Catholic University Law Review

Volume 25
Issue 3 *Spring 1976*

Article 7

1976

The Entitlements Program: Emergency Oil Regulation and Private Proprietary Rights

George D. Baker

THE ENTITLEMENTS PROGRAM: EMERGENCY OIL REGULATION AND PRIVATE PROPRIETARY RIGHTS

Whatever influence Adam Smith's "invisible hand" may have once enjoyed in the sphere of economics, today's economic emergencies invite and receive extensive governmental intervention. Inevitably, owners of private property affected by such regulation suffer what they consider to be unjust deprivations of property. When disputes about these deprivations arise, inquiry into the legally permissible limits of governmental interference with private property becomes appropriate. In determining the legal boundaries between private property interests and the exigencies of the general welfare, the legal questions placed before the courts have far-reaching political and economic significance. Nowhere is this more apparent than in controversies surrounding the allocation of increasingly scarce natural resources such as oil. Recent international developments limiting the supply of crude oil available to domestic refiners have necessarily pressed Congress to regulate the domestic oil industry. More specifically, advocates of federal regulation have sought legislation authorizing government allocation of existing supplies of domestic crude oil among competing refiners.

Beginning in 1971, the Organization of Petroleum Exporting Countries (OPEC)[1] negotiated a series of agreements with the major international oil producers which effected rapid and successive increases in the posted price of crude oil on the world market.[2] By additional concerted action in the

1. OPEC was established in 1960 to coordinate its members' negotiations with the buyers of petroleum in the international market in order to maximize revenues for each oil producing member. OPEC presently consists of Abu Dhabi, Algeria, Iran, Indonesia, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia and Venezuela.

2. A posted price is defined as "a written statement of crude oil prices circulated publicly among sellers and buyers of crude oil . . . in accordance with historic practices and generally known by sellers and buyers within the field." 10 C.F.R. § 212.31 (1976). The composite crude oil cost per barrel rose steadily both for major integrated refiners and for independent refiners from May 1973 through June 1974, then stabilized at a swollen level from July to September 1974.

COSTS PER BARREL

	Major Integrated Refiners	Independents
May 1973	$3.8207	$3.9109
November 1973	$5.3620	$5.6887
December 1973	$6.4828	$6.6736
January 1974	$7.2820	$8.1364

summer of 1973, the OPEC cartel raised oil prices to unprecedented levels.[3] As each successive agreement boosted the international price for crude oil, the domestic price in this country swept upward, taking with it the cost of refined petroleum and petrochemical products.

Congress responded by passing the Emergency Petroleum Allocation Act (EPAA),[4] which sought to design a national oil production policy to achieve two pressing objectives: the minimization of the inflationary impact of international market price increases on the United States economy, and the encouragement of increased domestic production of crude oil.[5] In pursuit of these twin objectives, the Federal Energy Administration (FEA)[6] developed an entitlements program designed to equalize the costs of oil production in order to prevent certain types of producers from being forced from the competitive marketplace. The FEA ordered integrated oil producers with large supplies of domestic oil to share the costs of production incurred by their domestic competitors who lacked access to cheaper domestic oil.

The major integrated oil producers challenged the entitlements program. These suits,[7] culminating in *Cities Service Co. v. FEA*,[8] charged that the program was an excessive, arbitrary and capricious abuse of administrative discretion and constituted not only an unconstitutional taking of private

---

February 1974	$8.1677	$9.4748
March 1974	$8.4070	$9.6106
April 1974	$8.7247	$9.9125
May 1974	$9.1388	$10.0337
June 1974	$9.1717	$9.9688
July 1974	$9.0760	$9.9646
August 1974	$8.9579	$9.8224
September 1974	$8.9418	$9.7374

Stipulated Record on Appeal at 357-58, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

3. The immediate effect of the OPEC embargo was to raise the price of Saudi Arabian light crude from $5.49 per barrel to $11.50 per barrel. The posted price of Arabian light crude leaped from approximately $3.07 per barrel in August 1973 to approximately $11.65 per barrel in January 1974. *See State of the Union Fact Sheet on Energy*, 1 CCH ENERGY MAN. ¶ 692 (1975).

4. 15 U.S.C. §§ 751-56 (Supp. III, 1973).

5. *See id.* § 751.

6. Pursuant to the EPAA, President Nixon established the Federal Energy Office (FEO) and delegated to it all authority vested in the President by the EPAA. Exec. Order No. 11,748, 3 C.F.R. 376 (1974). On June 25, 1974, the Federal Energy Administration (FEA) was set up by the Federal Energy Administration Act of 1974 § 3, 15 U.S.C.A. § 762 (Supp. 1976). That same day the President abolished the FEO and transferred all of its powers and functions to the FEA. Exec. Order No. 11,790, 3A C.F.R. 157 (1974).

