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Minimum Wage

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE HONORABLE LEON E. PANETTA
CHIEF OF STAFF TO THE PRESIDENT

ERSKINE BOWLES
DEPUTY CHIEF OF STAFF

HAROLD ICKES
DEPUTY CHIEF OF STAFF

DATE: 8/31

PAGES: (INCLUDING COVER) 23

TO: Harold Ickes - guest

FROM: Jennife O'Conner

FAX NUMBER: _____

COMMENTS: _____

Please Deliver to Mr. Ickes

Harold - please call to let me know

you received this. Also - Bob Nash /

Patsy Thomason urgently need to

Speak with you.

IF THERE ARE ANY PROBLEMS WITH THIS TRANSMISSION PLEASE CALL (202) 456-6797

THE WHITE HOUSE
WASHINGTON

August 31, 1995

MEMORANDUM FOR ERSKINE BOWLES
HAROLD ICKES
BRUCE LINDSEY

FROM: JENNIFER O'CONNOR *mw*
SUBJECT: Proposed Minimum Wage Executive Order

Secretary Reich forwarded the attached proposed Executive Order (E.O.) which would require federal contractors to pay the President's proposed new minimum wage of \$5.15 per hour. In his transmittal memorandum, he outlined the advantages and disadvantages of his proposal. The advantage is that it would demonstrate the President's commitment to increasing working families' wages. The disadvantages Reich discusses are twofold: 1) the policy rationale for such an E. O. is that it would increase overall economic efficiency; yet this finding is weak and not supported by the Department of Labor's economists; 2) the legal justification is also that the E.O. would increase economic efficiency; since the economists do not support such a finding, the E.O. is particularly vulnerable to a court challenge.

Also attached are memoranda from the following White House offices based on a quick review of the proposed E.O.: OMB, NEC, DPC, CEA, Vice President's Office, White House Counsel, Office of Legal Counsel at Department of Justice (OLC). None of these offices reported any positive reaction to the proposal. The criticisms they point out include: 1) it will not increase economic efficiency as claimed and because of this Administration economists will not support it; 2) it will make contractors stop doing business with the government which will drive up the government's, especially the Defense Department's, costs; 3) it will reduce employment among federal contractors; 4) there is no legal justification for the E.O. since it will not increase economic efficiency; 5) it will disproportionately hurt small and minority owned businesses; 6) it could add \$2 billion to our budget; 7) it is inconsistent with the National Performance Review goals of reinventing federal procurement; 8) it is inconsistent with a reported conversation the President had with the Vice President shortly before vacation in which he promised not to do anything further to undermine procurement reform.

The OLC memorandum includes suggestions for how to change the draft E.O. such that it would be legally defensible and supportable. It's suggested changes require the President to be comfortable claiming that the E.O. would increase overall economic efficiency (even if his economists don't agree).

MEMORANDUM

DATE: AUGUST 29, 1995

SUBJECT: MINIMUM WAGE EXECUTIVE ORDERS

Summary

As requested, we have prepared a draft executive order that would prohibit government agencies from doing business with federal contractors that pay below \$5.15 per hour.

Attached to this memorandum are: (1) the draft executive order relating to federal contractors and the minimum wage; (2) the press packet released by the White House on February 3, 1995 accompanying your legislative proposal to increase the minimum wage; (3) an excerpt on the minimum wage from your May 19, 1995 speech for the 75th Anniversary celebration of the Labor Department's Women's Bureau; and (4) a legislative background brief describing how members of Congress voted when the minimum wage was last increased in 1989.

Message

* The nation's leading economic problems are stagnant wages and declining real incomes for working families.

* The federal government should not contribute to the wage and income problems facing working families.

* The President has presented Congress with a legislative proposal to increase the minimum wage 90 cents from its current \$4.25 per hour. This initiative would assure that people who work hard and play by the rules receive a living wage of \$5.15 per hour. Congress has refused to act.

* If Congress won't act, President Clinton will. The President will use his executive authority to guarantee a living wage --- \$5.15 per hour --- for everyone working in firms that do business with the federal government.

* At a minimum, the federal government should not do business with corporations that pay workers less than a living wage.

Discussion

I. Increasing the Minimum Wage for Employees of Federal Contractors

A. How the Executive Order Would Work

This draft executive order would establish that "[i]t is the policy of the executive branch in procuring goods and services that . . . federal agencies shall contract with companies that pay their employees no less than \$5.15 an hour." This policy would be enforced in two ways. First, every government contract entered into after the effective date of the executive order (the date you sign it) would include a clause in which the contractor agrees to pay a minimum wage of \$5.15 per hour. Second, any contractor that pays below \$5.15 could have all of its government contracts terminated. The executive order does not provide for any exceptions.

The Secretary of Labor would enforce and administer the order. If the Secretary finds that a contractor is not paying a minimum wage of \$5.15, he would transmit a finding to the heads of contracting agencies or departments who, in turn, must terminate all contracts with the contractor unless the contractor pays all of its employees at least \$5.15 per hour within a time specified by the Secretary.

Like the "striker replacement" executive order, this draft order is premised on the authority delegated to the President by Congress in the Federal Property and Administrative Services Act of 1949 "to provide for the Government an economical and efficient system for . . . procurement and supply." Some economic theories suggest that increasing the wages of low-wage workers will result in an increase in those workers' productivity and, in turn, to increases in efficiency that will offset the cost to federal contractors of the higher wages. Thus, the federal government would, according to these theories, procure its goods and services from more efficient, more economical federal contractors.

B. Possible Variations in this Executive Order

(1) Use CEO Pay as a Trigger: The executive order could be made to apply only to federal contractors that pay their chief executive officer (or other top executive) more than 100 times the lowest wage paid to their employees. This approach would dramatize the growing wage disparity in our economy. On the other hand, it undermines the central moral argument which supports raising the minimum wage: every worker is entitled to a living wage, regardless of who employs them or how much others in their organization earn. Further, using a CEO pay trigger may weaken the nexus to economical and efficient procurement, the legal prerequisite for presidential action of this type.

(2) Use Profits as a Trigger: The executive order could also be made to apply only to federal contractors that earn above average profits. This approach would juxtapose the huge economic returns being yielded by capital (e.g., the soaring stock market) with the decline in

middle and working class family incomes. On the other hand, it suffers from both of the infirmities outlined above (i.e., undermining the moral argument and attenuating the procurement nexus), plus it would require an administrative apparatus to decipher each contractors' profits.

