PROCUREMENT CASES (from White House Counsel)

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AFGE v. CARMEN, 216 U.S. App. D.C. 17

Source: All Sources : Federal Legal - U.S. : **Federal Cases, Combined Courts**
Terms: **"executive order" and "40 usc section 471" and efficiency** (Edit Search)

*216 U.S. App. D.C. 17; 669 F.2d 815, *;*
*1981 U.S. App. LEXIS 15181, ***

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL. v. GERALD P. CARMEN, ADMINISTRATOR GENERAL SERVICES ADMINISTRATION, APPELLANT

No. 81-1244

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

216 U.S. App. D.C. 17; 669 F.2d 815; 1981 U.S. App. LEXIS 15181

September 21, 1981, Argued
December 15, 1981, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Columbia; (CA No. 79-02955).

CORE TERMS: parking, energy, space, energy conservation, phase, contingency plan, directive, federal employees, federal agencies, contingency, regulation, circular, subsidy, sheet, government property, effective, gasoline, standby, legislative history, individual employees, prescribe, carrying, conserve, time limitation, energy-minded, implemented, directing, validly, Administrative Services Act, Public Buildings Amendments

COUNSEL: Kenneth M. Raisler, Asst. U. S. Atty., Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., Royce C. Lamberth, and David H. Shapiro, Asst. U. S. Attys., Washington, D. C., were on the brief for appellant.

Mitchell Jay Notis, Washington, D. C., with whom James R. Rosa, Washington, D. C., was on the brief for appellee American Federation of Government Employees.

John F. Bufe, Washington, D. C., with whom Robert M. Tobias, Washington, D. C., was on the brief for appellee National Treasury Employees Union.

JUDGES: Before ROBINSON, Chief Judge, ROBB and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

OPINIONBY: RUTH B. GINSBURG

OPINION: [*816]

In November 1979, the government began phasing out free employee parking on federal property. On the complaint of individual employees and unions representing federal workers, the district court, 510 F. Supp. 596, in March 1981, ordered a permanent stop to the parking charges. n1 The government asserted, and the district court assumed arguendo, that the President, and executive branch agencies acting [**2] at his direction, had authority to institute the parking charges under the Federal Property and Administrative Services Act (FPASA). n2 Nonetheless, the district court concluded that the energy conservation purpose the President sought to advance through the charges placed the plan under governance of newer legislation, the 1975 Energy Policy and Conservation Act (EPCA). n3 Concededly, the President had not proceeded as specified [*817] in that Act. n4 Therefore, the district court held the executive action unlawful.

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n1. On March 6, 1981, the district court denied the Administrator's motion for a stay of the injunction pending appeal. One week later, this court denied an emergency motion for a stay pending appeal. By further order, issued in May 1981, the district court directed restitution of all monies federal employees paid to the government as parking fees, but stayed restitutive payments pending this appeal.

n2. As amended by the Public Buildings Amendments of 1972, 40 U.S.C. §§ 471 et seq.

n3. 42 U.S.C. §§ 6201 et seq.

n4. The EPCA empowers the President to propose and transmit to Congress "energy conservation contingency plans" to reduce demands for energy. Such plans are short-term measures; they may remain in effect for an initial period of not more than nine months. The President's role is that of initiator; plans may become effective only if approved by a resolution of each House of Congress. 42 U.S.C. § 6261.

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We conclude that the parking charges were authorized by and validly imposed under the FPASA and that the EPCA does not subtract from authority the FPASA grants to the President. Accordingly, we reverse the district court's judgment and remand with instructions to enter judgment in favor of the Administrator. In this opinion, we set out first the chronology of relevant events; next, the bases for our determination that the FPASA authorizes the executive directives at issue here; and, finally, our reasons for concluding that the EPCA, which augments initiatives available to the President to promote energy conservation, does not truncate or displace pre-existing FPASA authority.

I. The President's Decision and Its Implementation

A. The parking issue paper: a multi-purpose proposal contained in an energy packet

On March 22, 1979, President Carter received from two of his Domestic Policy Staff aides a packet of materials under a cover sheet captioned "Energy Issues." One of the items in the packet was a four-page issue paper headed "Phase-out of Federal Parking Subsidies." The paper presented the following question for the President's decision: "Should parking subsidies for Federal [**4] employees be phased-out at locations where nongovernment workers typically pay commercial parking rates?" n5 Air quality, transportation policy, and energy conservation concerns were cited in support of eliminating the subsidies. The paper further stated that the estimated annual cost recovery to the government would be in the $ 31 to $ 47 million range. In addition, the paper pointed out that for those who drive alone, the annual before-tax subsidy could amount to $ 1,100 or more; employees in carpools reaped a much lower individual benefit; persons using mass transit or working for agencies that lacked parking facilities received no subsidy at all for the cost of the trip to work. As the principal reason against ending parking subsidies, the paper cited adverse effects on the morale of federal workers. A "conclusions and recommendations" section stated that the head of the Office of Management and Budget (OMB) considered the phase out "the right way to go"; it indicated the course on which OMB would proceed, commencing with distribution of a draft circular to federal agencies, if the President had no objection. The paper's final page set out Decision lines. The line facing [**5] "Agree. Issue draft circular." bears a checkmark and the President's initial. n6

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n5. In parentheses after the question this notation appears: "(The authority for implementing such action rests with OMB under GAO rulings involving Federal Property and Administrative Services Act.)."

n6. The paper indicates that supporters of the "Agree" position included the OMB, the Council of Economic Advisors, the Treasury Department, the Department of Energy, the Environmental Protection Agency, and the Council on Environmental Quality. The "Disagree. Take no action." position, the paper notes, was advanced by the Domestic Policy Staff.

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B. The President's energy address and accompanying fact sheet: a single-issue speech and a more detailed White House release

In an April 5, 1979 address to the nation on the country's serious and worsening energy problem, President Carter announced numerous actions, plans, and proposals to "move us away from imported oil and toward a future of real energy security." n7 [*818] [**6] One sentence in the list of measures the President announced concerned the parking subsidy phase out:

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n7. 15 Weekly Comp. of Pres.Doc. 609, 614 (April 5, 1979).

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> Steps will be taken to eliminate free parking for Government employees in order to reduce the waste of energy, particularly gasoline, in commuting to and from work.

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8. Id. at 613. It was entirely consistent with the single-issue context of the President's speech to identify only the energy-related reason for instituting parking charges.

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A fact sheet released simultaneously with the President's speech by the White House Press Secretary provided further detail on items mentioned in the address. "Phase out of Free Parking for Federal Employees" appears in the fact sheet under the main heading "Longer Term Conservation Activities." n9 The fact sheet stated that "(t)he President has directed the Office of Management and Budget to begin phasing out subsidized [**7] parking for federal employees." It further stated that fees for parking "are intended to encourage greater carpooling and use of mass transit for commuting, and to recover the $ 35-40 million in costs which are borne by the general taxpayer."

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n9. Fact Sheet on the President's Program, April 5, 1976, at 6. Earlier in the release, short-term energy saving measures were listed, first among these, a standby conservation plan on thermostat settings in nonresidential buildings for which the President sought congressional approval under the EPCA. For federal buildings, however, implementation did not await the Presidential Proclamation (4667 of July 10, 1979, 44 Fed.Reg. 40629) putting the standby plan into effect. As to those buildings, temperature restrictions the President ordered in directions to heads of executive agencies were declared "effective immediately." Id. at 1-2, 4. See also 15 Weekly Comp. of Pres.Doc. 647 (April 10, 1979).

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C. OMB's Circular and GSA's Regulation

The day following the President's [**8] address, OMB distributed to federal agencies and federal employee unions a draft of Circular No. A-118, establishing policy on federal employee parking charges. Published in final version on August 17, 1979, n10 the circular cited, in addition to an energy conservation purpose, concerns about air quality, traffic congestion, and equity among federal employees. The Federal Register preamble referred to the President's April 5, 1979 energy address and also identified the expected $ 35 to $ 40 million saving in public funds. As authority for the parking charges, the circular cited the FPASA, as amended (40 U.S.C. § 490), n11 and referred to a 1976 Comptroller General review of the matter (55 Comp.Gen. 897); n12 it next described the responsibilities of the General Services Administration (GSA), inter alia, to determine rates and issue implementing regulations. n13

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n10. 44 Fed.Reg. 48638 (1979).

n11. Id. at 48640. See note 29 infra.

n12. That review responded to a Veterans Administration (VA) inquiry concerning a federal agency's authority to charge employees for parking spaces. The Comptroller General stated, inter alia, that "40 U.S.C. § 490(k) authorizes VA to impose charges for employee parking if, but only if, rates therefor have been approved by GSA and OMB." While stating "it seems clear" under 40 U.S.C. § 490(j)-(k) that charges for employee parking could be imposed, the Comptroller General reported GSA's view that "if (a parking fee) policy is adopted, it should be applied on a uniform basis, without regard to the preference of a single agency." 55 Comp.Gen. 897, 900 (1976). [**9]

n13. 44 Fed.Reg. at 48640.

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On September 6, 1979, GSA issued Temporary Regulation D-65, prescribing policies and procedures for the assignment of federal employee parking spaces and the assessment of charges for the use of such spaces. n14 That regulation became effective November 1, 1979. Federal agencies, pursuant to OMB Circular No. A-118 and GSA Temporary Regulation D-65, started phasing in parking charges on or shortly after that date. n15 Some sixteen months later, [*819] free parking was restored by the district court order now before us on appeal. n16

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n14. 44 Fed.Reg. 53161 (1979).

n15. For the phase in period the charge was set at 50 percent of the GSA-established commercial rates. Complete exemption was provided where the comparable commercial rate was less than $ 10 per month. Id. at 53163.

n16. Prior to the district court's injunction, the total amount collected by executive branch agencies was approximately $ 20 million.