7. Pasco, Inc. v. FEA, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975); Exxon Corp. v. FEA, 516 F.2d 1397 (Temp. Emer. Ct. App. 1975); Gulf Oil Corp. v. FEA, 391 F. Supp. 856 (W.D. Pa. 1975).

8. 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

property in violation of the fifth amendment but also an unconstitutional tax.[9] In every case, the Temporary Emergency Court of Appeals[10] upheld the entitlements program as a valid and constitutional exercise of administrative authority.

I. HISTORY OF OIL ALLOCATION

Oil allocation[11] in this country is a recent creation. One type of oil allocation program was initiated in 1959 in the form of the Mandatory Oil Import Program (MOIP).[12] This program mandated that domestic producers import no more than their respective shares of a national quota for imported crude and other foreign-made petroleum products.[13] However, as the demand for oil increased through the 1960's and early 1970's, and as domestic production proved insufficient to satisfy the consumer market, the MOIP, which restricted imports, became incompatible with the public welfare. The program was abandoned in 1973.[14]

---

9. *Id.* at 1019.

10. The Temporary Emergency Court of Appeals hears cases arising out of emergency economic legislation. Speedy appellate review is necessary so that governmental responses to economic emergencies are not delayed by litigation. At the same time, persons affected by such legislation can minimize the period in which their property is jeopardized. The Temporary Emergency Court of Appeals derives jurisdiction from section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1) (Supp. III, 1973), which incorporates the review provisions of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, Title II, 84 Stat. 799, *as amended*, Pub. L. No. 91-558, § 201, 84 Stat. 1468 (1970). *See* 28 U.S.C. §§ 1331, 2201 (1970).

11. In this article, "oil allocation" means the governmentally ordered apportionment, among competing domestic refiners, by quota or other regulatory scheme, of the crude oil available from any source.

12. MOIP was created by President Eisenhower for national security reasons in an effort to combat the lure of lower-priced imported oil which threatened to decrease domestic exploration and production. One critic charged that the MOIP was antithetical to the national security, arguing that it hastened the depletion of domestic reserves and insured future dependence on foreign sources. *See* Note, *United States Oil Import Restrictions: A Program In Need of Reform*, 3 N.Y.U.J. INT'L L. & POL. 343, 350-51 (1970).

13. The official national quota for imported crude and other petroleum products was set at 12.2 percent of domestic crude oil production. *Id.* at 345.

14. The MOIP was disbanded by Presidential Proclamation No. 4210, 3A C.F.R. 60 (1973). One commentator has stated that the MOIP actually insulated major producers from competition at the expense of small and independent producers. The MOIP allowed the latter to trade their import quotas to the major oil companies in exchange for low-sulphur domestic crude which was otherwise difficult to obtain. Such trading was given a financial premium due to the high costs of transporting imported oil overland from the coasts to the inland refineries. By trading the imported oil for local domestic crude which was nearer to the small and independent refineries, the high costs of transportation could be avoided. The MOIP was replaced by a program under which small

The current oil allocation regulations grew out of the price controls which the Cost of Living Council (CLC) imposed upon crude oil and petroleum products in August 1973.[15] The CLC regulations created a "two-tier" pricing system for domestic crude oil, differentiating between "old" and "new" oil.[16] The price for each level was determined by the historical production of each particular well property from which a domestic barrel of oil was pumped. Using the 1972 production figures for each oil producing property as the base level,[17] the "two-tier" system imposed a price ceiling of $5.25 per barrel on all crude oil produced from the same property in the same month of 1972.[18] Oil produced up to the 1972 levels was labeled "old" oil. In contrast, "new" oil was that crude oil pumped in excess of the respective 1972 production levels.[19] To encourage increased production, the regulations exempted "new" oil from the price controls.[20] As additional incentive, the production of each barrel of "new" oil released one corresponding barrel of "old" oil from the frozen price of $5.25, permitting such "released" oil to float with the market price of "new" oil.[21] Oil squeezed from wells yielding less than 10 barrels per day, called "stripper" oil, was exempt from price controls.[22]

While all refiners faced the necessary task of acquiring crude oil, the "two-tier" price controls placed an immediate premium on a refiner's accessibility to the lower-priced "old" oil.[23] This presented no problem to major

and independent producers gained increased access to foreign crude sources by means of fee-exempt licenses. Note, *National Energy Goals and FEA's Mandatory Crude Oil Allocation Program*, 61 VA. L. REV. 903, 905-07 (1975). *See generally* Note, *National Security and Oil Import Regulation: The License Fee Approach*, 15 VA. J. INT'L L. 399 (1975).

15. 38 Fed. Reg. 22538 (1973). (These regulations have been substantially readopted by the FEA and are now contained in 10 C.F.R.).

16. *Id.*

17. 38 Fed. Reg. 22538 (1973), *as amended, id.* at 32495 (10 C.F.R. § 212.72 (1975), *as amended,* 10 C.F.R. § 212.72 (1976)).