C. Arguments For and Against the Executive Order

(1) Pro: This draft executive order will demonstrate your commitment to increasing working families' wages (particularly for the lowest wage workers) and distinguish you from a congressional majority that refuses to even consider your legislative proposal to increase the minimum wage. The minimum wage has fallen 27% in real terms since 1979 and, without adjustment, will fall to its lowest real value in forty years in 1996. It is arguable that the growing disparity in family incomes and wealth is the most pressing issue for middle and working class families. This executive order would make your moral position clear --- you will not allow the federal government to do business with any company that contributes to declining real wages for low-wage workers.

(2) Con: This executive order is premised entirely on economic theory, much of which will be difficult to explain in simple terms to the public, that is outside the mainstream of scholarly economic thought; accordingly, it is unclear whether reliable third parties will validate the arguments set forth in the preamble. Further, it is unclear whether theory alone is adequate to support an executive order. Even accepting the theories as true, it is also unclear whether the nexus between a minimum wage increase and efficient and economical procurement is sufficiently close to pass judicial scrutiny.

Preliminary research has not disclosed any executive order, outside the context of President Roosevelt's extraordinary powers during World War II, that directly sets wages for employees of federal contractors; that is, this executive order could be unprecedented. The closest analogy may be President Carter's Executive Order No. 12092 which required federal contractors to certify that they were in compliance with voluntary wage and price guidelines established by the President's Council on Wage and Price Stability. Finally, this executive order could lend support to attacks that President Clinton and the Democrats want big government. A slippery slope argument is easily made: "If Bill Clinton can require federal contractors to pay a higher minimum wage, is he going to require a pay increase for all workers? Will he require all federal contractors to follow his health plan? To finance abortions through their health plans?"

(3) Likely Constituency Responses: The labor movement and other advocates for low-wage workers will likely support the executive order. Federal contractor groups and representatives of the business community (e.g., the Chamber of Commerce, the National Association of Manufacturers), as well as the Republican congressional majority, will oppose the executive order. Since a substantially larger group of federal contractors will be affected, it is reasonable to expect a much more vigorous negative response from the business community than the striker replacement executive order evoked. Litigation and congressional

action (e.g., efforts to overturn the executive order, appropriations riders blocking enforcement of the order) will likely result.

D. The EO's Costs Are Difficult to Estimate

A very rough estimate of the costs of the executive order suggests that it will cost federal contractors not more than \$2.1 billion per year. Please note, however, that the data needed to make a precise estimate of the cost of the minimum wage executive order are not available. Estimates of worker wages and the number of workers involved do, however, permit this crude projection.

The assumptions employed to reach the above estimate likely bias the estimate upward. First, many federal contractors (e.g., construction, service) are required to pay a prevailing wage above the minimum wage by the Davis-Bacon Act and the Service Contract Act. Second, federal contractors' firms tend to be larger and, as a result, may have a smaller percentage of minimum wage workers than firms in the economy as a whole. Accordingly, the total number of workers affected by the executive order is probably smaller than that assumed in the calculations to reach the above estimate. Certain structural changes to the executive order (e.g., adding a threshold, narrowing the definition of "federal contractor") would further reduce the number of workers covered and the commensurate costs.

On the other hand, this estimate does not take into account any "ripple" effect that minimum wage increase might have on the wages of workers that currently earn \$5.15 or slightly more. The ripple effect would tend to increase the costs of the executive order to federal contractors.

II. Two Approaches to Announcing the Executive Order

Should you decide to proceed, you should consider two approaches to announcing the executive order.

You could announce the executive orders in a speech --- such as your forthcoming address to the Alameda Central Labor Council's Labor Day Picnic --- or radio address and then sign the order soon before, the same day, or soon thereafter. This approach gives the White House control over timing and press arrangements. It also provides an opportunity to brief potential supporters without tipping off opponents. On the other hand, it could inspire congressional retaliation in the appropriations/reconciliation/debt ceiling process.

Or, you could announce in a speech or radio address that you are giving Congress a 90-day (or until Christmas or New Year's Eve) deadline before which it must enact your proposed 90-cent increase in the statutory minimum wage. If it does not act by the time the deadline is reached, you would issue the executive order. This approach puts the onus

squarely on Congress' shoulders. It also allows you to wield all of your available authority to keep the minimum wage from falling to its lowest real value in 40 years (which it will in 1996 if there is no adjustment). On the other hand, this approach allows opponents time to organize and, possibly, to seek judicial intervention. It also offers words when bold action might send a stronger and clearer message.

Attachments

DRAFT 4
August 25, 1995

ENSURING THE ECONOMICAL AND EFFICIENT ADMINISTRATION AND COMPLETION OF FEDERAL GOVERNMENT CONTRACTS

PREAMBLE

Some economic theories suggest that requiring federal contractors to pay a higher minimum wage will lead to increases in efficiency that will offset the cost to federal contractors of the higher wage. The minimum wage has fallen 27% in real terms since 1979 and, without adjustment, will fall to its lowest real value in forty years at the end of 1996. Meanwhile, labor productivity has increased 17% since 1979.

These theories suggest that the productivity of low-wage workers is depressed when the minimum wage falls significantly in real terms. These conditions can lead to greater levels of "shirking" (*i.e.*, reduced efforts by workers), higher turnover, lower morale, and longer periods in which needed jobs remain unfilled. Raising the minimum wage may lead to efficiency gains among federal contractors that employ low-wage workers by reducing shirking, lowering turnover, increasing morale, and reducing the periods of time during which needed jobs remain unfilled. In sum, productivity is lower when workers are paid an obsolete minimum wage and, as a result, the federal government receives lower quality, less reliable, and less timely goods for each taxpayer dollar. By paying a higher wage to low-wage workers, federal contractors will increase worker productivity. The federal government will procure its goods and services from more efficient, more economical federal contractors.

The market may not address this problem on its own. The problems of turnover, shirking, low morale, and extended job-slot vacancies likely result from a minimum wage which is too low to attract new workers and retain incumbent workers. However, employers cannot lure a new worker into a particular job with a higher wage without giving everyone else in that job a pay increase. Thus, in the absence of a requirement that they pay a higher wage, employers choose lower levels of employment and output rather than increasing the wages paid to all of their low-wage workers.