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II. The District Court's Analysis

Energy conservation was the paid parking plan's "raison d'etre," the district court declared, other reasons offered were "merely incidental." n17 The EPCA had granted the President standby authority, subject to congressional review, "to reduce demand for energy through the implementation of energy conservation (contingency) plans." n18 An "energy conservation contingency plan" is defined in the Act as "a plan which imposes reasonable restrictions on the public or private use of energy which are necessary to reduce energy consumption." n19 The paid parking plan "imposes restrictions on the use of energy and its purpose is to reduce energy consumption," n20 the district court stressed. Therefore, that court concluded, the plans falls squarely within EPCA territory. On this analysis, the district court reasoned, it was unnecessary to decide whether the parking plan "could have validly been implemented in reliance on the (FPASA) under any circumstances." n21 In the district court's view, the case turned on the "specific congressional command" in the EPCA "that energy conservation (contingency) plans could be implemented only after congressional review [**11] and with congressional concurrence." n22 That command, the district court believed, precluded the President from relying on more general authority: The President had ignored the EPCA and that meant the parking charge could not stand. n23

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n17. American Fed'n of Gov't Employees v. Freeman, 510 F. Supp. 596, 602 & n.17 (D.D.C.1981).

n18. 42 U.S.C. § 6201(1).

n19. 42 U.S.C. § 6262(a)(1).

n20. 510 F. Supp. at 602.

n21. Id.

n22. Id. at 605.

n23. In an earlier opinion denying the Administrator's motion to dismiss, filed September 25, 1980, the district court previewed its ultimate decision that the President's energy conservation purpose impelled classification of charges for employee parking as an EPCA "energy conservation contingency plan" which could become effective only after transmittal of the President's proposal to Congress and approval by both Houses pursuant to 42 U.S.C. § 6261.

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We do not perceive as clearly as did the district court that energy conservation eclipsed all [**12] other reasons for instituting parking charges. But even if we agreed that packaging the plan in an energy kit rendered air quality, cost recoupment, and other stated concerns "merely incidental," we would not conclude that the EPCA governed. The parking charge was not presented as a standby conservation plan for the short term, the kind of measure appropriate for the EPCA's "contingency plan" regime. Rather, it was put forward as a permanent fixture authorized by a law, the FPASA, that Congress had neither repealed nor revised. Because we do not read the EPCA as a statute encompassing the universe of energy-minded actions, n24 we must start with the inquiry the district court did not fully pursue: Was the parking charge authorized by and validly imposed under the FPASA?

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n24. Indeed, the EPCA itself recognizes the full force of the President's authority under "other law." 42 U.S.C. § 6361(a). But cf. 510 F. Supp. at 603-04 & n.26 (indicating, as did the earlier, September 25, 1980, district court opinion, a belief that energy-minded Presidential action could not be grounded in pre-EPCA executive authority; instead, in the district court's view, such action required compliance with the EPCA's procedures and limitations or new legislation).

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III. Fees for Employee Parking in Federal Facilities Were Validly Imposed Under Executive Authority Stipulated in the FPASA

The central question, as we view this case, is "whether or to what extent" the FPASA authorized the executive initiation of charges to individual federal employees for the use of federally owned parking spaces. See NAACP v. FPC, 425 U.S. 662, 665, 96 S. Ct. 1806, 1809, 48 L. Ed. 2d 284 [*820] (1976). n25 Section 486(a) of this Act provides:

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n25. The district court, because it viewed the EPCA as controlling, did not decide whether the FPASA permitted the free parking phase out. See 510 F. Supp. at 600-02. Appellee National Treasury Employees Union (NTEU) argues that, if this court should hold, as it does, that the EPCA does not apply to the parking plan, the proper course would be a remand to allow the district court to address this issue in the first instance. NTEU Brief at 34.

Although "(i)t is the general rule ... that a federal appellate court does not consider an issue not passed on below," Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826 (1976), "(t)he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Id. at 121, 96 S. Ct. at 2877. "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt...." Id. We believe this is such a case. All parties have fully addressed the question we consider central, both in this court and in the district court. "This is not a case, therefore, where resolution of an issue for the first time on appeal would cause undue surprise or prejudice." Grace v. Burger, 214 U.S. App. D.C. 375, 665 F.2d 1193, 1197 n.9 (D.C.Cir.1981). Since we find the resolution "beyond any doubt," we "believe that a remand to the District Court, which inevitably would result in a future appeal to this court, "would be a waste of judicial resources.' " Id. at 1197 n.9 (quoting United States v. Aulet, 618 F.2d 182, 186 (2d Cir. 1980)).

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> The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the (General Services) Administrator and executive agencies in carrying out their respective functions hereunder.

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26. Federal Property and Administrative Services Act of 1949, ch. 288, § 205(a), 63 Stat. 389, codified at 40 U.S.C. § 486(a). For discussion of the genesis of both the FPASA and this particular section, see AFL-CIO v. Kahn, 199 U.S. App. D.C. 300, 618 F.2d 784, 787-89 (D.C.Cir.) (en banc), cert. denied, 443 U.S. 915, 99 S. Ct. 3107, 61 L. Ed. 2d 879 (1979).

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The legitimacy under section 486(a) of President Carter's prescription of the free parking phase out, n27 implemented by OMB Circular No. A-118 and, in turn, GSA Temporary Regulation D-65, thus depends on whether the President acted "to effectuate the provisions" of the FPASA and, if he did, whether his action was "not inconsistent with" any specific provision of the Act. See AFL-CIO v. Kahn, supra, [**15] 618 F.2d at 788.

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n27. As detailed earlier, the President approved the parking plan, and steps to implement it, by initialing a position paper. See p. 817 supra. The district court did not decide "whether a Presidential speech or a checkmark on a memorandum was sufficient to delegate authority to OMB, or whether a more formal writing such as an **Executive Order** or proclamation was required." 510 F. Supp. at 600 n.11. Appellee American Federation of Government Employees (AFGE) argues that a more formal directive was required. AFGE Brief at 25 n.41. We disagree.

Our research has not revealed, and the parties have not cited, any relevant statute or judicial decision requiring the President, in a case such as this one, to act by **Executive Order** or any other formal proclamation. Many commands the President gives to his subordinates are verbal; only a fraction of his directives appear in the Federal Register. See Fleishman & Aufses, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Prob. 1, 7 (Summer 1976). Presidential action has been taken simply by writing "approved" or "Let it be done" at the end of a recommendation drawn by a subordinate. Senate Special Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., **Executive Orders:** A Brief History of Their Use and the President's Power to Issue Them 2 (Comm. Print 1977). Indeed, the Federal Register Act, 44 U.S.C. § 1505(a)(1), expressly excludes from its publication requirement those Presidential directives, as in the instant case, which are "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof." (The memorandum from the President to agency heads mandating temperature restrictions in federal buildings, see note 9 supra, is a further example of a Presidential action taken without the formality of an **Executive Order.**) Nor does section 486(a) limit Presidential action taken thereunder to "**Executive Orders.**" It simply states that the President may prescribe "policies and directives."

Finally, no party can claim lack of notice of the inauguration of the parking fee program. Temporary Regulation D-65 was published in the Federal Register. See 44 Fed.Reg. 53161 (1979). In effect, the Presidential action at issue provided the stimulus that provoked promulgation of this Regulation.

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[*821] The provisions of the FPASA are effectuated if the executive action in question assists "the Government (in obtaining) an economical and efficient system for ... the utilization of available property." n28 We believe it evident that the free parking phase out fits this description. The phase out would allow the government to recover annually an amount estimated to exceed $ 30 million. This cost recovery consideration was cited in the parking issue paper that elicited the President's action. In short, we find it inescapably obvious that the institution of parking charges would, indeed, assist the government in utilizing its property efficiently and economically.

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n28. FPASA of 1949, ch. 288, § 2, 63 Stat. 378, codified at **40 U.S.C. § 471.** Cf. AFL-CIO v. Kahn, supra, 618 F.2d at 788; Liberty Mutual Ins. Co. v. Friedman, 639 F.2d 164, 169 (4th Cir. 1981) (FPASA sets forth goal of economical and efficient system for procurement and supply).

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Appellees do not suggest that cost recovery or elimination [**17] of a benefit spread unevenly among federal employees falls beyond the pale of section 486(a). They emphasize, however, the energy conservation concern announced in support of the parking charge. The parking issue paper mentioned in addition other national goals not directly linked to economy and **efficiency** in government property management-cleaner air and reduced traffic congestion. We cannot agree that an exercise of section 486(a) authority becomes illegitimate if, in design and operation, the President's prescription, in addition to promoting economy and **efficiency,** serves other, not impermissible, ends as well. Our position in this regard is informed by notable precedent. See, e.g., AFL-CIO v. Kahn, supra, 618 F.2d at 792-93 (additional goal of slowing inflation in the economy as a whole); Contractors Association v. Secretary of Labor, 442 F.2d 159, 171 (3d Cir.) (additional goal of promoting enhanced employment opportunities for minorities), cert. denied, 404 U.S. 854, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971); Farmer v. Philadelphia Electric Co., 329 F.2d 3, 8 (3d Cir. 1964) (additional goal of checking racial discrimination).

Appellees further urge that even if the parking [**18] charge was intended to and would in fact effectuate the general provisions of the FPASA relating to economical and efficient utilization of government property, the action at issue is nonetheless invalid because it is inconsistent with specific provisions of the Act. For this argument, appellees rely on sections 490(j) and (k) of the FPASA. n29 These sections, they contend, confer authority to impose space occupancy charges directly upon the Administrator of GSA and executive agencies. According to appellees, any command emanating from the President imposing space-occupancy charges, directing the Administrator to do so, or delegating authority in the premises to OMB would be inconsistent with the [*822] statutory provisions explicitly authorizing action by "the Administrator" and by an "executive agency."

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n29. 40 U.S.C. § 490 provides in relevant part:

> (j) The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services, except that with respect to those buildings for which the Administrator of General Services is responsible for alterations only (as the term "alter" is defined in section 612(5) of this title), the rates charged the occupant for such services shall be fixed by the Administrator so as to recover only the approximate applicable cost incurred by him in providing such alterations. The Administrator may exempt anyone from the charges required by this subsection if he determines that such charges would be infeasible or impractical. To the extent any such exemption is granted, appropriations to the General Services Administration are authorized to reimburse the fund for any loss of revenue.
>
> (k) Any executive agency, other than the General Services Administration, which provides to anyone space and services set forth in subsection (j) of this section, is authorized to charge the occupant for such space and services at rates approved by the Administrator. Moneys derived by such executive agency from such rates or fees shall be credited to the appropriation or fund initially charged for providing the service, except that amounts which are in excess of actual operating and maintenance costs of providing the service shall be credited to miscellaneous receipts unless otherwise authorized by law.