18. The $5.25 price ceiling results from the formula set out at 39 Fed. Reg. 31650 (1974) (now 10 C.F.R. § 212.73 (1976)). Stipulated Record on Appeal, Affidavit of John Vernon, at 324-25, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

19. 38 Fed. Reg. 22538 (1973) (10 C.F.R. § 212.72 (1975), *as amended,* 10 C.F.R. § 212.72 (1976)).

20. 38 Fed. Reg. 22538 (1973) (10 C.F.R. § 212.74 (1975), *as amended,* 10 C.F.R. § 212.74 (1976)).

21. *Id.*

22 15 U.S.C. § 753(e)(2)(A) (Supp. III, 1973).

23. *See* 40 Fed. Reg. 7133 (1975). Between 35 and 40 percent of the oil refined domestically is "old" oil. Roughly 35 percent is imported oil which sells at the free market price. "New," "stripper," and "released" oil constitute the remainder of the crude available for refining at the world market price. Stipulated Record on Appeal, Affidavit

integrated oil producers[24] who dominated the supplies of "old" oil and refined it in their own facilities.[25] But nonintegrated refiners did not have private sources of oil. They traditionally bought crude oil from the major integrated producers. The nonintegrated refiners, forced to rely heavily on imported or "new" oil at the inflated world market price, sustained a significant competitive disadvantage vis-á-vis competitors with large supplies of relatively cheap "old" oil. To some small[26] and independent[27] producers, this disadvantage assumed competitively prohibitive proportions, forcing them out of the oil business. The significant cost differential between the major producers' cost for "old" oil and the cost incurred by nonintegrated competitors[28] prompted Congress to enact the EPAA.

The EPAA empowered the President to promulgate regulations for the mandatory allocation of crude oil and petroleum products.[29] Such regulations were intended to insure an equitable distribution of the available crude oil and petroleum products to small and independent refiners in the various

---

of John Vernon, at 329, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

24. Major producers are those having total assets of more than $1 billion as of 1970 and which are fully integrated companies. The generally recognized largest major producers are Amoco, Atlantic Richfield, Cities Service, Continental, Exxon, Getty/Skelly, Gulf, Marathon, Mobil, Phillips Petroleum, Shell, Standard of California, Sun, Texaco, and Union of California. 3 CCH ENERGY MAN. ¶ 20 at 140 (April 1974).

25. Note, VA. L. REV., *supra* note 14, at 908.

26. A small refiner is one whose sum production does not exceed 175,000 barrels per day. 10 C.F.R. § 211.62 (1976).

27. An independent refiner is one who obtains more than 70 percent of its refinery input of domestic crude oil from producers who do not control, are not controlled by, and are not under common control with, the refiner, and also distributes a substantial volume of its refined gasoline through independent marketers. *Id.*

28. Those refiners placed at a competitive cost disadvantage because of the two-tier pricing system included not only the small and independent refiners, but also some major integrated producers. For example, although Getty and Amerada Hess are considered major integrated producers, they draw large amounts of their crude from foreign sources at the going market price. Consequently, these majors compete with domestic-based majors such as Cities Service which have invested heavily in domestic oil fields and which, under the price controls, would enjoy a relative advantage over their fellow major integrated producers. It is this relative advantage that the entitlements program was designed to eliminate. *See* FEA Notice, 40 Fed. Reg. 17326 (1975).

29. Section 4(a) of the EPAA provides in pertinent part:

> [T]he President shall promulgate a regulation providing for the mandatory allocation of crude oil . . . in amounts specified . . . and at prices specified in . . . such regulation. . . . Except as provided in subsection (e) . . . such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

15 U.S.C. § 753(a) (Supp. III, 1973). Section 4(b)(1) of the EPAA, 15 U.S.C. § 753(b)(1) (Supp. III, 1973), sets out the objectives of the Act. *See* note 53 *infra*.

geographical regions of the country, while reducing economic distortions and inflexibility in the national economy.

The first regulations issued pursuant to the EPAA were designed to prevent those firms with large supplies of "old" oil from terminating supply contracts with competitors who otherwise would be cut off from access to the low-priced crude.[30] The supplier-purchaser rule[31] froze such supply contracts until the expiration of the EPAA,[32] with the exception that termination of a contract is possible upon mutual agreement of the parties.[33]

The Federal Energy Administration also began to allocate crude oil at the refiner level to insure that all refiners had sufficient access to crude oil to maintain their operations.[34] If a prospective buyer-refiner were unable to find a seller of crude, the FEA could compel a sale by a refiner-seller with more than its share of the national supply.[35]

Because major disincentives existed to prevent firms from producing to efficient capacity,[36] the supplier-purchaser rule failed to meet the goals of minimizing economic inflation and maximizing domestic production of crude. One estimate was that the regulations reduced crude imports for consumer use by up to one million barrels per day while providing a massive windfall

---

30. 10 C.F.R. §§ 211.1-.225 (1975).