NOW, THEREFORE, to ensure the economical and efficient administration and completion of Federal Government contracts, and by the authority invested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 471 and 486(a) and 3 U.S.C. 301, it is hereby ordered as follows:

Section 1: It is the policy of the executive branch in procuring

goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, Federal agencies shall contract only with companies that pay their employees no less than \$5.15 per hour of work. All Government contracting agencies shall include in every Government contract hereafter entered into the following provision:

"During the course of the contract the contractor agrees that all employees of the contractor will be paid no less than \$5.15 an hour."

Sec. 2.(a) The Secretary of Labor ("Secretary") may investigate any Federal contractor to determine whether the contractor is paying any of its employees less than \$5.15 per hour of work.

(b) The Secretary shall receive and may investigate complaints that the contractor is paying any employee less than \$5.15 per hour of work.

(c) The Secretary may hold such hearings, public or private, as he or she deems advisable, to determine whether any contractor is paying any employee less than \$5.15 per hour of work.

Sec. 3. (a) When the Secretary determines that a contractor has paid any employee less than \$5.15 per hour of work, the Secretary may make a finding that it is appropriate to terminate the contract for convenience. The Secretary shall transmit the finding to the head of any department or agency that contracts with the contractor. All Government contracts with the contractor shall be immediately terminated unless the contractor commences within a time specified by the Secretary to pay all of its employees no less than \$5.15 per hour of work.

(b) Each contracting agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

Sec. 4.(a) The Secretary shall be responsible for the administration and enforcement of this order. The Secretary may adopt such rules and regulations and issue such orders as may be deemed necessary and appropriate to achieve the purposes of this order.

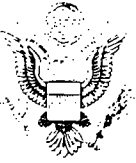
(b) The Secretary may delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 5. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its

agencies, its officers, or its employees. The order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Sec. 6. This order is effective immediately.

THE WHITE HOUSE



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON, D.C. 20500

THE CHAIRMAN

August 30, 1995

95 AUG 30 98:20

MEMORANDUM FOR THE PRESIDENT

FROM:

JOSEPH STIGLITZ
MARTIN BAILLY

Subject:

Proposed Executive Order Regarding Minimum Wage

Although we strongly support the Administration's proposal to raise the minimum wage, we have serious reservations about the proposed Executive Order on minimum wages for federal contractors.

- o There is, to our knowledge, no substantive body of literature to support the proposition stated in the preamble that requiring federal contractors to pay a higher minimum wage will lead to increases in efficiency *sufficient to offset the cost to federal contractors of the higher wage*. Most of the economic literature has either focused on low wage sectors, like restaurants, or discussed effects of an across the board increase in the minimum wage.
- o More generally, the effects of an increase in wages mandated in one sector of the economy (here the federal contracting sector) may be far different from those of an across the board increase in wages.
- o Most economists would argue that if federal contractors' costs would have been lowered by paying higher wages, they would have already done so. Imposing *additional* constraints on contractors would normally be expected to increase total costs. (The preamble does not contain any refutation of this argument.)
- o The magnitude of the increased costs may be significantly greater than the direct costs associated with increasing wages of workers at or near the minimum wage. The executive order will make it less attractive for firms to bid on government contracts (since it will raise costs on all production, not just on production for the government), and with fewer firms bidding, costs to the government will rise. More generally, the executive order is likely (if actively enforced) to interfere seriously with our efforts to reform government procurement policy, to make government procurement more efficient and less costly.

- o There is some chance that the increased minimum wage will reduce employment among federal contractors--even under conditions in which an across the board increase in the minimum wage would not. Federal contractors could simply substitute high-quality high wage workers. Such policies could exert downward pressure on wages in other sectors of the economy.

There are a further set of technical issues not addressed by the executive order. Will contractors be responsible for insuring that subcontractors pay the \$5.15 minimum wage? If not, this is an easy way for contractors to avoid the force of the executive order. But if contractors are responsible for enforcing minimum wages on subcontractors, it may impose significant economic costs. Each contractor will have to review the wage policies of all of its subcontractors (and its subcontractors of their subcontractors). For some, the share of federal business may be sufficiently small that they will be unwilling to revise their wage policy, necessitating entering into new contractual arrangements, presumably at greater costs. And what about products purchased on the market: does the contractor have to make sure that each product is produced by a manufacturer who pays the \$5.15 wage?



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DEPUTY DIRECTOR

August 30, 1995

MEMORANDUM FOR HAROLD ICKES

FROM: Jack Lew 
SUBJECT: Minimum Wage Executive Order

This afternoon I received a copy of the draft executive order that would require all federal contractors to pay the proposed new minimum wage of \$5.15 per hour. The following comments reflect our quick review. I have pulled together comments from Steve Kelman, Ken Apfel's shop and Bob Damus, our general counsel. Without addressing the merits of a statutory minimum wage increase, we think it would be a mistake to implement a minimum wage increase applicable to federal procurement only.

(1) Required finding is problematic

As a legal matter, any procurement-related Executive Order would need to be justified on the rationale that it promotes "economy and efficiency" in procurement. While it might be possible to identify a theoretical study that shows that improved morale increases efficiency, the common sense case would be difficult to make. There is a risk that the result would expose us to significant ridicule, i.e., that we think you promote economy and efficiency by spending more money and paying higher prices than others.

(2) Differential minimum wage would disrupt Federal procurement

Creating a differential minimum wage, which is higher for federal contractors than for all other employers, would cause many existing government contractors who also sell in the commercial marketplace to withdraw from government business. It is unlikely that many of these employers would be willing to disturb their existing wage structure (where a minimum wage increase would produce ripple effects on other wages within the company) in order to do business with the government. If fewer companies are willing to do business with the government, we will experience higher prices due to less competition. This contradicts the Administration's reinventing government efforts to attract more contractors to business with us and increase competition.

This will be particularly an issue for small businesses and minority contractors, with which the Administration is making efforts to expand opportunities.

(3) Budgetary impact

It is not possible this afternoon to produce a precise budget estimate, but the direct wage effect alone could cost over \$2 billion, not counting the ripple effect as wages near minimum climb as well. As noted above, in addition to the direct effect, there would be the added cost of reduced competition if there is a higher minimum wage for firms that do business with the federal government, as many firms opt to drop federal contracts to avoid the wage increase in their non-federal business. This indirect cost increase would not be present if there is a statutory increase in the minimum wage.

The cost of reduced competition will be most severely felt at the Department of Defense, which has already been experiencing significant problems in terms of contractors who are unwilling to do business with the federal government.