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We find this argument unpersuasive. The plain language of section 486(a) states that policies and directives the President prescribes "shall govern the Administrator and executive agencies in carrying out their respective functions hereunder." The legislative history of the FPASA, moreover, confirms that Congress intended section 486(a) to clarify that "Presidential policies and directives shall govern-not merely guide-not only the Administrator but all executive agencies in carrying out these property-management functions." n30 Sections 490(j) and (k), it is true, state what the Administrator and an executive agency are authorized to do. But section 486(a) assigns to the President the lead role. Pursuant to that provision, the President has clear authority to direct the Administrator and executive agencies "in carrying out their respective functions" under specific FPASA provisions, including sections 490(j) and (k). Thus we find nothing "inconsistent with the provisions of (the FPASA)" in a directive by the President that requires the Administrator and agency heads to install n31 a system for collection of parking fees from individuals. n32

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n30. 95 Cong.Rec. 7441 (1949) (remarks of Rep. Holifield). See also H.R.Rep. No. 670, 81st Cong., 1st Sess. 17 (1949); S.Rep. No. 475, 81st Cong., 1st Sess. 3, 19 (1949). Representative Holifield, the House sponsor of the FPASA, further stated, "Here we have established, therefore, a clear-cut line of authority running directly from the President and involving a very close working relationship between the President and the Administrator." 95 Cong.Rec. 7441. [**20]

n31. The district court raised, without deciding, the question whether initiation of a fee was timely under sections 490(j) and (k) of the FPASA. See 510 F. Supp. at 600-01 n.13. Section 11 of the Public Buildings Amendments of 1972, 40 U.S.C. § 603 note, states that

> (t)he effective date of applying the rates to be charged pursuant to the regulations to be issued under subsections (j) and (k) (of section 490) shall be determined by the Administrator of General Services but in any event shall not be later than the beginning of the third full fiscal year subsequent to the enactment (of the Public Buildings Amendments of 1972).

Appellee NTEU, relying upon this provision, argues that any action taken by the Administrator pursuant to section 490 subsequent to 1975 is untimely. NTEU Brief at 37.

The government responds that the time limitations should be read to apply only to charges against the agencies because Congress wished to avoid undue delay in putting in place a system under which agencies would be required to account for the space they use. The time limitation would be divorced from its function, the government urges, if it were read to apply to the pass on of charges by the agencies. Despite the language of the statutory note, which refers expressly to section 490(k) as well as section 490(j), the government's position comports with the probable intent of Congress in stipulating a time limitation. The legislative history suggests that the time directive was included solely to speed the process of rendering agencies accountable for the space they use:

> While Section (11), the last section, makes the legislation effective upon enactment, it recognizes the necessity for postponing the effective date of the user charges for a reasonable period after enactment to accommodate the budgetary process.

Letter from Harry S. Trimmer, Jr., Assistant Administrator of GSA, to Carl Albert (August 4, 1971), reprinted in H.R.Rep. No. 989, 92d Cong., 2d Sess. 14 (1972). This statement indicates that Congress recognized some delay was unavoidable, but sought to insure that accommodation to the budgeting process would not take more than three years. We would be loath to ascribe to Congress a purpose to allow anyone, including an agency, to escape the obligation to account for space used simply because the Administrator failed to act within the three year time limitation. Cf. Church of the Holy Trinity v. United States, 143 U.S. 457, 472, 12 S. Ct. 511, 516, 36 L. Ed. 226 (1892).

However, in view of our position that the free parking phase out was validly initiated by the President pursuant to section 486(a), which has no time limitation, rather than section 490, we need not definitively resolve this issue. [**21]

n32. Appellee NTEU argues that "nothing on the face of Sections 490(j) and (k), or in the legislative history, indicates that Congress intended that GSA or Federal agencies would charge individual employees who park on government-owned parking lots. The statutory language and its history speak only in terms of charging the agencies." NTEU Brief at 36. See also 510 F. Supp. at 600 n.12. In light of our holding, NTEU's argument amounts to an assertion that Presidential action under section 486(a), directing that individual employees be charged, is inconsistent with section 490, and is therefore invalid. Even if we agreed with NTEU's premise concerning what appears "on the face" of the legislation, we would question the strained reading NTEU gives to the "not inconsistent with" proviso of section 486(a).

But we cannot accept NTEU's premise. The statute provides that "anyone," see note 29 supra, a term which ordinarily would include individuals, is subject to a charge for space use. Additionally, the legislative history does not bear out NTEU's position. The Senate version of section 490(k) would have allowed agencies, which provide space to other agencies, to charge only those other "agencies" for such space. See S.Rep. No. 412, 92d Cong., 1st Sess. 10 (1971). The House version, on the other hand, which was adopted at conference, allowed an agency to charge "anyone" provided space by the agency. H.R.Rep. No. 1097, 92d Cong., 2d Sess. 12 (1972). In view of this language change, we are unable to read section 490(k) as disallowing a charge to individual employees for the parking spaces they use. See also 55 Comp.Gen. 897, 899-900 (1976).

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[*823] Finally, even in the absence of a clear statutory provision establishing a governing role for the President, we would not conclude that Congress, simply by assigning a function to an executive agency, thereby intended to exclude initiating action by the President. As this court has had recent occasion to observe, "Within the range of choice allowed by statute, the President may direct his subordinates' choices." National Federation of Federal Employees, Local 1622 v. Brown, 207 U.S. App. D.C. 92, 645 F.2d 1017, 1022 (D.C.Cir.1981). See also National Treasury Employees Union v. Reagan, 214 U.S. App. D.C. 62, 663 F.2d 239, 248 (D.C.Cir.1981); Sierra Club v. Costle, 211 U.S. App. D.C. 336, 657 F.2d 298, 406 & n.524 (D.C.Cir.1981). n33

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n33. While a statutory provision assigning a function to an executive agency or officer ordinarily does not signal preclusion of a directing role for the President, "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." Myers v. United States, 272 U.S. 52, 135, 47 S. Ct. 21, 31, 71 L. Ed. 160 (1926). However, nothing in the text or the legislative history of the FPASA leads us to conclude that section 490 "so peculiarly and specifically committed" discretion to the Administrator as to make the instant exercise of section 486(a) Presidential authority "inconsistent with the provisions" of section 490.

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In sum, President Carter directed executive action-the phase out of free parking for federal employees-mindful of and fully compatible with the design of the FPASA to promote economy and **efficiency** in the utilization of government property. His authority to direct the phase out is securely established by section 486(a) n34 and no other provision of the Act is inconsistent with the action he commanded.

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n34. Because we conclude that the free parking phase out was authorized by section 486(a), we do not reach the question whether, as the government contends, President Carter's action draws independent support from the Take Care Clause of article II, section 3 of the Constitution.

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IV. The President's Authority to Direct the Phase Out of Free Parking for Federal Employees Is Not Eliminated or Diminished by the EPCA

In the FPASA, Congress established a governing role for the President in setting policy and directing federal agencies regarding the procurement and management of government property. We have concluded [**24] that the phase out of free parking for federal employees, as determined by the President and implemented by OMB and GSA, falls comfortably within the property management executive authority conferred by section 486(a) of the FPASA. We now turn to the question whether Congress, when it enacted the EPCA, sub silentio withdrew or qualified the authority granted to the President under the FPASA.

As appellees acknowledge, the EPCA empowers the President "to respond quickly to energy supply interruptions or other energy crises." n35 It arms the President with new authority to initiate "contingency plans" for energy conservation in urgent circumstances. n36 But this novel authority [*824] is subject to controls. First, and perhaps principally indicative of the crises character of the executive initiatives Congress envisioned, contingency plans may not run beyond nine months. n37 Second, while Congress must respond to the President's initiatives expeditiously (within 60 days of transmittal), n38 approval resolutions of both Houses are prerequisite to implementation of a contingency plan. n39 Third, certain measures may not be taken under the extraordinary EPCA contingency plan initiation [**25] and approval procedure. The President may not prescribe in a contingency plan "rationing or any tax, tariff, or user fee." n40 Nor may he propose in this manner "any provision respecting the price of petroleum products," or "provide for a credit or deduction in computing any tax." n41 New law in these areas, even for a short term, must be made through the regular legislative process. The EPCA's contingency plan provisions thus guardedly augment the President's power. We cannot read into the Act's qualified, crisis-focused grant of extraordinary power n42 any intention to terminate or modify authority Congress earlier had accorded the President. n43

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n35. NTEU Brief at 28.

n36. See S.Rep. No. 26, 94th Cong., 1st Sess. 22 (1975) (bill "provides the authority to deal with situations created by severe energy shortages"); H.R.Rep. No. 340, 94th Cong., 1st Sess. 1 (1975), U.S.Code Cong. & Admin.News 1975, p. 1762.

n37. 42 U.S.C. § 6261(a)(1).

The finding specified in 42 U.S.C. § 6261(b)(3), "that putting such contingency plan into effect is required by a severe energy supply interruption or in order to fulfill obligations of the United States under the international energy program," must be made anew at the end of each nine month period to continue a contingency plan in effect. Such a renewed finding was made by President Carter when he sought continuation of the Emergency Building Temperature Restrictions, see note 47 infra, beyond the original nine-month period. See Pres.Proc. No. 4750, 45 Fed.Reg. 26019 (1980). [**26]

n38. 42 U.S.C. § 6422(b)(1).

n39. 42 U.S.C. § 6261(b)(2).

n40. 42 U.S.C. § 6262(a)(2). In response to the Administrator's argument that a parking charge is a "user fee" to which the EPCA has no application, the district court said the characterization question need not be decided: "(I)f the charges are not user fees, then the paid parking plan is an "energy conservation contingency plan,' and compliance with the EPCA procedures for expedited congressional review was required. If the charges do constitute user fees, then new legislation was required to authorize their imposition for conservation purposes." 510 F. Supp. at 604 n.26. That analysis is consistent with the district court's apparent view that the executive may not act to conserve energy unless the action is taken under the EPCA or pursuant to specific energy-minded legislation enacted thereafter. For the reasons indicated in this opinion, we reject that expansive interpretation of the EPCA's province.

n41. 42 U.S.C. § 6262(a)(2).

n42. See S.Rep. No. 26, supra note 36, at 22, 25; H.R.Rep. No. 340, supra note 36, at 1, 22; 121 Cong.Rec. 22744 (1975) (remarks of Rep. Dingell, House manager of the EPCA) ("Extraordinary powers, subject to congressional review, have been included which would authorize the President to impose mandatory energy conservation plans and a gasoline rationing plan under narrowly defined circumstances."); id. at 41041 (remarks of Sen. Hartke) (bill "establishes standby energy authorities to allow the President to deal with emergency situations"); id. at 9157 (remarks of Sen. Bumpers); id. at 22742 (remarks of Rep. Wirth); Letter from Frank Zarb, FEA Administrator, to Rep. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce (June 16, 1975), reprinted in H.R.Rep. No. 340, supra note 36, at 113 ("these authorities are intended only to provide this country the means whereby we might cope with another acute emergency such as last year's embargo"). The extraordinary nature of the power the EPCA grants to the President is further indicated by the statute's subheadings. Contingency plan provisions appear in Subchapter II, Part A of the Act; Subchapter II is headed "Standby Energy Authorities," Part A is titled "General Emergency Authorities." [**27]

n43. Cf. Udall v. Littell, 125 U.S. App. D.C. 89, 366 F.2d 668, 673-74 (D.C.Cir.1966) (specific statutory provision addressed to particularly identified problem "does not by itself indicate the Executive Branch lacks authority to act under other (earlier enacted) statutory provisions").

