it should be borne in mind that there is a presump-

tion in favor of the constitutionality of every statute. Courts are slow to impart a construction to a statute which would render it constitutionally invalid. In this connection, it is stated in 37 O. Jur. 624:

> " * * * It is the duty of courts to construe statutes liberally in order to save them from constitutional infirmities. Accordingly, a construction rendering a statute unconstitutional should be avoided, unless the plain language of the statute forbids any other construction. Where an act is fairly susceptible of two constructions, one of which will uphold its validity while the other will render it unconstitutional, the one which will sustain the constitutionality of the Law should be adopted, even though such construction may not be the most obvious or natural one. Indeed, the very last construction which should be adopted is one which would make the statute conflict with the Constitution. In other words, every endeavor should be made to uphold the validity of a law rather than to destroy it."

Indeed, it has been declared by the United States Supreme Court that if doubt exists as to the constitutionality of a statute under certain construction, such construction should be avoided. In other words, a construction which might render a statute unconstitutional should not be adopted. In the case of United States v. Standard Brewery, 251 U. S. 210, 64 L. ed. 229, it was said by Mr. Justice Day who delivered the opinion of the court:

> "Furthermore, we must remember, in considering an act of Congress, that a construction which *might* render it unconstitutional is to be avoided. We said in United States v. Jim Fuey Moy, 241 U.S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658: 'A statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also *grave doubt* upon that score.' See also United States ex rel. Atty Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527." (Emphasis mine.)

To the same effect is a declaration of Mr. Chief Justice Hughes in the case of Crowell v. Benson, 285 U. S. 62, which is as follows:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

See also:

> Panama R. Co. v. Johnson, 264 U. S. 390, 68 L. ed. 754;

Missouri P. R. Co. v. Boone, 270 U. S. 466, 471, 472, 70 L. ed. 688, 691, 692;

Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 346, 72 L. ed. 303, 308;

Blodgett v. Holden, 275 U. S. 142, 148, 72 L. ed. 206, 210;

Lucas v. Alexander, 279 U. S. 573, 577, 73 L. ed. 851, 854.

With this principle in mind, let us regard the effect of a construction which would include the states and their subdivisions within the purview of the Act in question.

Congress of course has only such powers as are granted to it by the Constitution of the United States. All powers which were not delegated to the United States by the then states, upon the adoption of the Constitution of the United States, were reserved to the states respectively. The Tenth Amendent to the Constitution of the United States reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

With respect to the powers reserved unto themselves by the states, it was said, in the case of Buffington v. Day, 11 Wall. 113, 124:

> "It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments."

See also United States v. Sprague, 282 U. S. 716, 733.

Therefore, unless provisions which empower Congress to regulate salaries of the employes of a state or its subdivisions exist in the Constitution of the United States, that body is without authority to do so. Certainly, there is no language in that instrument which in express terms grants such powers to Congress. Consequently, unless it can be

said that power to regulate such salaries is included within other powers granted to Congress, it would follow that the Act in question is constitutionally invalid.

Article I, Section 8 of the Constitution of the United States, which provides that the Congress shall have power to declare war, raise and support armies, provide and maintain a navy, etc., concludes with the following language:

> "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In the enactment of H. R. 7565, the declared purpose of Congress was to aid in the effective prosecution of the war. It then undertook to authorize the President to issue a general order stabilizing prices, wages and salaries. I think it is readily conceded that the term "to declare war" as the same appears in the Constitution, necessarily connotes the plenary power to wage war with all the forces necessary to make it effective.

In the case of Ex Parte Milligan, 4 Wall. 2, 139, decided in 1866. it was stated:

> "The authority conferred by this clause extends to all legislation necessary in the prosecution of the war with vigor and success. It is not limited to operations in the field and the dispersion of the enemy, but carries with it the power to prosecute war to a termination and to guard against its renewal. It includes the authority to use other means besides those indicated by the terms of the grant and contemplates all means and any manner in which war may be legitimately prosecuted. All acts tending to lessen an adversary's strength are lawful."

See also:

Stewart v. Bloom, 11 Wall. 493, 507;

Legal Tender Cases, 12 Wall. 457;

White v. Hart, 13 Wall. 646;

Raymond v. Thomas, 91 U. S. 712, 715;

Young v. United States, 97 U. S. 39, 60;

Ford v. Surget, 97 U. S. 594, 605;

Civil Rights Cases, 109 U. S. 3, 18.

Looking again to the Act in question, we find that the authority conferred upon the President thereby is granted "in order to aid in the effective prosecution of the war." It is therefore obvious that Congress in its judgment determined that the stabilization of wages and salaries would be conducive to the effective prosecution of the war. The question of whether or not the stabilization of salaries and wages of the employes of a state or its subdivisions bears a reasonable relation to the conduct of the war must, of course, be initially resolved by Congress. The duty and responsibility of determining what laws are necessary and proper to carry into execution the war powers granted by Congress in Article I, section 8 of the Constitution are confided in the first instance to that body.