THE WHITE HOUSE

WASHINGTON
August 30, 1995

MEMORANDUM FOR ERSKINE BOWLES
HAROLD ICKES

CC: CAROL RASCO

FROM: Paul Weinstein

SUBJECT: Proposed Executive Order On Increasing
Minimum Wage For Government Contractors

The DPC has read over the proposed Executive Order from the Department of Labor requiring any Federal contractor to pay a minimum wage of \$5.15 per hour. While the goal of such a proposal is laudable, we believe the Order has some serious drawbacks from a policy perspective. First, we do not think that there will be any significant economic efficiency gains from the Executive Order. Second, as part of the Vice President's reinventing government effort, the Administration has been trying to reform the procurement system by reducing the number of socio-economic requirements placed on Federal agencies when they contract with the private sector. The issuing of this Executive Order would be inconsistent with the National Performance Review's procurement reform proposal. Finally, the Executive Order would have a negative budgetary impact at a time when we are struggling to identify funds to pay for Presidential initiatives.

THE WHITE HOUSE

WASHINGTON

August 30, 1995

~~95 AUG 30 P 6: 27~~

MEMORANDUM TO THE PRESIDENT

FROM: LAURA TYSON
BO CUTTER

SUBJECT: PROPOSED EXECUTIVE ORDER REGARDING MINIMUM
WAGE

We oppose an Executive Order requiring federal contractors to pay a minimum wage higher than the statutory minimum wage. (Gene Sperling is out of the country, but we believe he would agree.)

- . As a matter of process, we should not make as complex a decision as this one with as little analysis as has been carried out to date.
- . The proposed Executive Order would further complicate federal procurement, raising an additional barrier to working with the Federal Government, and would be inconsistent with the overall direction of federal procurement policy. We have not analyzed the long-run costs the Government would experience as firms shift away from federal work.
- . The proposed Executive Order would raise federal procurement costs, and, therefore, because budgets will not expand, may well result in lower employment derived from federal procurement.
- . The proposed Executive Order raises a number of other detailed issues we have not been able to analyze in this short a time period: How would the international operations of affected firms be treated? Would firms cut back on benefits? Are we legally able to terminate contracts?
- . Finally, the basic justification for such an Executive Order -- that it would increase overall economic efficiency -- is not supportable for a measure applying only to part of the economy. Larry Katz, who is, as you know, a leading proponent of this argument when applied to the whole economy, would probably publicly criticize it in this case.
- . We think our current minimum wage position is right and a political winner. We do not need to jeopardize our position with one action we have not thought through. If you wish, we can initiate a process immediately to develop a more thorough analysis and provide you with a better basis for a decision.

EXECUTIVE OFFICE OF THE PRESIDENT

30-Aug-1995 04:54pm

TO: OCONNOR_J

FROM: Lee Ann Brackett

SUBJECT: minimum wage -- procurement eo

Jennifer,

Please tell Harold in ;the strongest possible terms that the VP would be very much opposed to the proposed executive order requiring federal contractors to pay a minimum wage higher than the statutory minimum wage. This proposal would run counter to all of the President's efforts in the area of procurement reform. The effect would be to cause many existing government contractors to withdraw from government business since these companies do not now produce products off separate product lines. Having fewer companies willing to do business with the government means both higher prices for the government and contradicts the Administration's efforts to lower the cost of goods and services through procurement reform.

In addition, the VP believes that he has a commitment from the President made at their last lunch before vacation that in the search for executive actions, we would not entertain any further actions that undermine procurement reform. If this does not die I will insist that the VP weigh in.

Elaine Kamarck



OFFICE OF THE VICE PRESIDENT
WASHINGTON

August 30, 1995

MEMORANDUM FOR HAROLD ICKES
ERSKINE BOWLES

FROM: ELAINE KAMARCK *ek*
KUMIKI GIBSON *kg*

SUBJECT: MINIMUM WAGE EXECUTIVE ORDER

We have reviewed the proposed Executive Order on "ensuring the economical and efficient administration and completion of Federal government contracts." We oppose the issuance of this Executive Order for several reasons.

First, please be advised that before leaving for their vacations, the President and the Vice President agreed that the President would not issue any new directives regarding procurement reform -- an effort being pursued as part of the National Performance Review. Second, we have serious concerns as to whether this order will in fact "increase efficiency," as it purports to do. Third, we question whether this order is defensible legally. Finally, we believe that this order may be viewed as purely political.

Please contact either one of us if you have any questions regarding our position.

Thank you.

THE WHITE HOUSE

WASHINGTON

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INITIALS: JAM DATE: 12/1/77

2016-0531-F

PRIVILEGED AND CONFIDENTIAL

August 30, 1995

MEMORANDUM FOR ABNER J. MIKVA

FROM: CHRIS CERF *CPE*

RE: Minimum Wage E.O. Talking Points

- * The proposed Executive Order would require federal contractors to pay employees \$5.15 per hour.
- * The D.C. Circuit has held that the President can "legislate" in this fashion only if he has the express or inherent authority to do so.
- * The E.O. relies solely on the Federal Property and Administrative Services Act as the basis for presidential authority. Under D.C. Circuit law, the President may properly rely on the Act if there is a "nexus" between his actions and "the pursuit of economy and efficiency in the management of federal property."
- * It is unclear to what degree a court would "look behind" a presidential finding that such nexus exists. Judge Kessler's opinion in the Striker Replacement cases implies that courts would give deference to such a finding, and there is some support for this in the D.C. Circuit.
- * The Minimum Wage E.O. asserts that "some economic theories suggest that requiring federal contractors to pay a higher minimum wage will lead to increases in efficiency that will offset the cost to federal contractors of the higher wage." In other words, pay people more and they will be more productive and the savings associated with that productivity will be at least equal to the increased costs stemming from the higher wages.
- * The Chief Economist of D.O.L. has informed me that there is no empirical evidence to support this theory. Moreover, although the theory has some support in the literature, it does not go so far as to suggest that there would be a full offset. In his view, "it is unlikely, but possible" that

the savings from the efficiency gains would fully offset the increased costs." He does think, however, that there would be some offset.

- * The Office of Legal Counsel thinks that it is reasonable to assume (but not certain) that courts would more or less defer to a concrete presidential finding. They believe, however, that the E.O., as currently drafted, does not contain such a finding.
- * To pass muster, the E.O. would need to delete all reference to "economic theories" (see above) and state outright that requiring contractors to pay a higher minimum wage would lead to increases in efficiency that would offset the increased costs associated with the wage.
- * The key question is whether the President would be comfortable making such a finding. If not, the best guess is that the order would not survive judicial review.
- * Even if we can make such a finding, there are substantial litigation risks. The outcome will depend on how "tight" a nexus the D.C. Circuit requires and whether it simply accepts the President's finding or allows the plaintiffs to challenge its factual basis.