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[*825] Our view that the EPCA does not subtract from authority that other legislation, including the FPASA, confers is buttressed by references in the text of the Act. Signalling that the EPCA does not repeal other laws by sweeping within its governance all federal attempts to curtail prodigal use of energy, the Act calls upon the President to exercise his authority "under other law" to develop standards with respect to energy **efficiency** in Government procurement policies and decisions. n44 It further instructs the President, "to the extent of his authority under other law," to implement a long-range (10-year) plan for energy conservation in buildings owned or leased by federal agencies. n45

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n44. 42 U.S.C. § 6361(a)(1). [**28]

n45. 42 U.S.C. § 6361(a)(2).

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Appellees call to our attention the President's resort to the EPCA to gain approval from Congress for two of the energy programs listed in the White House fact sheet released at the time of the President's April 5, 1979 energy address. n46 Formal EPCA contingency plans were presented to Congress for building temperature restrictions n47 and mandatory weekend closing of gasoline stations. n48 If these programs were subject to the EPCA, appellees reason, then the parking program listed in the very same fact sheet was equally subject to that Act's regime. n49 The flaw in this reasoning is apparent. No "other law" n50 authorized the President to impose thermostat controls in nonpublic buildings. n51 Nor did any "other law" provide for the closing of privately owned gasoline stations by federal command.

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n46. See note 9 supra.

n47. Emergency Building Temperature Restrictions (Standby Conservation Plan No. 2), reprinted in Notice of Final Energy Conservation Contingency Plans, 44 Fed.Reg. 12906, 12911-14 (1979) (applicable to all nonresidential buildings (except healthcare facilities) in the private and public sector). [**29]

n48. Emergency Weekend Gasoline Sales Restrictions (Standby Conservation Plan No. 1), reprinted in Notice of Final Energy Conservation Contingency Plans, supra note 47, 44 Fed.Reg. at 12907-11 (owner of retail filling station may not sell or otherwise transfer gasoline or diesel fuel during restricted hours).

n49. See NTEU Brief at 31.

n50. Cf. 42 U.S.C. § 6361(a).

n51. The "contingency plan" on thermostat controls approved by Congress under the EPCA covered public as well as private nonresidential buildings. However, authority for imposing controls in federal buildings was not dependent upon the EPCA. See note 9 supra. Appellees acknowledge executive authority, at least in GSA, "to conserve energy, e.g., in relation to the heating of government buildings," and do not suggest such conservation must abide compliance with the EPCA's congressional approval procedure. See AFGE Brief at 40.

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To summarize, we reject the notion that all "Presidential actions attempting to conserve energy must be taken pursuant to the EPCA." n52 Rather, we believe the EPCA contingency plan provisions [**30] on which appellees rely must be invoked only in situations not provided for in other laws. The executive action taken here is covered by another law, the FPASA. Consistent with the lead role the FPASA reserves for the Chief Executive in government property management, the President directed executive agencies subject to his supervision to impose fees for parking spaces furnished to federal employees. One of the stated purposes for that direction was cost recovery, and there is no doubt that the measure in fact serves a genuine interest in thrifty management of government facilities. The program is not rendered unlawful because it was billed as an energy-minded measure and in fact may work to conserve energy. We decline to convert a law designed to enhance the President's power to act in energy crises into an instrument to shear the Chief Executive's authority under other [*826] legislation. Since the district court judgment has that effect, we reverse that judgment n53 and remand with instructions to enter judgment in favor of the Administrator.

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n52. AFGE Brief at 30.

n53. The government has not requested that we authorize collection of fees from individuals for the period the district court's injunction was in effect, although it has reserved its rights to seek such relief. See Joint Appendix at 102 P 2B. Without deciding the question, we note that restitution upon the reversal of a judgment, like restitution generally, is not automatic. Rather, it "rest(s) in the exercise of a sound discretion," and may be denied "where the justice of the case does not call for it." Atlantic Coast Line R.R. v. Florida, 295 U.S. 301, 310, 55 S. Ct. 713, 717, 79 L. Ed. 1451 (1935) (Cardozo, J.) (quoting Gould v. McFall, 118 Pa. 455, 456, 12 A. 336, 337 (1888)). Accord, Democratic Central Comm. v. Washington Metropolitan Area Transit Comm'n, 158 U.S. App. D.C. 7, 485 F.2d 786, 825 (D.C.Cir.1973), cert. denied, 415 U.S. 935, 94 S. Ct. 1451, 39 L. Ed. 2d 493 (1974); Williams v. Washington Metropolitan Area Transit Comm'n, 134 U.S. App. D.C. 342, 415 F.2d 922, 944 (D.C.Cir.1968) (en banc), cert. denied, 393 U.S. 1081, 89 S. Ct. 860, 21 L. Ed. 2d 773 (1969); Restatement of Restitution § 74 & comment c (1937).

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It is so ordered.

A AFGE v. CARMEN, 216 U.S. App. D.C. 17

Source: All Sources : Federal Legal - U.S. : **Federal Cases, Combined Courts**
Terms: **"executive order" and "40 usc section 471" and efficiency** (Edit Search)
View: Full
Date/Time: Friday, November 19, 1999 - 12:40 PM EST

157 U.S. App. D.C. 381 printed in FULL format.

NORTHEAST CONSTRUCTION COMPANY v. GEORGE ROMNEY, SECRETARY OF HOUSING AND URBAN DEVELOPMENT and ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES; BIRD ASSOCIATES, INC., APPELLANT; NORTHEAST CONSTRUCTION COMPANY v. GEORGE ROMNEY, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.; BIRD ASSOCIATES, INC., APPELLANT; NORTHEAST CONSTRUCTION COMPANY v. GEORGE ROMNEY, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., APPELLANTS, BIRD ASSOCIATES, INC.

Nos. 71-1650, 71-1891, 71-1893

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

157 U.S. App. D.C. 381; 485 F.2d 752; 1973 U.S. App. LEXIS 11309; 6 Fair Empl. Prac. Cas. (BNA) 119; 5 Fair Empl. Prac. Cas. (BNA) 746; 6 Empl. Prac. Dec. (CCH) P8784; 5 Empl. Prac. Dec. (CCH) P8495

March 6, 1973, Decided

SUBSEQUENT HISTORY: [**1]

Petition for Rehearing Denied June 6, 1973.

DISPOSITION: Reversed.

CORE TERMS: bid, bidder, procurement, regulation, contractor, informality, invitation, contracting, appendix, responsiveness, irregularity, utilization, designated, manpower, omission, responsive, correction, hiring, preliminary injunction, small business, set forth, immaterial, workmen, number of employees, affirmative action, supplied, blanks, opened, waive, inconsequential

COUNSEL: Roger K. Zuker, with whom Gary R. Alexander, was on the brief, for Appellant in Nos. 71-1650 and 71-1891.

Eloise E. Davies, Attorney, Department of Justice, with whom L. Patrick Gray, III, Assistant Attorney General at the time the brief was filed, Harold H. Titus, Jr., United States Attorney, and Alan S. Rosenthal, Attorney, Department of Justice, were on the brief, for Appellants in No. 71-1893. Thomas A. Flannery, United States Attorney at the time the record was filed and Morton Hollander, Attorney, Department of Justice, also entered appearances for Appellants in No. 71-1893.

Abraham J. Harris, for Appellee.

JUDGES: Bazelon, Chief Judge, Tamm and Leventhal, Circuit Judges. Bazelon, Chief Judge, dissenting.

OPINIONBY: LEVENTHAL

OPINION: [*753] LEVENTHAL, Circuit Judge:

This appeal is from a preliminary injunction enjoining the Secretary of Housing and Urban Development (HUD) from awarding a contract, for the rehabilitation of certain public housing units in the Anacostia section of Washington, D.C., to anyone other than [*754] the plaintiff, Northeast Construction Company. n1 We reverse.

n1 The District Court issued a preliminary injunction on June 22, 1971. The Government moved for reconsideration. On August 23, 1971, following a hearing at which intervenor Bird Associates Inc., also an appellant, was also heard, the court continued the injunction in full force and effect. It is from that order that the Secretary on September 28, 1971, took an appeal. Bird has also taken an appeal.

[**2]

I. Material Facts; and District Court's Order

The invitation for bids issued in January 1971 incorporated the provisions of the "Washington Plan," which requires a prospective contractor to complete an "Appendix A" specifying his estimated total employment under the contract in designated trades over a four year period and the percentage of minority group employees to be included ("minority" being Negro, Spanish surname American, Oriental and American Indian), within prescribed ranges established by the Secretary of Labor. The execution of Appendix A, or its equivalent, is made prerequisite to eligibility for a contract award for federal construction projects costing in excess of $500,000 by an order promulgated by the Secretary of Labor on June 1, 1970, implementing Executive Order 11246, as amended, requiring equal employment opportunity by federal contractors. n2

n2 The plan in its entirety is included in the Code of Federal Regulations at 41 C.F.R. § 60-5 (A. 315-22); a model appendix similar to that provided by HUD to the bidders in this case is found at 41 C.F.R. § 60-5.30. Executive Order 11246, as amended, is included in *30 F.R. 12319 (1965), 32 F.R. 14303 (1967),* and *34 F.R. 12985 (1969).*

[**3]

When the bids were opened on March 11, 1971, the two low bidders were found to be Northeast with a bid of $1,047,500 and Bird Associates, with a bid of $1,094,645. The plaintiff was thus the low bidder by $47,145. However, upon examining Northeast's bid, HUD's contracting officer noted that the company had failed to supply its goals for minority manpower employment in Appendix A. When the omission was called to the attention of Northeast's president, who was present at the opening, he pointed out that he had signed the Appendix in the two places provided thereon for signature. n3 He stated that, by signing Appendix A on its 4th and 12th pages, he had thereby intended to commit himself to employ at least the minimum percentage of minority workmen specified by the Government. n4 Two days later, by letter to the Government he reduced this oral commitment to writing. On April 6, 1971, HUD advised Northeast that it was ineligible for the contract award, since its bid was not deemed responsive to the bid invitation.

n3 The first part of Appendix A is a "Notice of Requirement for Submission of Affirmative Action Plan to Ensure Equal Employment Opportunity." This part provides spaces where a bidder may insert his goals for minority manpower utilization in designated working trades during the term of his performance of the contract "in conformity with the Requirements, Terms and Conditions of this Appendix A hereinafter set forth." App. 21. The "Requirements, Terms and Conditions" are contained in and comprises the second part of Appendix A. App. 24-32. On the sixth and seventh pages of Appendix A the Requirements, Terms and Conditions set out the percentage ranges within which contractors' goals for minority employment in the designated trades are to be set.