31. *Id.* § 211.63.

32. The EPAA has been extended three times. Its original expiration date was February 28, 1975, 15 U.S.C. § 753(g)(1) (Supp. III, 1973), but the termination was postponed until August 31, 1975 by Pub. L. No. 93-511, 88 Stat. 1608 (1974). On September 29, 1975, a six-week extension of the EPAA was negotiated between congressional Democrats who favored maintaining the price controls, and Republicans led by President Ford, who pressed for decontrol of the entire oil industry. On November 14, 1975, President Ford signed Pub. L. No. 94-133, 89 Stat. 694 (1975), extending EPAA until December 15, 1975. As section 401 of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 947 (1975), which was signed into law by the President on December 22, 1975, the EPAA has been extended indefinitely.

33. 10 C.F.R. § 211.63(a) (1976).

34. *Id.* § 211.65.

35. *Id.* § 211.65(h)(1).

36. The supplier-purchaser rule credited any amount of oil refined above a firm's FEA limit toward the subsequent allocation period's quota. Second, higher priced foreign oil that was imported and refined in excess of FEA limits would be forced to be sold at prices below those of the world market at which the foreign oil was purchased. A third flaw of the supplier-purchaser rule was that several major producers such as Texaco, Atlantic Richfield, and Getty qualified to purchase crude from small firms. The effect was to reward the giants for not aggressively searching for their own new domestic sources. Along with these disincentives to increase the oil supply, the regulations directed existing crude oil away from firms which could manufacture diversified and sophisticated petro-chemicals, and also contributed to the severe East Coast oil shortage in the fall of 1973. *See* Note, VA. L. REV., *supra* note 14, at 912-14.

for those firms which could buy crude developed at the expense and effort of a competitor.[37]

While the FEA subsequently modified the crude oil allocation program,[38] serious problems persisted. Once the oil shortage abated in 1974, the small and independent refineries found themselves unable to recoup the full increase in their respective crude oil costs and consequently suffered lower profits than major competitors who were rich in "old" oil supplies.[39] It became clear that the very regulations that were intended to assist the small and independent refineries had backfired by diminishing their profit margins while benefiting the major producers.[40] Under these conditions, the FEA launched the entitlements program.

II. The Entitlements Program

In developing the entitlements program, the FEA sought to allocate the benefits of low-priced "old" oil and the burgeoning costs of "new" oil throughout the entire oil industry so that no producer would be forced from the competitive market. Because the actual exchange of barrels of price-controlled "old" oil for "new" oil would have imposed enormous administrative burdens on both the government and the industry, the FEA implemented the entitlements program to achieve the same effect by allocation of the rights to the supply of "old" oil.

The primary aim of the program was cost equalization. To achieve this aim, each month the FEA was required to issue to each domestic refiner that number of entitlements[41] which constituted that producer's proportionate share of the monthly national "old" oil supply.[42] Refiners with more than

---

37. The Wall Street Journal, Feb. 28, 1974, at 4, col. 3.

38. Attempting to remedy the allocation program's shortcomings, the FEA altered the allocation formulae. 10 C.F.R. § 211.65(a)(1) (1976). The FEA also eliminated the $.84 normal profit that refiner-sellers collected on each barrel they were forced to sell, but permitted refiner-sellers a "dollar-for-dollar-pass-through" to consumers for increased costs incurred in the procurement of the oil allocated to competitors. For an analysis of the modification of the Crude Oil Allocation Program, see Note, Va. L. Rev. *supra* note 14, at 919-22.

39. The major producers who controlled the bulk of the "old" oil supply still enjoyed a lower average cost than competitors forced to depend on "new," "released," "stripper" or foreign oil.

40. The Wall Street Journal, April 11, 1975, at 36, cols. 1-4.

41. An entitlement is the right of a refiner to include one barrel of "old" oil in its adjusted crude oil receipts in a particular month. 10 C.F.R. § 211.62 (1976).

42. To determine the precise number of entitlements issuable to a refiner—that is, a refiner's proportionate share of the total "old" oil supply in a given month—the FEA computed an "adjusted national old oil supply ratio" for each month. This ratio was the volume of "old" oil included in the aggregate crude oil receipts for all domestic refiners,

their proportionate share of the national "old" oil supply were required to purchase entitlements from refineries with less than their proportionate share.[43] The monthly price of an entitlement was set at the difference between the controlled price of "old" oil and the average of the uncontrolled market prices of "new," "released," "stripper" and foreign oil.[44] In addition, the FEA provided a "small refiner bias" which offered small refiners an upward adjustment in the number of entitlements available to them per month.[45] A refiner-by-refiner procedure was available for exemption from the mandatory purchase of entitlements.[46] Since the onset of the entitlements program, the gross value of entitlements exchanged has been large,[47] and the cost of the individual entitlement has steadily risen.[48]