Memorandum



Subject

Minimum Wage Executive Order

Date

August 30, 1995

To

Robert Damus
General Counsel
OMB

From

Teresa Wynn Roseborough *TR*
Deputy Assistant Attorney
General
Office of Legal Counsel

We have reviewed the draft executive order entitled "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts" and the accompanying draft documents.¹ We believe that the determination that economy and efficiency in procurement will be promoted by the specific provisions of the order is legally available, if the assertions made in the order can be substantiated. That is, if the President determines, in good faith, that increasing the minimum wage of persons employed by federal contractors would promote economy and efficiency in federal procurement, we believe the issuance of the order would be authorized by the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.* See Chamber of Commerce v. Reich, 886 F. Supp. 66 (D.D.C. 1995).

The supporting documents, however, do not suggest economy and efficiency in government procurement would be promoted by proposed provisions that would link the application of the order to CEO pay or company profits. Accordingly, we suggest that such provisions be eliminated from consideration. Below are our suggestions for strengthening the draft order and supporting documents:

A. The Executive Order.

We believe that the preamble articulates an economy and efficiency argument that may be sufficient to support the issuance of this order with the following alterations:

(1) The first and third paragraphs should be deleted because they weaken the economy and efficiency argument and seem to be contradictory and confusing. However, it may be possible

¹ This memorandum provides our initial comments and observations. OLC review for form and legality is not yet complete.

to fit the penultimate sentence of the first paragraph into the second paragraph.

(2) The President's authority to issue the proposed order is contingent upon his determination that it will promote economy and efficiency. Therefore, in the third sentence of the second paragraph, we believe the word "may" should be replaced with a less equivocal formulation, such as "I find that this order would" If the President cannot make such a finding, the basis for issuing the order would be doubtful. (While it is not necessary for the President to be absolutely certain that the proposed order will promote economy and efficiency, we believe that language that suggests a higher degree of certainty than "may" is necessary. In that regard, we suggest that, where possible, the language of this paragraph should be strengthened to reflect that the President holds a good faith belief that the proposed order will promote economy and efficiency in government procurement. See, e.g., Executive Order 12954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts.")

(3) Finally, we suggest that the penultimate sentence of the second paragraph be amended to read as follows: "By paying a higher wage to low-wage workers, federal contractors will increase worker productivity, **improve the stability of their workforce, attract better qualified employees, and produce higher quality goods. Procuring goods from such contractors will promote economy and efficiency in federal procurement by (fill in the blank).**" (addition in bold) The last sentence of the second paragraph should be deleted.

The Striker Replacement Order provides that the Secretary's exercise of discretion under the order must be consistent with the policy stated in section 1 of the order. We believe that the Secretary's exercise of discretion under section 3(a) of the proposed order should be similarly limited. We therefore suggest the insertion of the following sentence at the end of section 3(a): "All discretion under this section shall be exercised consistent with the policy enunciated in section 1 of this order."

B. The Discussion Memorandum for the President.

We believe that the Memorandum does a very good job presenting the pros and cons of issuing this proposed order. Therefore, we limit our comments to three points.

First, the Memorandum fails to reveal the view of the Secretary of Labor as to whether the proposed order will promote economy and efficiency in procurement and does not include his recommendation as to whether the President should issue the proposed order. We believe that the President's determination

that economy and efficiency in government procurement will be promoted by the proposed order would be substantially bolstered if it were supported by the recommendation of the Secretary.

Second, we believe that when discussing the different options for announcing the order it should be made clear that congressional retaliation in the appropriations/reconciliation/debt ceiling process is a possibility regardless of the approach the President decides to take. While the memorandum only lists this possibility as a factor to be considered in the "sign immediately" approach, we believe that it is also a possibility if the President decides to announce his intention to act if Congress fails to enact legislation within a certain time period. In fact, utilization of the latter approach may provoke Congress to block the operation of the order through a prospective appropriation's rider.

Finally, we believe the discussion of the litigation risks associated with the order should be expanded. In addition to recognizing that the proposed order will almost certainly be challenged, we note that the issuance of the proposed order may have an adverse impact on the Chamber of Commerce litigation, which is presently pending before the Court of Appeals in the District of Columbia. The court may be more reluctant to accept assertions of Presidential authority in Chamber of Commerce knowing that this potentially would lead to broader assertions of authority. If the court were to view the proposed order as an indication that the President intends to legislate other than through bicameralism and presentment, this too could color the result of the litigation in Chamber of Commerce.

cc: Jennifer O'Connor
Chris Cerf

Minimum Wage

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY

*2/8-
DRAFT
CAB AFFAIRS
Delivered
F-Y-1*

February 8, 1995

Note to: Steve Silverman

From: Kris Balderston

Per our conversation, please see the attached draft minimum wage letter from the President to Speaker Gingrich and Vice President Gore.

WORKING FOR AMERICA'S WORKFORCE

~~CONFIDENTIAL~~**DRAFT**

FEB 8 1995

The Honorable Newt Gingrich
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Al Gore
President
United States Senate
Washington, D.C. 20510

Dear Mr. Speaker:

Dear Mr. President:

I am pleased to enclose for the consideration of Congress a draft bill entitled the "Working Wage Increase Act of 1995."

This draft bill would amend the Fair Labor Standards Act to increase the minimum wage from the current rate of \$4.25 an hour in two 45 cent steps --- to \$4.70 an hour on July 4, 1995 and to \$5.15 a year thereafter. This increase in the minimum wage builds on a similar increase that President George Bush signed into law in 1989.

I believe that this minimum wage increase is needed to assist 2.5 millions of working Americans who are at the minimum wage. It is these workers who are the least capable of bargaining for higher incomes and of sharing in our increased prosperity. The increase in the minimum wage is an essential component in making work pay and in assuring a living wage for working Americans.

In submitting this legislation, I am mindful that certain and technical policy and conforming changes may be needed with respect to this legislation. I look forward to prompt and constructive Congressional consideration and passage of this legislative measure of fundamental importance to working Americans.

Sincerely,

William J. Clinton

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: JAM DATE: 12/1/17

206-0531-F

DRAFT

A BILL

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Working Wage Increase Act of 1995."