However, the judgment of Congress in regard thereto is not conclusive. Manifestly, its determination in this respect is open to judicial inquiry. While the Constitution grants to Congress power to make the laws which shall be necessary and proper to carry into execution the so-called war powers conferred upon it by that instrument, the question of whether or not Congress erroneously or wrongfully exercised such powers is certainly subject to review by the courts.

It may well be that the increase of salaries of persons employed by the states or their political subdivisions has a reasonable relation to the constitutional authority of Congress to declare war and support an army and navy. On the other hand, it is entirely conceivable that learned economists may honestly disagree on this point. It is capable of understanding how increased wages in industry might affect the prosecution of the war. Obviously, higher wages paid to workmen who are engaged in operations connected with the manufacture of war materials for the government under a cost plus contract, would result in higher prices being paid to the manufacturer by the government. To this extent, at least, a direct effect on the cost of conducting the war is manifested. This one fact standing alone offers a distinction between wages paid in industry and salaries paid to public employes, which might prove sufficient to influence a conclusion that the Act might be unconstitutional if applied to the latter.

My reason for indulging in this discussion is to point out that if the question of relationship between stabilization of salaries of public employes and the conduct of the war is honestly debatable, it might be

concluded that the act providing for such stabilization is unconstitutional. It therefore appears to me that under the rule of construction announced in the case of United States v. Standard Brewery, supra, the Act should be construed to exclude states and their subdivisions.

There is still another point which I believe should be called to attention. As hereinbefore observed, the tenth Amendment to the Constitution of the United States provides that all powers not delegated by the Constitution to Congress, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

That any state, in the exercise of its sovereign powers, may lawfully fix the salaries and wages of its employes certainly requires no argument or citation of authority. The manner of fixing such salaries is likewise solely within the jurisdiction of each state.

To establish and maintain its government is probably the highest attribute of sovereignty which a state enjoys and this power, because it has never been surrendered by the states, may be exercised by them alone. For Congress to do so would be a clear usurpation of state powers denied to that body by the states when the Constitution of the United States was adopted. And what may be said in this regard on behalf of the state is likewise true with respect to its political subdivisions. The same sovereign power reserved to our state by the Constitution of the United States may lawfully be exercised by its subdivisions under the powers delegated to them by either the Constitution of Ohio or the statutes.

The question then is, does the existence of the state of war authorize Congress to suspend the operation of the Tenth Amendment? In other words, may Congress invoke the war powers granted to it by the Constitution and thereby transcend all constitutional limitations?

Power exercised by Congress in the prosecution of war has been upheld by the Supreme Court of the United States in a number of cases.

In the case of Dupont de Nemours Powder Co. v. Davis, 264 U. S. 456, it was held that the United States, in taking over and operating the railroad systems of the country, did so in a sovereign capacity, as a war measure under a right in the nature of eminent domain. The Supreme Court, in the cases of Arver v. United States, 245 U. S. 366, and

Cox v. Wood, 247 U. S. 3, upheld the Selective Draft Law in 1917. The provisions of the Volstead Act, extending the scope of the wartime prohibition act, were held constitutional in the case of Hamilton v. Ky. Distilleries & W. Co., 251 U. S. 146.

There has not come to my attention, however any case wherein it was held that a sovereign state could be divested of the power expressly reserved to it under the Tenth Amendment to the Constitution.

I have previously stated that if stabilization of salaries and the prosecution of the war are not reasonably related to each other, Congress is without power to legislate with respect to the former. To this observation should be added the statement that unusual economic conditions do not erase from the Constitution of the United States those provisions which reserve to the states all sovereign power which is not granted to the United States, nor does the specter of inflation take away from the sovereign states one iota of the power which is theirs to exercise. In the celebrated case of Schechter v. United States, 295 U. S. 494, the following declaration was made by Mr. Chief Justice Hughes (page 528):

> "Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment."

In light of the above observations, it appears to me that if the Act in question were construed so as to operate as a restriction upon the exercise of its sovereign power by a state, grave doubt would lie as to its constitutionality, and I am therefore constrained to the view that such construction should be avoided.

It is also noteworthy in this connection that since the outbreak of the war many public employes of the state and their subdivisions resigned from their positions and are still resigning therefrom to accept employment with the Federal Government and with private industries engaged in war work, because of the attraction of higher salaries.

It is a matter of common knowledge that various departments in our state government have suffered losses of efficient employes, and consequently if the state, in order to retain those employes who are essential to vital governmental functions, may not lawfully increase the salaries of such employes, without first securing permission from a federal officer, it seems to me that the free exercise of its sovereignty guaranteed each state by the Constitution of the United States would be seriously impeded.