[**4]

n4 While the Government disputes whether this oral statement was made, its position on appeal is that this is immaterial since an oral commitment would not cure a defect in the bid.

Northeast immediately protested the rejection to the Comptroller General. On June 7, 1971, the Comptroller General advised Northeast that its failure to submit specific goals for minority manpower utilization made it ineligible for the contract award.

The Comptroller General noted that the invitation in terms expressly requires that the bid as filed contain a [*755] completed Appendix A, with specific goals for minority manpower utilization, n5 and even provides blanks to be filled out by the bidder, by trade and time period. He concluded that under 41 C.F.R. § 1-2.405, n6 this omission was not a deviation that could be waived or corrected.

n5 See Comptroller General's ruling B-172581, p. 3:

Section 1 of Appendix A states:

"* * * unless the bidder completes and submits, prior to bid opening, this document designated as Appendix A * * * which shall include specific goals of minority manpower utilization for each trade designated below * * * during the term of his performance of the contract, such goals to be established * * * at least within the ranges established by this Appendix * * *.

* * *

"A bidder who fails or refused to complete or submit such goals shall not be deemed a responsive bidder and may not be awarded the contract * * *. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract.

"To be eligible for award, each bidder will be required to comply with this Appendix for the hereinbefore designated trades to be used during the term of the performance f he contract * * *." (Emphasis supplied.)

In addition, paragraph 2 of amendment No. 1 states:

"* * * Bidder is cautioned to complete Appendix A as required therein and return the completed Appendix A with the bid. Failure to do so shall cause the bid to be rejected as nonresponsive." (Emphasis supplied.)

In view of the above, and as set forth below, we do not agree that a failure to submit specific goals for minority manpower utilization is a deviation which can be waived or corrected.

[**5]

n6 41 C.F.R. 1-2.405 permits a contracting officer to waive or permit correction of "a minor informality or irregularity . . . which is merely a matter of form and not of substance . . . pertain[ing] to some immaterial or unconsequential defect or variation of a bid. . . ."

On June 10, HUD sent a notice of intent to award the contract to Bird Associates. On the following day, Northeast filed this action, naming as defendants both the Secretary and the Comptroller General.

The District Court granted a preliminary injunction on June 21, 1971, stating:

The Court does not agree that plaintiff's bid was not responsive. The signatures of plaintiff's president on Appendix A was sufficient to bind it to employ the minimum percentage of minority workmen. The failure to copy these figures in the blanks provided was at most a minor irregularity covered by the provisions of 41 C.F.R. § 1-2.405, which allows for their correction. It should be noted in this context that the requirement that bids be responsive and that no modifications are allowed after opening is to protect the integrity of the [**6] bidding system. It is to prevent a bidder from gaining an unfair advantage over other bidders by altering or withdrawing his proposal after other bids have been revealed. Exceptions to the strict responsiveness rule are allowed so that the government can accept advantageous bids that deviate only in minor detail, such as in form. Here plaintiff's bid was non-responsive only in the form in which it indicated that it intended to employ at least the specified minimum percentages of minority workers.

In a Memorandum opinion of August 23, 1971, denying reconsideration, Judge Gasch stated:

The Court notes that Appendix A does contain a specific requirement that the blanks be filled out. The Court also notes that Appendix A specifically permits a bidder to adopt his own form for replying to the requirements of Appendix A, requiring only that it be "substantially similar." The Court concludes that if a contractor agrees to make a good faith effort to commit himself to the minimum range of percentages indicated in [*756] Appendix A that he has thereby substantially complied with the requirements of Appendix A. n1

n1 The requirements of Appendix A are flexible in that good faith effort only is specified. Also a percentage range is provided. The obvious purpose of Appendix A is to encourage the employment of minority workmen. Where the sizes of the categories composing the actual work force are the subjects merely of estimates, the Government's requirement that the contractor apply a range of percentages to that estimated figure seems to be nothing more than an estimate on an estimate. By committing itself to employ the specified percentage of minority workmen, the low bidder, Northeast, is in practical effect every bit as committed as the second low bidder Bird, which has filed out the range of percentages on a yet unknown work force.

[**7]

* * *

Since Northeast committed itself both orally and in writing to employ the specified minimum range of minority group workmen, the Court interprets this as substantial compliance with the provisions of Appendix A. It is also noted that Northeast's bid was the first bid opened and that Northeast's oral commitment was received before the opening of any other bids. Its written commitment was received a day or so later and in view of the provisions respecting the correction of minor errors heretofore noted in the Code of Federal Regulations, 41 C.F.R. 1-2.405, the Government should have permitted the low bidder to make the corrections indicated in his written communication, even if it was unwilling to accept the oral representation to that effect.

* * *

The Court concludes that absent substantial reasons to the contrary, a low bidder is entitled to the award. There was no rational basis for concluding that a contractor who committed his organization to the requirements of Appendix A and who was the low bidder by approximately $47,000 was not entitled to this award. To rule otherwise under these circumstances was to act arbitrarily and capriciously.

We conclude [**8] that the preliminary injunction should be reversed. We are mindful of the broad latitude and discretion vested in the trial court, and do not predicate our reversal on any difference of approach as to such matters as its finding that plaintiff was threatened with irreparable injury, and that grant of injunctive relief is responsive to the balancing of the equities and conveniences of all parties. But a preliminary injunction must be reversed even where no abuse of discretion exists as to such matters, when the trial court has proceeded upon a premise as to the rule of law which the appellate court deems erroneous. n7 We conclude that underlying the District Court's conclusion of law, that plaintiff is likely to succeed on the merits, is an erroneous legal premise that requires reversal.

n7 *Delaware and Hudson Ry. Co. v. United Transportation Union, 146 U.S.App.D.C. 142, 158, 450 F.2d 603, 619,* cert. denied *403 U.S. 911, 29 L. Ed. 2d 689, 91 S. Ct. 2209 (1971).*

II. Pertinent Principles

1. The District [**9] Court's memorandum adverts to certain matters that, on reflection, we find to be not material. We refer, for example, to the fact that plaintiff's bid was opened first. If it was sufficient in law as a bid, it would make no difference whether it were opened first or last, and counsel for plaintiff-appellee agreed, when pressed at oral argument.

2. Similarly, as to the statements of plaintiff's representatives, at the bid opening and later in writing, that its intention in signing Appendix A was to commit plaintiff to hire the minimums in the range of percentages set forth in Appendix A. The question is, at best, the effect of the bid as signed and submitted. Certainly if it did not bind plaintiff, the later statements could not cure the omission. The effect of such [*757] an approach would be to permit a bidder who repented his bid -- perhaps on seeing that his bid was too far below the next bidder to be economically sound -- to step away from the matter by simply failing to supply the omission.

3. A legal question arose whether a contractor who omitted the specific goals had bound himself, whether he might successfully argue that he had failed to complete the indispensable [**10] prerequisite for any commitment; that the contract document must be construed strictly against the party who prepared it [the Government], and as prepared the document did not provide for a commitment in the absence of insertion of specific goals. n8

n8 Appendix A says "The following are hereby submitted by the undersigned bidder as its goals for minority manpower utilization . . . to be achieved on all work of the bidder within the Washington, D.C. . . . Area during the terms of his performance of this contract in the trades specified below in conformity with the Requirements, Terms and Conditions of this Appendix A hereinafter set forth." And those Terms say: "The contractor's . . . goals established within the above ranges shall express the contractor's . . . commitment of the percentage of minority personnel who will be working in each specified craft. . . ."

Is the procurement officer required to resolve this legal question, which at the very least the wording of the Appendix sought to avoid? Even if [**11] he projected as probable that a Federal court would ultimately rule, as Judge Gasch did, that there was such a commitment, is the procurement officer required to buy a lawsuit? n9 Is not the Government's interest in this commitment important enough to require it in the bid, as filed, in the form of specific goals, without any question as to supplementation, and without any if, ands, or buts?

n9 The contention that there was no "commitment" in a bid with omissions, might well gain legal force from a favorable factual setting, if the contractor's Federal work had sufficient minority employment, but a breach was claimed in that his other work going on at the same time did not have sufficient minority employment, and all this was sought to be made the basis of, say a debarment from further Government contracts.

4. The problem thus far discussed supports the reasonableness of the procurement officer's rejection of the bid. There must also be taken into account that this is not a case where the requirements of the [**12] bid in question were initiated by the authorities handling the procurement, or even by their agency. These provisions were mandated by the Secretary of Labor. The paragraph incorporating Appendix A into the IFB states that the appendix "stipulates Contractor responsibilities under government requirements for affirmative action to assure compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally involved Construction Contracts."

Appendix A is substantially the same as the contents of the Washington Plan, adopted by the Secretary of Labor, and published in the Federal Register for December 22, 1970, *35 F.R. 19352* ff; see 41 C.F.R. § 60-5.1 et seq. This is an order by the Secretary of Labor, which provides, 40 C.F.R. § 60-5.21:

"Sec. 60-5.21 Order.

After full consideration and in view of the foregoing it is:

(a) Ordered:

(1) That no contracts or subcontracts shall be awarded for Federal and federally-assisted construction in the Washington, D.C., Standard Metropolitan Statistical Area on projects whose estimated cost exceeds $500,000 unless the bidder completes and submits, prior to bid opening, the document identified as [**13] Appendix A, Notice of Requirement for Submission of Affirmative Action Plan to Ensure Equal Employment Opportunity or a substantially similar document, which shall include specific goals of minority manpower utilization for each trade designated below which will be used by the contractor on all of his work within the Washington, D.C. Standard [*758] Metropolitan Statistical Area during the term of his performance of the contract, such goals to be established by the contractor at least within the ranges established by these rules.

(2) A bidder who fails or refuses to complete or submit such goals shall not be deemed a responsive bidder and may not be awarded the contract or subcontract, but such goals need be submitted only for those trades to be used in the performance of the Federally-involved contract. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract. (emphasis supplied).

The authority of the Secretary of Labor is established by Executive Order 11246, Equal Employment Opportunity, 30 C.F.R. 12319 (Sept. 24, 1965), which provides: [**14]

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

* * *

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors.