INCREASE IN THE MINIMUM WAGE

Section 2. Paragraph (1) of section 6(a) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)) is amended to read as follows:

"(1) except as otherwise provided in this section, not less than \$4.25 an hour during the period ending July 3, 1995, not less than \$4.70 an hour during the year beginning July 4, 1995, and not less than \$5.15 an hour after July 3, 1996;"

Runn wage - 12/2/84 -

• not clear that increase in runn wage will decrease
expenditure

Δ fast food restaurants only 25% of runn wage weekly

Cons:

① - 10% ^{in running} ~~runn~~ bus - 1% effect on expenditure

② not ~~see~~ runn wage goes to ~~low~~ one -
but no longer true -

= 40% of wages of lower wage families

→ come from runn wage weekly

Polly info:

- people overvaluing support runn wage

- but if runn wage is included w/ other

income payments, then it makes

lower but still positive

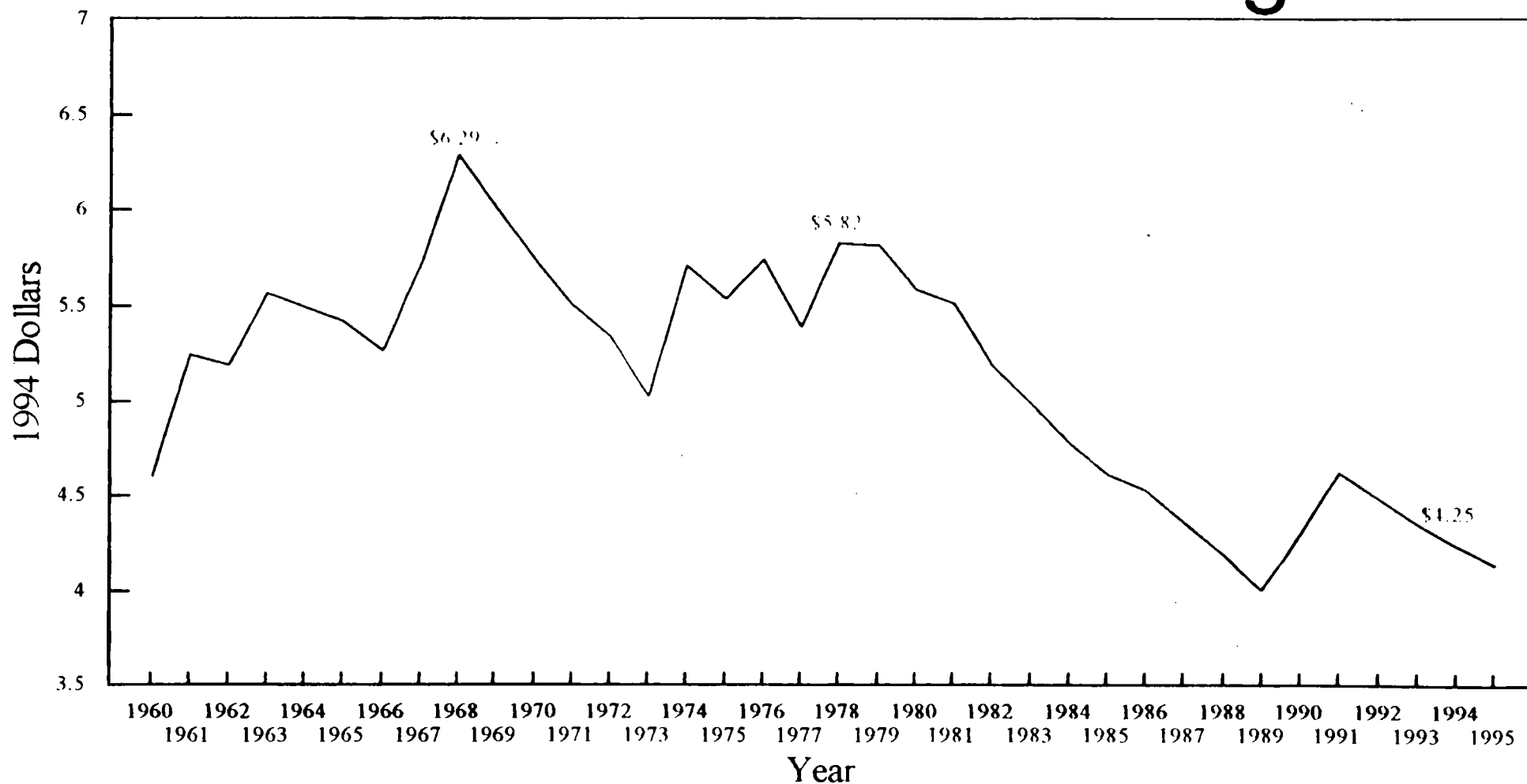
runn wage very low "old amount"

The Minimum Wage

- The Administration has promised to revisit the minimum wage after the impact of health care reform on employers was resolved.
- In Putting People First and during the campaign, President Clinton promised to index the minimum wage to prevent a decline in its purchasing power and to "make work pay." Since its last increase (April 1991), the real value of the minimum wage has declined by 45 cents.
- The Federal minimum wage is currently \$4.25 an hour. The minimum wage increased to \$4.25 in April 1991 and to \$3.80 in April 1990. It was frozen at \$3.35 per hour 1981-90.
- The real value of the minimum wage is now 33 percent lower than it was in 1979. If the minimum wage does not increase again, by 1996 it will sink to its lowest real level since 1955.
- The recent expansion in the EITC, while very helpful, only partially offsets the erosion in the value of the minimum wage. In the best case scenario (for a married couple with a year-round minimum-wage earner) the EITC brings the after-tax hourly wage rate up to \$5.14 in 1994 -- still below the poverty level.
- The phase out of the EITC increases the marginal tax rate for some workers, which may discourage work. The minimum wage has the opposite effect -- it makes work more desirable.
- The EITC is only claimed by about 80% of eligible families, and the EITC is generally paid in a lump sum. The benefits of a minimum wage hike are received with every pay check.
- The standard criticism of the minimum wage is that it raises employer costs and reduces employment opportunities for teenagers and disadvantaged workers. Recent research finds no convincing evidence of significant adverse employment consequences of moderate (e.g., \$1.00 or less) increases in the minimum wage. See pages 4 and 5.
- The youth subminimum wage that was enacted in 1989 for a three year period. Much evidence suggests that employers very rarely took advantage of the subminimum wage.
- On a theoretical level, the minimum wage may not harm employment because some employers will be able to fill vacancies faster and reduce turnover if there is a moderate rise in the minimum wage. Employers don't do this on their own because it cuts into profit. Of course, too high a rise in the minimum could have adverse consequences for employment.
- Two-thirds of minimum-wage workers are adults. The dramatic changes in the wage structure the last 15 years (i.e., the rise in wage dispersion) has meant that many prime-age workers are earning wages at, or near, the minimum wage. The average minimum-wage earner brings in 40 percent of his or her family's labor income.