III. Challenges to the Entitlements Program

Challenges to the entitlements program quickly ensued. The Cities Service Oil Company was within the class of oil producers most adversely affected by the entitlements program. As an entitlement buyer, Cities Service was predominantly domestic in its operations, producing relatively little crude oil outside the North American continent.[49] By deliberate

---

expressed as a percentage of the total volume of crude oil runs to refineries for all domestic refiners for that month. For example, if the total number of barrels of "old" oil was 100 million and the total number of crude runs was 250 million barrels, the "old" oil supply ratio was 2/5, or 40 percent. Thus, if all "old" oil were equitably allocated among all domestic refiners, each refiner would have crude runs consisting of 40 percent "old" oil. Since the FEA also issued entitlements to small refiners in a number adjusted upward in accordance with a "small refiner bias," the total volume of "old" oil used to calculate the "old" oil supply ratio was reduced by the number of additional entitlements so issued. This was the adjusted national old oil supply ratio. FEA then applied this ratio to each domestic refiner's volume of crude oil runs and issued to each refiner a sufficient number of entitlements to cover that percentage of its crude runs. 10 C.F.R. § 211.67 (1976).

43. *Id.* § 211.67(b). These purchases of entitlements must be effected within two months following any particular month's issuance of entitlement quotas. The transfer of entitlements is accomplished by a buying firm sending its corporate check to the seller, resulting in a direct exchange between the parties.

44. *Id.* § 211.67.

45. The number of additional entitlements available to small refiners per month is derived from a designated percentage of their respective average daily volume, with the percentage increasing as the small refiner's volume decreases. *Id.* § 211.67(e).

46. *Id.* § 205.70.

47. For example, in February 1975, the gross payments for transferred entitlements totalled $83,238,813. *See* 40 Fed. Reg. 17325-28 (1975).

48. For the first five months of 1975, the price of an individual entitlement rose from $5.00 per barrel in January to $7.29 per barrel in June, a rise of $2.29 per entitlement. FEA Notices, 40 Fed. Reg. 2560 (1975), 40 Fed. Reg. 26498 (1975).

49. According to R. Frank Thornburg, Cities Service's Manager of Crude Oil Supply, 36 percent of the firm's total capital expenditures from 1965-74 were invested in exploration and production in the United States. Of the $1.8 billion spent in exploration

business decisions, heavy entitlement buyers such as Cities Service had invested in domestic exploration and operations in the belief that this country offered a more profitable and secure investment opportunity than did nations abroad.[50] Having large supplies of domestic "old" oil, these producers were forced to buy large numbers of entitlements in order to maintain the right to refine the oil they already owned,[51] and many of these purchases were from the major competitors of Cities Service which had chosen to invest in foreign operations. Through April 1975, Cities Service purchased 4,209,-834 entitlements at a total cost of $23,901,194.[52]

Cities Service raised three arguments in its challenge to the entitlements program. First, it argued that the FEA had exceeded and abused its authority in promulgating the entitlements system. Second, it argued that the program constituted a violation of the due process clause of the fifth amendment. Finally, it was argued that the program constituted an unconstitutional tax. These arguments each had a prior history under the entitlements program that must be examined.

A. Scope of FEA's Allocation Authority and Administrative Discretion

The statutory goals of the EPAA are very broad, empowering the FEA to regulate the oil industry in the interest of the public health, safety, welfare and the national defense.[53] Given such wide latitude, the limits of FEA's allocation authority were not readily defined. Many of the legal principles relevant

---

and production over that decade, $1.02 billion, representing 87 percent, went to domestic operations and only $156 million, or 13 percent, was devoted to foreign activity. Stipulated Record on Appeal, Affidavit of R. Frank Thornburg, at 290-93, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

50. Affidavit of Fred H. Ramseur, Jr., Executive Vice-President of the Cities Service Oil Company, *id.* at 318, 319.

51. By illustration, Cities Service produced in excess of 90,000 barrels of "old" oil per day with total receipts of purchased and produced crude amounting to approximately 125,000 barrels per day. As a result of being relatively rich in "old" oil, in the first three months of the entitlements program, Cities Service purchased 3,447,861 entitlements costing $18,757,876. *Id.* at 10.

52. Affidavit of Charles D. Head, Jr., Ass't Controller for Cities Service Co., *id.* at 269-70.

53. The goals of EPAA are contained in 15 U.S.C. § 753(b)(1) (Supp. III, 1973), which provides in pertinent part:

> The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—
>
> (A) protection of public health, safety, and welfare . . . and the national defense;
>
> (B) maintenance of all public services . . . ;
>
> (C) maintenance of agricultural operations . . . ;
>
> (D) preservation of an economically sound and competitive petroleum industry . . . ;

to determining those limits regarding implementation of the entitlements program were explored in challenges to the previous FEA oil programs.