The local plans are issued by the Department of Labor to implement the requirement of E.O. 11246 that contractors "take affirmative action" to ensure employment for minorities. "The Labor Department interpretation of the affirmative action clause must, therefore, be deferred to by the courts." *Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir. 1971).*

With Federal departments and agencies, and their procurement officials, being mandated to comply with Labor Department regulations, and with those regulations mandating the information that must be contained in the bids when filed, we do not think a procurement official can be held to be unreasonable if [**15] he follows his mandate. Indeed, we think a serious question would arise whether the procurement official could take it on himself to justify a departure from the Labor Department's mandate by reference to 41 C.F.R. § 1-2.405, n10 which provides that in case of a "minor informality or irregularity" the contracting officer shall either give the bidder an opportunity to make a correction or shall waive the deficiency. That provision of the Federal Procurement Regulations treats a defect in a bid as "immaterial and inconsequential" if it lacks significance "as to price, quantity, quality or delivery." This must, however, be read in conjunction with the basic procurement statute that awards or bids shall be made "to that responsible bidder whose bid, conforming to the invitation for bids, will [*759] be most advantageous to the Government, price and other factors considered." *41 U.S.C. § 253*(b). n11 And whether a bid complies in all material respects with the invitation depends on whether the method and timeliness of submission maintains the integrity of the procurement system. 41 CFR § 1-2.301. n12

n10 41 C.F.R. § 1-2.405:

Minor informalities or irregularities in bids

A minor informality or irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. The contracting officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive such deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include:

(a) Failure of bidder to return the number of copies of signed bids required by the invitation for bids.

(b) Failure to furnish required information concerning the number of bidders' employees.

* * *

[**16]

n11 *41 U.S.C.* § *253*(b):

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

n12 41 C.F.R. 1-2.301:

(a) To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained.

Appellee's counsel seizes, dramatically, on certain language in 41 C.F.R. § 1-2.405. That regulation begins by stating that a minor informality is one pertaining "to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation [**17] for bids, the correction or waiver of which would not be prejudicial to other bidders." It goes on to state: "Examples of minor informalities or irregularities include: * * * (b) Failure to furnish required information concerning the number of bidder's employees." This provision, of long standing in government contracts, certainly antedating the minority employment plans, n13 relates to a distinct and different subject -- employment capability at the time of the bid -- which does not involve any commitment. What the Washington Plan, and Appendix A, called for was a statement of specific goals for the future period, not as of the time of the bid, and a commitment for minority utilization. The specific command of the Appendix A regulation clearly states and reiterates a bid lacking the pertinent information concerning projected employers and specific goals will be deemed nonresponsive. Whether or not other bidders would be prejudiced by subsequential insertion, the Government's broad policy objective may be prejudiced by the omission.

n13 The "Minor Informality" provision was first promulgated on February 20, 1960. *36 Fed. Reg. 1510, 1516 (1960).*

[**18]

Appellee's reliance on the "Minor Informalities" regulation overlooks a well-established distinction between the responsibility of the bidder and the responsiveness of the bid, a distinction discussed in *48 Comp. Gen. 291 (1968).* Questions of bidder responsibility essentially relate to whether a given bidder has the necessary resources and experience to perform a given job, and advertised bids often request material pertinent in this regard. As the Comptroller General has stated, however, bidder responsibility is ultimately a question of fact: n14

Recognizing the desirability, both from the standpoint of administrative convenience and from that of the prospective bidders who may be saved useless expense and effort, of including in invitations for bids some notice to bidders of minimum standards to be applied in determining the qualifications of bidders, we feel nevertheless that the statement of such qualifications should not be considered as having the effect of transforming the purely factual question of responsibility into a legal question of conformity to the invitation.

n14 *39 Comp. Gen. 173, 178 (1959),* accord *48 Comp. Gen. 291, 297 (1968).*

[**19]

Questions of the "responsiveness" of the bid, on the other hand, relate to "conformity with the invitation" [*760] and are generally not curable after bid opening. In our judgment, the example in 41 C.F.R. § 1-2.405, of failure to furnish required information concerning the number of employees at time of bid relates to responsibility, where the Government may want to know whether a particular bidder has the employment capability to perform the contract. Since such questions are not material to bid openings, n15 though they well may be to contract award, after procurement authorities conduct appropriate inquiries, their absence is properly considered to be a "minor informality."

n15 See *Ocean Electric Corp. v. Laird, 145 U.S. App. D.C. 24, 473 F.2d 154* (D.C. Cir., 1972) (security clearance matter of "responsibility" of bidder and not material to bid opening, but essential only prior to the performance of work).

In the case before us, however, as Appendix A plainly indicates, the information pertinent to [**20] minority utilization goals, including both number of employees during the period of performance and minority percentage had -- under directive of the Secretary of Labor -- been made a question of "responsiveness" to the bid pointing toward obtaining effort and obligation from all responsive bidders. That regulation overrides any general concept that the characteristics of a bidder relate to responsibility rather than responsiveness, and makes it clear that in this context what was involved was information necessary for "responsiveness" of the bid. While usually the "experience" of the bidder is a matter of responsibility, there are occasions when it rises to the level of responsiveness of the bid -- provided this is made clear in the invitation for bids. See 52 Comp. Gen -- (No. B-175254, August 16, 1972).

This is not the case of a bidder who may claim he was misled by two inconsistent provisions in the specifications furnished to him. Here the specifications furnished him were clear and specific, and they were ignored. He cannot realistically be heard to say that he was relying on the minor irregularities clause of 41 CFR § 1-2.405(b). If he knew that much about government [**21] procurement, he knew enough to know that he was governed by the regulation, with directions, in Appendix A, that were both specific and reiterated.

Whatever the latitude provided to a procurement official under 41 C.F.R. § 1-2.405 in case of a conventional procurement question, the matter stands on an entirely different footing when the question arises under one of the clauses that have been inserted, over the years, into the "clauseology" of today's government contract. n16 Congress and the President have increasingly had recourse to the procurement power for nonprocurement objectives, as "a device for the accomplishment, implementation, or even formulation of important national policies and goals, as a sophisticated technique for public administration as well as procurement . . . . conditioning the award or the terms of government procurement contracts in order to promote national social or economic standards or goals that in themselves had no immediate relevance to supplying the particular procurement need." n17

n16 See J. Whelan, Underlying Values in Government Contracts, *10 J. PUB. LAW 298 (1961).* [**22]

n17 H. Leventhal, Public Contracts and Administrative Law, *52 A.B.A.J. 35, 36-37.*

The difficulty posed by this case is that the mold of our recent decisions giving the disappointed bidder a remedy in case of action that either disregards or arbitrarily and unreasonably misapplies procurement regulations, n18 has been used for the casting of a challenge taken to a provision of a regulation issued for a social or economic objective. Such social or economic objectives may be sufficiently related to procurement considerations in a broad sense and over [*761] the long run to validate use of the procurement power by Congress or the President. n19 However, when, as is only natural, a department or agency with particular interest or concern in the social or economic problem has been given government-wide authority for the administration of this program now incorporated into the public contracts system, the controversy cannot be meaningfully considered solely in terms of standard procurement regulations, or by presuming authority in the procurement officials, typically located in other departments [**23] and agencies, to disregard the mandate of the department given responsibility for the new program. The procurement official would have no basis for saying that the information that the agency given responsibility -- here, the Department of Labor -- required be included in the bid as filed was only a formality, lacking in consequence, etc.

n18 *Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970); Steinthal & Co. v. Seamans, 147 U.S.App.D.C. 221, 455 F.2d 1289 (1971).*

n19 See *Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra, 442 F.2d at 170* ("it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen").

5. This does not mean that the disappointed bidder is lacking in remedies. He could contend that the Labor Department's requirement is invalid. Ultimately, he could bring an action in District Court to [**24] enjoin that department from persisting in its regulation, or for declaratory relief. n20 Initially, he could combine a protest to the procurement officer that he should be given the award with a protest to the department involved that its regulations should be amended, or applied, so as to permit supplementation after award. Certainly the procurement system is well acquainted with requirements as to responsibility that may be satisfied after the filing of the bid. See e.g., *Ocean Electric Corp. v. Laird,*

supra note 15. But whether that is satisfactory depends on the needs of the agency responsible for issuance of the (government-wide) requirement. Some opportunity must be given that agency to consider the objection of the disappointed bidder and the question whether his proposal satisfies its regulatory needs. That opportunity is a precondition to judicial intervention, under the principle of exhaustion of administrative remedies.

n20 *Air Reduction Co. v. Hickel, 137 U.S.App.D.C. 24, 420 F.2d 592 (1969); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra.*

[**25]

The District Court erred in proceeding to preliminary injunction, on a hypothesis that plaintiff would probably prevail on the merits in establishing that the omission in the bid was waivable or correctible, in the absence of any administrative recourse whatever to the responsible department. The Government brief argues to this court that the plaintiff's omission in the bid frustrated the policy of the Labor Department's "affirmative action" Washington Plan. n21 At oral argument, plaintiff's counsel contended that the material omitted was needed by the Labor Department solely for statistical purposes, and that the Labor Department's requirement that this material be contained in the bid as filed was unnecessary to its purpose. But in the absence of any recourse to the Labor Department, we do not have the administrative consideration that is a precondition to sure-footed judicial analysis.

n21 "Finally, the thrust of the Washington Plan is the concept of affirmative action, embodied in Executive Order 11246, which it implements. The court below by characterizing plaintiff's failure to commit to specific goals as a mere failure 'to copy . . . figures in the blanks provided' (Opinion, June 22; A. 76) or 'to do the arithmetic said to be required by Appendix A' (Opinion, August 24; A. 331) clearly misconstrued the policy underlying this equal employment opportunity program. The Washington Plan anticipates that the construction contractor will make a knowing and thoughtful commitment based upon his own employment and recruitment situation. Thus, contrary to the view of the district court, there is no warrant for the substitution of government prescribed goals for the bidder's individual goals." Govt. Brief at p. 19.

[**26]

[*762] The same considerations govern the District Court's conclusion that the bid as submitted substantially complies with the invitation, which permits use of Appendix A or "a substantially similar document." Under Appendix A the bidder is required to submit, for each of the various trades, and for all work done in the Washington area (not merely the work on this contract) the total number of employees to be used and the number of minority employees to be included in that total.

There was no way for the procurement official to supply these figures even assuming, arguendo, that the bidder could be taken in law to have made a commitment to hire minority employees to the extent of the specific goal percentage that was the minimum acceptable under Appendix A. The document filed by plaintiff cannot be considered "substantially similar" to a properly completed Appendix A unless one is prepared to assert that the missing data are of no real consequence to the Government's program administered by the Labor Department. n22 And here there was no presentation of the question to the Labor Department.

n22 Or at least to say that the Labor Department cannot reasonably require that the information be supplied with the bid, and refuse to permit it to be furnished on a pre-award supplement.

[**27]

Reversed.

[*764contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

ORDER

On consideration of appellee's petition for rehearing it is ordered by the Court that appellee's aforesaid petition is denied.