- Wage growth for median and low-wage earners has been remarkably low in this recovery. In 1993, and so far in 1994, the median worker (as well as lower-wage workers) has experienced a decline in his or her earnings.
- A recent study concludes that the declining real value of the minimum wage since 1979 accounts for 20 percent of the rise in wage inequality for men, and 30 percent for women.
- A \$1.00 rise in the minimum wage would directly raise the pay of some 13 million low-wage workers, and could have a "ripple" effect on another 4 million.
- Last year five bills were introduced in Congress to raise or index the minimum wage. Senators Kennedy and Sarbanes made raising the minimum wage an effective campaign issue this year. Senator Kennedy plans to reintroduce his bill this year.
- A large majority of Republicans voted to increase the minimum wage to \$4.25 in 1989 (including Newt Gingrich and Bob Dole).
- A 1992 Time-CNN poll found that 74% of the public favored raising the minimum wage to make work a more attractive alternative to welfare. Polls find that support for a minimum wage increase is strongest among women and minorities. Polls have found that most of the public is skeptical of claims that a minimum wage increase reduces employment. A majority of the public even supports a minimum wage hike if they are first told that a minimum wage rise will cost some people their jobs.
- The AFL-CIO has voiced its support for a minimum wage increase. In addition, women's groups (women currently make up 66% of minimum-wage earners), children's groups, and civil rights groups would favor a minimum wage increase.
- The interest groups opposed to the minimum wage (e.g., NFIB) are better organized and more influential than they have been in the past.

The Real Minimum Wage



NOTE: Minimum wage is in 1994 CPI-U-X1 Dollars. The inflation rate for 1994 and 1995 is assumed to be 2.7 and 3.1 percent, respectively.

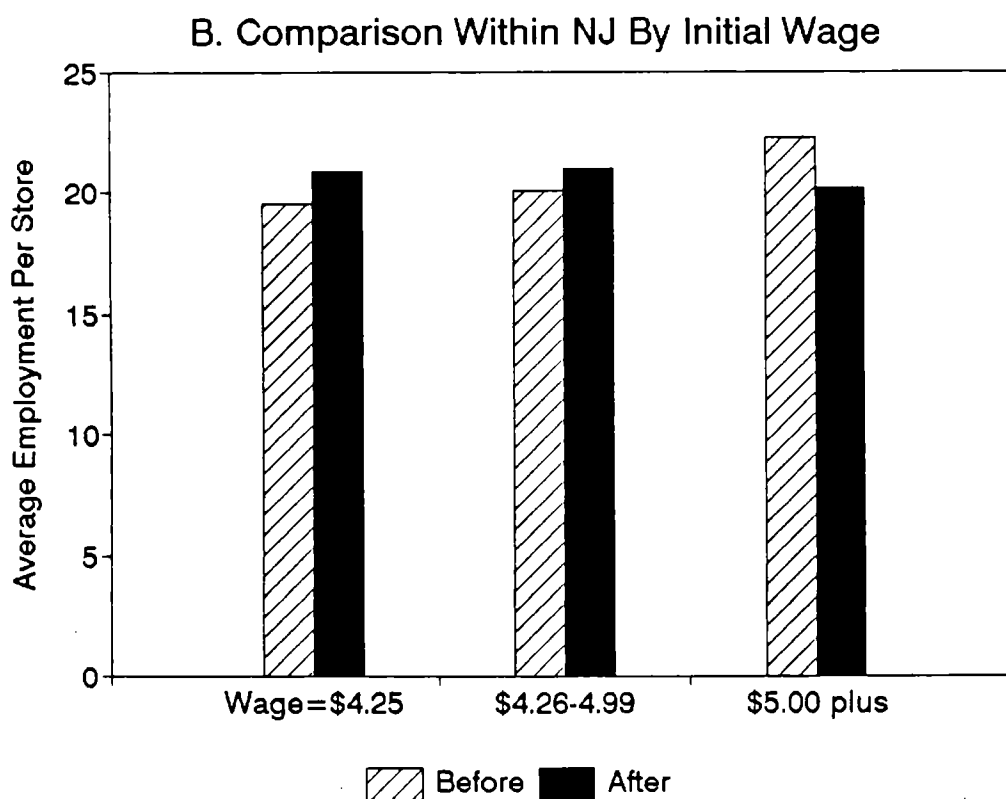
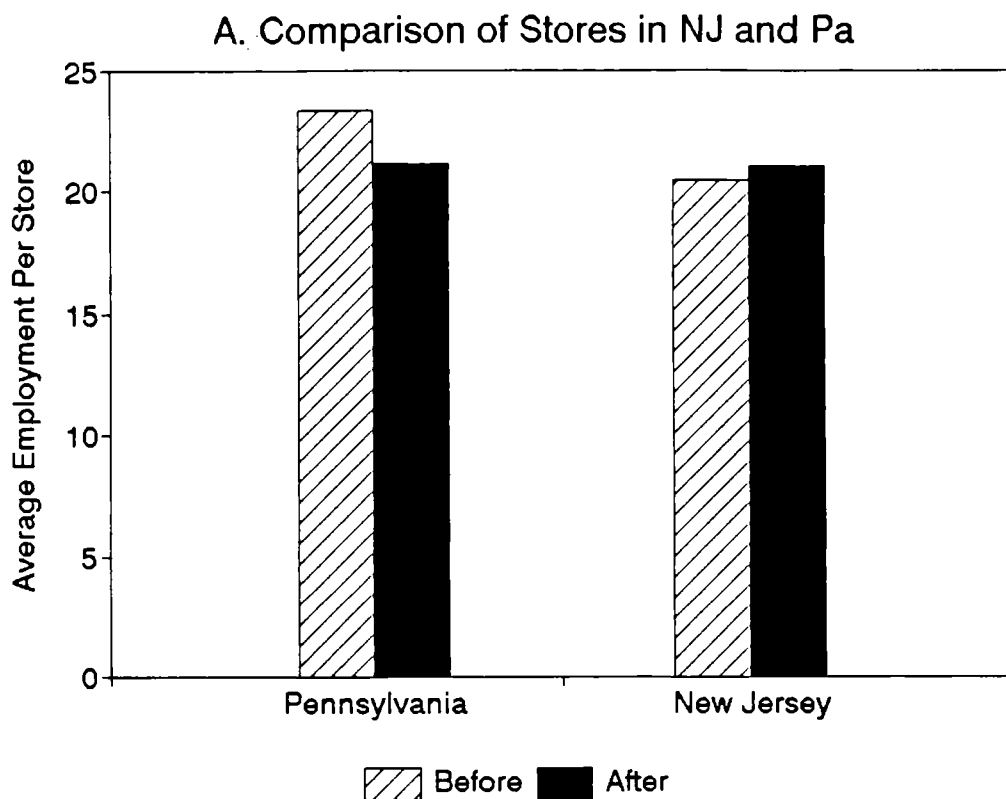