High salaries paid to technical men by private employers who are under contract to furnish armament and war material to the United States are constantly attracting away from state employment highway engineers who in the present emergency are highly essential in the job of keeping our highways open for the transportation of vital war materials.

It would therefore appear that any federal order asserting the power of prohibiting an increase of state salaries which would in a measure place such employes on a parity with those in private war industry would be detrimental to "the effective prosecution of the war", rather than conducive thereto.

Therefore, in specific answer to your question, you are advised that in my opinion, Public Law 729 — 77th Congress — Chapter 578 — 2d Session — H.R. 7565, does not confer authority upon any Federal officer or agency to issue orders or regulations governing the adjustment of salaries or wages of state, county, municipal or school district employes, and consequently the salaries and wages of such employes may be increased without compliance with the regulations relating to wages and salaries issued by the Economic Stabilization Director and approved by the President, October 27, 1942, as Title 32, Chapter XVIII, Subchapter A, Part 4001, Sections 4001.1 to 4001.17, of the Code of Federal Regulations.

While the above conclusion remains unaffected thereby, it should be

pointed out that subsequent to the issuance of the regulations discussed herein, the National War Labor Board, on November 12, 1942, issued General Order No. 12, and the Commissioner of Internal Revenue on December 2, 1942, issued certain regulations, which order and regulations deal with the subject here under consideration. Said Order reads:

> "A State or its political subdivision, or any agency or instrumentality thereof, which proposes to make an adjustment in salaries or wages not fixed by State Statute which would otherwise require the prior approval of the National War Labor Board may make such adjustment on certification to the Board that the adjustment is necessary to correct maladjustments, or to correct inequalities or gross inequities, as defined in the Board's Statement of Wage Policy of November 6, 1942. A certificate by the official or agency authorizing the adjustment stating the nature and amount of such adjustment, and briefly setting forth the facts meeting the foregoing requirement, will be accepted by the Board as sufficient evidence of the propriety of the adjustment, subject to review by the Board. Modification by the Board of Adjustments made by a government official or agency acting pursuant hereto shall not be retroactive. The certificate prescribed herein, together with four copies thereof, shall be filed promptly with the committee established by joint action of the National War Labor Board and the Commissioner of Internal Revenue, namely, the Joint Committee on Salaries and Wages, Room 5406, Department of Labor Building, Washington, D. C., which will forward the same to the Board or the Commissioner, as the case may require.
>
> The certification procedure shall not apply to any adjustment which would raise salaries or wages beyond the prevailing level of compensation for similar services in the area or community. In exceptional cases where such an adjustment is sought, and in all cases where the agency seeks an adjustment other than by the certification procedure, application for approval shall be filed with the appropriate Regional Office of the National War Labor Board."

Section 1002.17 of said Regulations deals with salaries of government employes, and reads:

> "An adjustment in salaries (not fixed by statute, see section 1002.32) may be made by a State, or any political subdivision thereof, the District of Columbia, or any agency or instrumentality of any of the foregoing, on certification to the Commissioner that such adjustment is necessary to correct maladjustments, or to correct inequalities or gross inequities. The certification procedure shall not apply to any adjustment which would not otherwise require the Commissioner's approval or which would raise salaries beyond the prevailing level of compensation for similar services in the area or community. A

certificate by the official or agency authorizing the adjustment stating the nature and amount of such adjustment, and briefly setting forth the facts meeting the foregoing requirement, will be accepted by the Commissioner as sufficient evidence of the propriety of the adjustment, subject to review by the Commissioner. Modification by the Commissioner of adjustments made by a governmental official or agency acting pursuant hereto shall not be retroactive.

In exceptional cases where such an adjustment is sought, and in all cases where the agency seeks an adjustment other than by the certification procedure, application for approval shall be filed with the appropriate regional office of the Salary Stabilization Unit."

While the regulations of the Economic Stabilization Director dealing with wages and salaries generally, require approval of all salary adjustments before the same become effective, it will be noted from the above that the wages and salaries of public employes which are not fixed by statute may be adjusted without securing prior approval therefor simply upon the filing of the certificate prescribed in said Order and Regulations.

It is conceivable that a complete statistical record of adjustments of salaries paid by states and their subdivisions might be essential, or at least helpful, in the furtherance of certain economic policies related to the conduct of the war. For such reasons it might be advisable to acquaint the officers of the various subdivisions with the provisions of the above order and regulation, so that they in turn, if they so desire, might file with the appropriate Federal agency the certificate provided therein, recognizing of course that it is not obligatory under the law for them to do so.

Respectfully,

THOMAS J. HERBERT
Attorney General.