In *Mandel v. Simon*,[54] the governor of the state of Maryland sued the Federal Energy Office seeking allocation of an additional 16 million gallons of gasoline for his state at the peak of the east coast energy shortage. The Temporary Emergency Court of Appeals displayed great reluctance to interfere with the FEO's allocation scheme. Noting that the gasoline shortage called for immediate and extensive regulation, the court feared that judicial intervention might retard progress towards resolution of the crisis.[55] Adopting the limited standard of review imposed on other contemporary economic regulations,[56] the court ruled that the issue was not whether the agency's solution was the optimal one, but only whether, considering all the facts, the allocation plan had a rational basis.[57]

Subsequently, in *Reeves v. Simon*,[58] the Temporary Emergency Court of Appeals sustained the FEO's regulations prohibiting service stations from giving preference to established customers in the sale of gasoline. Using the limited review demonstrated in *Mandel*, the court indicated that although less burdensome alternatives might exist to allocate gasoline equitably, the existence of such alternatives was irrelevent should the particular technique chosen by the regulatory agency survive the rational basis scrutiny.[59]

Shortly thereafter, the Temporary Emergency Court of Appeals sustained the supplier-purchaser rule[60] in *Condor Operating Co. v. Sawhill*.[61] The court emphasized that it was the sole prerogative of the FEA to select any rational means in furtherance of the broad goals of the EPAA irrespective

(E) the allocation of suitable types . . . of crude oil to refineries . . . ;

(F) equitable distribution of crude oil . . . among all regions and areas of the United States and sectors of the petroleum industry . . . ;

(G) allocation of . . . petroleum products . . . for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion . . . .

54. 493 F.2d 1239 (Temp. Emer. Ct. App. 1974).

55. *Id.* at 1240.

56. *See, e.g.*, Meat Packers Ass'n v. Dunlop, 482 F.2d 1401 (Temp. Emer. Ct. App. 1973) (Cost of Living Council's temporary meat price ceiling regulations found rationally based in fact and not violative of union members' right to equal protection); *accord*, Meat Jobbers Ass'n v. Cost of Living Council, 481 F.2d 1388 (Temp. Emer. Ct. App. 1973) (CLC's extension of price freeze on beef upheld as rationally based in fact).

57. 493 F.2d at 1240.

58. 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

59. *Id.* at 460-61.

60. *See* text accompanying notes 30-33 *supra*.

61. 514 F.2d 351 (Temp. Emer. Ct. App. 1975), *cert. denied*, 421 U.S. 976 (1975).

of the financial deprivations visited on any individual affected by the FEA's actions.[62]

The rational basis standard of review was extended to the entitlements program in *Pasco, Inc. v. FEA*.[63] Pasco, a small refiner, sought exemption of all small refiners from the entitlements regulations.[64] The Temporary Emergency Court of Appeals denied Pasco relief. The court stated that in spreading the burdens of soaring oil costs throughout all sectors of the industry, including the small refineries, and while also providing a "small refiner bias,"[65] the entitlements program rationally encompassed at least two of the EPAA's nine goals, namely, the maintenance of the small refiner's competitive viability and the establishment of equitable prices among all sectors of the petroleum industry.[66]

The court's statutory interpretation in *Pasco* reaffirmed the view that Congress intended none of the EPAA's nine broad objectives to be a mandatory duty;[67] that is, no objective took preference over any other. Rather, those objectives required balancing in order for the FEA to maximize the benefits envisioned by the legislation.

Cities Service again raised this issue of the statutory authority of the FEA to promulgate the program when it filed suit in 1975 in *Cities Service Co. v. FEA*.[68] Arguing for a strict interpretation of the EPAA, Cities Service charged that a program to achieve cost equalization was beyond the FEA's statutory authority. That authority was allegedly limited to the promulgation of a scheme for the "mandatory allocation of crude oil."[69] The court disagreed. To demand a specific statutory authorization for the entitlements program's cost equalization, the court stated, was unwarranted

---

62. *Id.* at 359.

63. 525 F.2d 1391 (Temp. Emer. Ct. App. 1975).

64. Pasco argued that in allocating entitlements, the FEA should distinguish between those refiners processing low proportions of "old" oil due to their own high production of uncontrolled oil ("new," "stripper," and "released") and those refiners processing low proportions of "old" oil due to large purchases of uncontrolled oil. The FEA's failure to do so, Pasco claimed, rendered the entire entitlements program arbitrary, capricious and beyond the FEA's statutory authority. *Id.* at 1393-98.

65. *See* note 45 and accompanying text *supra*.

66. 525 F.2d at 1397.