Figure 2.3 Average Employment Per Store, Before and After
Rise in minimum wage

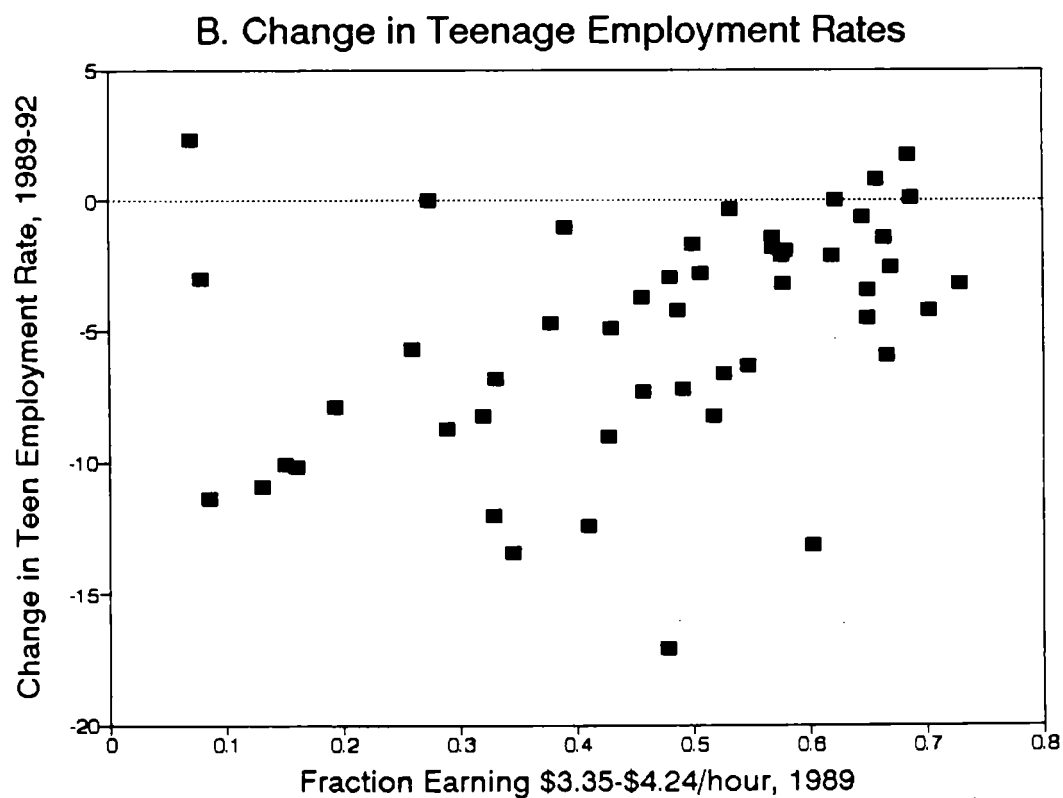
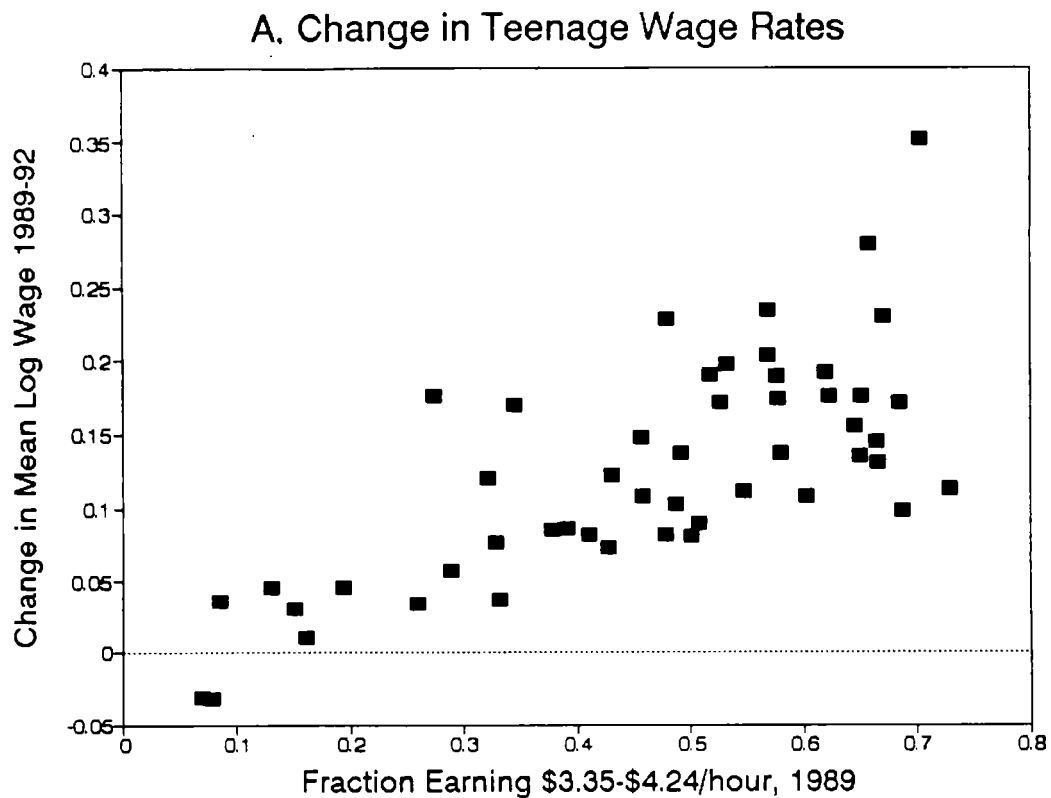


Figure 4.5 Interstate Patterns of Wage and Employment Growth, 1989 to 1992