Chief Judge BAZELON dissents from the denial of rehearing.

Opinion by Circuit Judge LEVENTHAL with whom Circuit Judge TAMM concurs, denying appellee's petition for rehearing.

SUPPLEMENTAL OPINION

LEVENTHAL, Circuit Judge:

We have considered appellee's petition for rehearing, and have sought and received supplemental memoranda. On reconsideration, we conclude that our decision was correct.

Perhaps there should be added to the original opinion the notation not only that the "minor informality" provision of 41 C.F.R. 1-2.405 was promulgated in 1960, long prior to the Washington Plan of October 1970, but also that an almost identical provision had been included in the Armed Services Procurement Regulations since 1955. See 32 C.F.R. 2-405. The latter provision has been understood to relate directly to the Small Business Act. [**28]

The enactment of the Small Business Act in 1953 rendered the size of a firm significant for procurement purposes. n1

n1 A pertinent section of the Act, at *15 U.S.C. § 632* provides:

For the purpose of this title * * * a small business concern shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. In addition to the foregoing criteria the Administration, in making a detailed definition, may use these criteria among others: Number of employees and dollar volume of business. (July 30, 1953, c. 282, Title II, § 203, 67 Stat. 233). [Emphasis supplied].

Under implementing regulations issued by the Small Business Administration the number of employees which a small business might have within the small business definition varied from industry to industry. See *41 Comp. Gen. 739-40 (1962)*. Bidders were asked to state the number of their employees so that contracting officers might determine whether their firms came within the relevant [**29] SBA small business definition. Such information clearly went to the "responsibility" of the bidder rather than to the "responsiveness" of the bid, since it did not affect the bidder's legal obligations. The term "number of employees" as used in the "minor informalities" provision relates to a firm's capacity and capabilities, to a matter of "responsibility". The recent Armed Services Regulations [*765] amendment pairing the term with "size status" reinforces this view. n2

n2 The ASPR amendment has been construed by the Comptroller General, in one unreported opinion, B-170026, decided December 14, 1970, where it was argued in a bid protest that:

The company failed to state whether or not it is small business as required by page 2 of Standard Form 33 at 33A. (P. 4).

The Comptroller General ruled:

ASPR-405(ii) [the equivalent of 41 C.F.R. 1-2.405(b)] specifically includes the bidder's failure to make a representation concerning his size status as an example of the type of minor informality that can be waived. Therefore, it is of no consequence that the company failed to indicate in its bid whether it is a small business concern.

[**30]

The number of employees of Northeast Construction Company within the meaning of the regulation, as indicated in the transcript of the proceedings below, was "three officers". n3 The bidder by executing Appendix A was required to show the "estimated total employment for the trade on the contract," and "the number of minority group employees and their percentage of the total" for the years 1971 through 1974. The two kinds of data are clearly unrelated; one goes to the "responsibility" or "eligibility" of the bidder, the other goes to the "responsiveness" of the bid.

n3 A review of the record indicates that in fact the firm consists of three officers and one full time employee who acts as field supervisor, thus the correct number should have been "four." All construction workers were to have been furnished by subcontractors (Joint Appendix, Vol. I, pp. 115-117).

Northeast makes a contention based on the placement of § 1-2.405 in the Regulations, but on analysis we find this to be inconclusive.

We think it [**31] right to add that the wording of § 1-2.405 presented a strong legal argument in this case, which commended itself to the District Court although we did not find it conclusive.

Under the circumstances, the District Court can take this into account in determining whether and to what extent damages should be assessed on the injunction bond. n4

n4 *Page Communications v. Froehlke, 155 U.S.App.D.C. 1. 475 F.2d 994 (1973).*

DISSENTBY: BAZELON

DISSENT: [*762contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

BAZELON, Chief Judge, dissenting:

I agree with the majority that a bidder's statement of minority hiring goals is a legitimate and significant interest of government contracting officers. The rub in this case is that the government's procurement regulations clearly state that a bidder's failure to submit the number of his employees is a "minor informality or irregularity." [**32] Perhaps that regulation should be amended to indicate that the number of minority employees is not a minor item. Until the amendment is made, bidders have the right to expect that contracting officers will follow the mandatory requirements of their own regulations.

The error in Northeast's bid falls precisely into the category described in 41 C.F.R. § 1-2.405 as "minor informalities or irregularities". As explained in the majority opinion, "Appendix A" calls for information on the total number of employees on the contract in each designated trade, and the number of minority employees in each trade. That information was a required part of the bid package. Thus Northeast's failure to fill in the blanks on "Appendix A" was a "Failure to furnish required information concerning the number of bidder['s] employees". Such a failure is set forth in the procurement regulations as an example of a minor informality. n1 In such a case, the regulations provide as follows: "The contracting officer shall either give the bidder an opportunity to cure . . . or waive such deficiency, whichever is advantageous to the government." (emphasis added).

n1 41 C.F.R. § 1-2.405(b).

[**33]

The continuing mystery in this case is why the contracting officer refused to follow the established procedure for dealing with minor informalities. Given the importance of "Appendix A", it is understandable that the government would not choose to waive the deficiency in Northeast's bid. Eliminating that alternative, the contracting officer was required to allow Northeast to correct its oversight. Had the officer accepted Northeast's letter curing the deficiency, he would have achieved both of his legitimate objectives: award to the lowest bidder, and a written commitment to specified hiring goals.

It was suggested at oral argument that Northeast's bid was rejected because its mistake on "Appendix A" demonstrated a lack of true commitment to minority hiring. This is a reasonable [*763] concern. The success of minority hiring programs depends on something more than mechanical compliance with numerical requirements. The government is justified in demanding that its contractors demonstrate a sincere interest in equality of opportunity.

Northeast contends, however, and I agree, that its error demonstrates not disinterest, but merely confusion. Even when measured against other [**34] government forms, where clarity is hardly a watchword, "Appendix A" is a remarkably obtuse document. It does not surprise me that a building contractor with little or no legal experience might assume that, in signing that portion of the form which set forth the government's hiring goals, he was committing himself to adhere to those goals. There is no reason to believe that Northeast's misreading of "Appendix A" evidenced bad faith; even if it did, that evidence would at least be offset by the firm's rapid submission of a separate, written commitment to minority hiring goals.

If the government is genuinely interested in enhancing minority employment in the building trades, it should think twice before requiring strict accuracy in the completion of arcane bureaucratic forms. It has been reported recently that small construction firms -- including many minority firms -- have been unsuccessful in competing for work on Washington's subway system largely because these firms cannot afford the legal and accounting expertise necessary to prepare a conforming bid. n2 The very existence of 41 C.F.R. § 1-2.405 indicates that the government is aware of this problem.

n2 The situation is so serious that the Washington Metropolitan Transit Authority recently created an agency to help minority firms in preparing future bids. The Washington Post, Dec. 1, 1972, p. B1, col. 2.

[**35]

Neither the contracting officer nor the GAO has explained why the regulation was not followed in this case. The majority opinion deals with this problem by suggesting that standard procurement regulations should not govern contract provisions designed for "nonprocurement objectives." This is an intelligent and valid distinction, and the government's contracting experts may well decide to incorporate it into federal procurement regulations. Until they do, however, I do not think we can apply such a rule. To do so would be unfair to Northeast and other contractors who have never been informed of it, and would impair the "public interest in having agencies follow the regulations which control government contracting." n3

n3 *Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 376, 424 F.2d 859, 864 (1970).*

The majority opinion implies that the order of the Secretary of Labor implementing the "Washington Plan" creates a "mandate" requiring government procurement officers to disregard the regulations set [**36] forth at 41 C.F.R. § 1-2.405. Here again the government may wish to amend its regulations to establish that this is so. At present, however, the existence of two contradictory regulations creates an ambiguity which must, of course, be construed against the government and in favor of the private contractor. *M. Steinthal & Co. v. Seamans, 147 U.S.App.D.C. 221, 225, 455 F.2d 1289, 1303 (1971).*

The majority cites three Comptroller General decisions which draw a distinction between the responsibility of a bidder and the responsiveness of a bid. All three decisions involved cases where a bidder's capacity to do the work was questioned. The responsibility/responsiveness distinction has been an important one in that context, but it hardly contributes to the resolution of the case before us. There is no dispute here as to Northeast's experience or capacity to perform. I do not fully understand the [*764] rationale for applying the distinction to the facts at hand. If the majority is suggesting that Northeast's mistake was a question of responsiveness, I agree: and I agree that such questions "are generally not curable after bid opening." But the general rule has certain exceptions, [**37] which are set forth explicitly in the federal procurement regulations. This case clearly falls into one of the specific exceptions. Under existing regulations, Northeast's failure to supply the number of its employees is curable, and the contracting officer was required to give Northeast the opportunity to cure.

It may be that the government is unwilling -- for political purposes or otherwise -- to state clearly in its regulations that minority employment is not a trivial matter. The majority and I share the view that minority hiring programs are of great importance. If the executive branch agrees, I would hope that this case will stir it to clarify its regulations on the point.

For the reasons stated above, I think Judge Gasch's order was eminently correct.

74 F.3d 1322 printed in FULL format.

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., APPELLANTS v. ROBERT B. REICH, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

No. 95-5242

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

316 U.S. App. D.C. 61; 74 F.3d 1322; 1996 U.S. App. LEXIS 1453; 151 L.R.R.M. 2353; 131 Lab. Cas. (CCH) P11,496; 40 Cont. Cas. Fed. (CCH) P76,878

December 15, 1995, Argued
February 2, 1996, Decided

JBSEQUENT HISTORY: [**1]

As Amended February 15, 1996.

ıggestion for Rehearing En Banc Denied May 10, 1996, Reported at: 1996 U.S. ›p. LEXIS 10893.

›hearing Denied May 10, 1996, Reported at: 1996 U.S. App. LEXIS 10894.

›hearing Denied May 10, 1996, Reported at: 1996 U.S. App. LEXIS 11195.

ᚲIOR HISTORY: Appeal from the United States District Court for the District of ›lumbia. (95cv0503).

)RE TERMS: contractor, Procurement Act, regulation, replacement, permanent, ıdicial review, pre-emption, strikers, procurement, reviewable, :esidential, cause of action, permanently, hire, non-statutory, labor .spute, waiver of sovereign immunity, legality, hired, National Labor ›lations Act, organizational, debarment, labor relations, agency action, ›viewability, wage, unfair labor practice, implementing, replaced, ›vereign immunity

)UNSEL: Timothy B. Dyk argued the cause for appellants, with whom Andrew M. :amer, Willis J. Goldsmith, and Daniel H. Bromberg were on the briefs.