67. *Id.*

68. 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

69. 15 U.S.C. § 753(a) (Supp. III, 1973). Cities Service claimed that cost equalization was not the same as allocation of crude oil for two reasons: first, the purchase of entitlements was nothing more than a cash subsidy from one refiner to a competitor because no oil was physically transferred in the sale; second, at most FEA regulated the price of oil and did not physically allocate oil itself as envisioned by section 4(a) of the EPAA. Brief for Appellant at 8-9, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

and unreasonable when Congress had evidenced an intent to couple price controls with allocation authority.[70] The court also indicated that the pursuit of the EPAA's goals dictated the need for flexibility and efficiency in the selection of a regulatory framework.[71]

Cities Service also argued that the FEA had arbitrarily ignored the cost penalties incurred by the larger integrated refiners through the imposition of the "two-tier" pricing system.[72] Since the entitlements program reduced the impact of the price controls on some competitors, such as the small and independent refiners, but did not address relief to integrated producers with large supplies of "old" oil, Cities Service felt that the FEA had capriciously penalized integrated producers like itself. The court found the FEA's failure to distinguish between integrated producers and nonintegrated refiners to be irrelevant;[73] the program satisfied the rational basis test, and being duly authorized by the EPAA, was not arbitrary or capricious.[74]

B. *Entitlements and the Fifth Amendment*

Economic regulations imposed upon the use of private property generally attract charges that the government has taken property without just compensation contrary to the fifth amendment. This has been no less true with respect to the entitlements program. *Condor Operating Co. v. Sawhill*[75] presented the just compensation issue in the context of the supplier-purchaser oil regulations. The Temporary Emergency Court of Appeals reasoned that the national impact of economic crises can justify the temporary suspension

---

70. *See* Joint Explanatory Statement of the Committee of Conference on the Petroleum Allocation Act, CONF. REP. No. 628, 93d Cong., 1st Sess. 2 (1973). *See also* S. REP. No. 1082, 93d Cong., 2d Sess. 2 (1974); H.R. REP. No. 1443, 93d Cong., 2d Sess. 3 (1974).

71. 529 F.2d at 1022. *See* United States v. Bisceglia, 420 U.S. 141 (1975) (language of INT. REV. CODE OF 1954, § 7602, empowering the IRS to use summons in tax investigations, interpreted broadly to avoid frustrating purpose of investigations); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (right to strike clause in National Labor Relations Act interpreted broadly despite private labor contract's "no strike" provision).

72. Brief for Appellant at 20-22, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

73. 529 F.2d at 1024-25.

74. As FEA argued, the program rationally reflected three significant factors: the social need to preserve the competitive viability of small refiners; the small and independent refiners' need to market their products at a reduced price in competition with brand name integrated producers; and the relatively higher unit costs of operation incurred by small and independent refiners over integrated producers. Brief for Appellee at 17, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975).

75. 514 F.2d 351 (Temp. Emer. Ct. App. 1975), *cert. denied*, 420 U.S. 991 (1975).

of personal property rights. While such suspensions may not do equity to all individuals affected, the regulations are not unconstitutional if they are generally fair.[76] In the hierarchy of interests protected by law, the general welfare clearly takes precedence over the usual prerogatives of ownership during the emergency.[77] Noting the temporary nature of emergency regulations, the court quoted Justice Holmes: " 'A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.' "[78]

Condor was not the first case to raise the issue. Prior to *Condor*, the oil companies had argued that the entitlements program deprived them of their property without due process.[79] But the district courts dismissed their suits and refused to recognize any substantial merit in the fifth amendment argument. As the court in *Gulf Oil Corp. v. F.E.A.*[80] observed, the entitlements purchasers failed to establish that they had suffered irreparable harm. Although the program temporarily increased costs in the form of entitlements expenses, it permitted purchasers to pass these costs on to consumers when market conditions permitted. Believing that the market would not bear the cost of entitlements at present, entitlements purchasers had banked these costs. Until the oil companies attempted such cost pass-through and were unable to recoup the entitlements costs, the court said that any allegations of injury remained only speculative and insufficient to establish irreparable harm.[81] In entertaining these suits, district courts refused to involve themselves in a detailed analysis of oil industry economics. Further, the Temporary Emergency Court of Appeals deferred to the district courts' decisions on the merits of the fifth amendment challenges.[82]

Whether the entitlements program was a "taking" was again addressed in *Cities Service Co. v. FEA*.[83] Drawing heavily on *Condor*, the court in *Cities*

---

76. *Id.* at 361.

77. *Id.* at 361-62.

78. *Id.* at 362, *quoting* Bloch v. Hirsh, 256 U.S. 135, 157 (1921).

79. Gulf Oil Corp. v. FEA, 391 F. Supp. 856 (W.D. Pa. 1975). The *Exxon* and *Marathon* appeals were consolidated because the constitutional taking issue and the right to interlocutory appeal issue were the same. Exxon v. FEA, 516 F.2d 1397 (Temp. Emer. Ct. App. 1975).

80. 391 F. Supp. 856 (W.D. Pa. 1975).

81. *Id.* at 863-64.

82. The court in *Exxon* ruled that in enacting the Economic Stabilization Act of 1970 § 211(d)(2), 12 U.S.C. § 1904 (Supp. I, 1971), *as amended*, (Supp. IV, 1974) Congress specifically intended to alter traditional judicial review in the interests of speedy determination of suits that might delay implementation of the EPAA. 516 F.2d at 1400-04. The court further held that interlocutory appeals from a district court's ruling on constitutional issues involving the EPAA could not be brought unless certified by the district court. *Id.* at 1403-04.

Service Co. emphasized that the entitlements program was a temporary measure, launched in response to the OPEC embargo and was terminable upon America's reaching energy self-sufficiency and economic stability.[84] The existence of time constraints and the complexity of the oil supply situation justified the temporary and limited interruption of property rights. The entitlements program was not unconstitutional merely because Cities Service could not refine all of its own oil during the expected limited life of the immediate national oil crisis.[85]

C. *The Entitlements Program as a Tax*

Looking at the entitlements program functionally, Cities Service argued that the program required the company to purchase entitlements in order to enjoy property which the company already owned. Cities Service equated this with the levying of a burden on the exercise of a personal right, namely a tax, by an administrative agency. Since only Congress may levy taxes under the Constitution,[86] Cities Service argued that the tax was unconstitutional. The court dismissed Cities Service's argument by indicating that it is well settled that a regulatory scheme that does not have as its primary purpose or effect the raising of governmental revenues is not a tax.[87] Citing *Rodgers v. United States*,[88] the court made it clear that as long as regulation was the primary purpose of a congressional delegation of authority, even if revenue were raised incidentally those revenues were not to be considered a tax but an effective regulatory sanction.[89] Applying these primary purpose concepts, the Temporary Emergency Court of Appeals held that the entitle-

83. 529 F.2d 1016 (Temp. Emer. Ct. App. 1975). Contrary to the *Exxon* and *Marathon* petitions for preliminary injunctions, the district court treated Cities Service's suit as a plenary hearing on the merits, denied relief, and entered judgment for the FEA. Thereupon, Cities Service appealed the constitutional question as of right to the Temporary Emergency Court of Appeals, without need for certification by the district court.

84. *Id.* at 1028.

85. *Id.*

86. U.S. CONST. art. I, § 8.

87. 529 F.2d at 1029. The Supreme Court first embraced the primary purpose doctrine in the time-honored Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884), in which the Court considered Congress' imposition of a $.50 duty per passenger on owners of vessels bringing non-United States citizens from foreign ports to this country. The Court held the measure to be a valid exercise of the congressional power to regulate commerce with foreign nations and not an unconstitutional tax. *Accord,* Moon v. Freeman, 379 F.2d 382, 391 (9th Cir. 1967) (agricultural export certification); Rodgers v. United States, 138 F.2d 992, 995 (6th Cir. 1943) (penalty for cotton production in excess of quotas).

88. 138 F.2d 992 (6th Cir. 1943).

89. 529 F.2d at 1029.

ments program raised no revenues for the government and that under the *Rodgers* test, the program clearly qualified as a regulatory measure.[90]

IV. The Limits of Government Regulation in Economic Emergency

As long as administrative tampering with private property is a rational response to a congressionally recognized economic crisis, the courts are loathe to second guess the agency's choice of a regulatory scheme. The urgency of action justifies both the breadth of authority granted the agencies in selecting a program and the limited judicial review of that selection. The rational basis standard permits timely action without demanding an optimal solution. Modern economic administrative regulations encompass technical expertise and massive, sophisticated compilations of data not within the competency of jurists except in generalized form. Courts are ill-equipped to make the detailed evaluations of technique; they are highly qualified to pass on whether the technique chosen is rationally related to the law.

Moreover, as long as proprietary deprivations are temporary, the courts will not upset the regulatory scheme as an unconstitutional taking of property. The value of the property temporarily taken from the owner, or the magnitude of his loss, does not enter into the legal consequences of the regulation.

The legal developments surrounding the entitlements program are most fortunate. The oil shortage is only one instance of America's awakening to the limitations of natural resources. Natural gas, chlorine or any other scarce resource significant to the public welfare and national economy may prove themselves in need of rapid, emergency regulation. Unquestionably, the entitlements program, like its companion parts of American oil allocation, is flawed and arguably works inequities on some individual segments of the oil industry. However, the strength and advantage of the entitlements program rest in its overall operation which permits the small and independent refiners to remain in business as taxpayers, employers, consumers and, especially important, as competitors along with the major producers. The program stabilizes the oil industry and prevents further national economic distortions inherent in closed access to domestic reserves of crude oil.[91]

George D. Baker

90. *Id.*
91. As for the future, President Ford has repeatedly stated his intention to completely decontrol the oil industry. However, the subject of oil policy remains far too politically sensitive to expect decontrol before the 1976 presidential election.