:ephen W. Preston, Attorney, United States Department of Justice, argued the ıuse for appellee. On the brief were Frank W. Hunger, Assistant Attorney ›neral, and Mark B. Stern, Attorney, Eric H. Holder, Jr., United States :torney, Allen Feldman, Steven J. Mandel, and Edward D. Sieger, Attorneys, ıited States Department of Labor.

ırtin S. Kaufman was on the brief for amici curiae Paul Coverdell and Slade ›rton.

ıurice Baskin, Michael E. Avakian, Peter A. Susser, and Douglas Darch were on ıe brief for amici curiae Associated Builders and Contractors, Inc., ınufacturers Alliance International Mass Retail Association, Center on National ıbor Policy, Inc., American Bakers Association, National-American Wholesale

:ocers' Association/International, Driver Employer Council of America, Society ›r Human Resource Management, Illinois Chamber of Commerce, and Wisconsin ınufacturers and Commerce.

ıthony B. Byergo entered an appearance [**2] for amici curiae Illinois ıamber of Commerce and Wisconsin Manufacturers and Commerce.

JDGES: Before: SILBERMAN, SENTELLE, and RANDOLPH, Circuit Judges. Opinion for ıe Court filed by Circuit Judge SILBERMAN.

'INIONBY: SILBERMAN

'INION: [*1324] SILBERMAN, Circuit Judge: Appellants challenge President .inton's Executive Order barring the federal government from contracting with ıployers who hire permanent replacements during a lawful strike. The district ›urt determined that appellants' challenge is not judicially reviewable and, in ıy event, the Order is legal. We conclude that judicial review is available and ıat the Order conflicts with the National Labor Relations Act, and therefore we ›verse.

I.

President Clinton issued Executive Order No. 12,954, 60 Fed. Reg. 13,023 !995), on March 8, 1995, pursuant to his authority under the Federal Property ıd Administrative Services Act, 40 U.S.C. @ 471 et seq. (the Procurement Act), ıich declares:

: is the policy of the executive branch in procuring goods and services that, › ensure the economical and efficient administration and completion of Federal ›vernment contracts, contracting agencies shall not contract with employers '*3] that permanently replace lawfully striking employees.

:der at 13,023, @ 1. The Order applies to all government contracts over $)0,000. In 1994, federal procurement exceeded $ 400 billion and constituted ›proximately 6.5% of the gross domestic product. See STATISTICAL ABSTRACT OF IE UNITED STATES 451 (115th ed. 1995). As of 1993, approximately 26 million ›rkers, 22% of the labor force, were employed by federal contractors and ıbcontractors. GENERAL ACCOUNTING OFFICE, REPORT TO SENATOR PAUL SIMON, WORKER :OTECTION: FEDERAL CONTRACTORS AND VIOLATIONS OF LABOR LAW (Oct. 1995) (GAO :PORT).

The Order explains that the "balance" between allowing businesses to operate ıring a strike and preserving worker rights is disrupted when an employer hires ›rmanent replacements during a strike. "It has been found" that the hiring : permanent replacements results in longer strikes, can change a "limited .spute into a broader, more contentious struggle," and results in the loss to ıe employer of the "accumulated knowledge, experience, skill, and expertise" of ıe striking workers. These consequences adversely affect federal contractors' ›ility to supply high quality and reliable [**4] goods and services.

The Secretary of Labor is charged with implementing and enforcing the Order. : the Secretary finds that a contractor has permanently replaced lawfully :riking workers, the Secretary "may make a finding that it is appropriate to ›rminate the contract for convenience" unless the head of the contracting jency objects. The Secretary is also to debar contractors that have permanently ɘplaced striking workers from future government contracts unless the "labor ıspute precipitating the permanent replacement of lawfully striking workers has ɘen resolved, as determined by the Secretary" or the head of the agency ɘtermines that there is a compelling reason to lift the debarment. A debarment ıormally will be limited to those organizational units of a Federal contractor ıat the Secretary finds to have permanently replaced lawfully striking ɔrkers."

On May 25, Secretary Reich issued final implementing regulations. ɘe Permanent Replacement of Lawfully Striking Employees by Federal Contractors,) Fed. Reg. 27,856 (1995). Organizational unit is defined as covering "(1) A ivision or other organizational [*1325] element of a person that is ɘsponsible as the prime contractor [**5] for performing a contract, and (2) ıy other affiliate of the person that could provide the goods or services ɘquired to be provided under the contract." The regulations also set forth the ıctors to be considered in determining whether a labor dispute resulting ı debarment has been resolved: whether the parties to the dispute have reached formal settlement or agreed upon a procedure for resolving their differences, ıether the parties have agreed to an informal resolution of the dispute, ıether the striking employees have returned to work, and any other factors ːending to lead to the conclusion that the labor dispute has ended."

Prior to the President's Executive Order, there were numerous legislative ːtempts to restrict the use of permanent replacements. In 1993 the Workplace ıirness Act was introduced in the Senate, see S. 55, 103d Cong., 1st Sess., ıich would have made the use of permanent replacements an unfair labor ːactice. Supporters similarly argued that the use of permanent replacements ɔsets the "balance" between labor and management and leads to lower ːoductivity. See S. REP. NO. 110, 103d Cong., 1st Sess. 20-25 (1993). It failed ɔ pass.

Appellants, [**6] the Chamber of Commerce, American Trucking ɜsociations, Inc., Labor Policy Association, National Association of ınufacturers, Bridgestone/Firestone, Inc., and Mosler Inc., filed suit on March ɜ, prior to the Secretary's promulgation of the regulations, seeking ɘclaratory and injunctive relief against the Secretary of Labor's enforcement ː the Executive Order. They alleged that the Order is contrary to the National ıbor Relations Act, 29 U.S.C. @ 151 et seq. (NLRA), the Procurement Act and the ɔnstitution. On expedited appeal we reversed the district court's determination ıat appellants' claims were not ripe. See Chamber of Commerce v. Reich, 313 .S. App. D.C. 14, 57 F.3d 1099 (D.C. Cir. 1995). The district court, on remand, ʒain ruled in favor of the government. It held that appellants' statutory claim ıat the Executive Order violated the NLRA is not judicially reviewable since ıe Procurement Act vests broad discretionary authority in the President just as ıd the statute at issue in Dalton v. Specter, 128 L. Ed. 2d 497, 114 S. Ct. ʔ19 (1994), in which the Supreme Court refused to review a claim that the ːesident had abused his statutory discretion. Appellants' constitutional claim ımilarly was [**7] held to be unreviewable as nothing more than an argument ıat the President abused his statutory powers. The district court, in the ːternative, rejected appellants' statutory claim on the merits, reasoning that ıder the Executive Order the government was acting in a proprietary capacity ıd, therefore, NLRA pre-emption was inapplicable. The court stressed that the ːesident's interpretation of the Procurement Act as authorizing the Order was titled to Chevron-like deference and was reasonable because it furthered the atutory values of "economy" and "efficiency" (the government does not attempt defend on appeal the court's deference to the President's interpretation). e court also noted that the government was merely exercising an option vailable" to a private contractor.

II.

Appellants challenge the Executive Order on three separate grounds: that the der transgresses an employer's statutory right (under the NLRA) to hire rmanent replacements to supplant "economic" strikers; n1 that the Order also olates the very Procurement Act which it purports to implement because the esident neglected to make findings tying the Order to savings in vernment procurement [**8] costs; and that this lack of presidential ndings independently violates the Constitution since it would render e Procurement Act an unconstitutional delegation under Panama Refining Co. v. an, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935).

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n1 "Unfair labor practice strikers" are not permanently replaceable. See NLRB International Van Lines, 409 U.S. 48, 50-51, 34 L. Ed. 2d 201, 93 S. Ct. 74 972).

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Before dealing with appellants' substantive arguments, we must treat with the vernment's assertion that we lack authority [*1326] to review the esident's Order. The government argues that appellants lack the necessary atutory cause of action and can point to no applicable waiver of sovereign munity. A cause of action under @ 702 of the APA is not available because this ction applies only to a "person suffering legal wrong because of agency tion," 5 U.S.C. @ 702 (1977) (emphasis added). Here, the government argues, pellants' challenge is directed at the President's statutory authority to sue the Executive Order. In Franklin v. Massachusetts, [**9] 505 U.S. 788, 2 S. Ct. 2767, 2773, 120 L. Ed. 2d 636 (1992), the Supreme Court held that the 'resident is not an agency within the meaning of the [APA]." Similarly, the vernment contends that @ 702's waiver of sovereign immunity "by [its] terms plies only to agency action." Given the nature of appellants' challenge, there es not exist the necessary "agency action" that triggers the APA's waiver of vereign immunity.

Even were appellants to pass by cause of action and sovereign immunity rriers, the government, relying heavily on the Supreme Court's recent decision Dalton, contends that the President's actions are not reviewable here because ongstanding authority holds that [judicial review of an alleged presidential olation of a statute] is not available when the statute in question commits e decision to the discretion of the President." Dalton, 114 S. Ct. at 1727. nce the Procurement Act grants the President such broad discretion, it is gued that appellants' case reduces only to a claim that the President abused s discretion--a claim which we are not authorized to entertain. The government knowledges that whatever discretion to set procurement policy the President joys [**10] under the Procurement Act is limited by the Constitution, and erefore an independent claim of a President's violation of the Constitution

›uld certainly be reviewable. Still, the government would have us brush aside ›pellants' Panama Refining argument because it is based on a long- disregarded ternative holding in that case, n2 and therefore appellants should be thought merely make the same abuse of discretion claim in constitutional dress.

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n2 The primary holding was that the statute constituted an unconstitutional ·legation because it gave President Roosevelt unguided discretion to prevent .e shipment in interstate commerce of oil produced in contravention of state w. Appellants do not claim that the Procurement Act is similarly an .constitutional delegation of legislative authority.

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The government's characterization of appellants' Panama Refining claim .rikes us as a bit disingenuous, and we are puzzled that the district court :ver even mentioned the claim--either as to its jurisdictional [**11] .gnificance or on its merits. Nevertheless, we very much doubt that the .ternative holding of Panama Refining has a great deal of separate vitality ›day; even the basic doctrine of unconstitutional delegation, while by no means :pudiated, see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 S. 607, 648, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980) (plurality), remains ıly a shadowy limitation on congressional power. Since our subject matter ırisdiction must be determined claim by claim and appellants' more powerful :guments seem to be its statutory ones, we will first consider whether we have ırisdiction to review them.

Appellants could not possibly have relied on the APA for a cause of action :ior to the Secretary's issuance of regulations implementing the Executive ·der because, as the government correctly emphasizes, the President is not an :gency" under that Act and appellants sued before the Secretary issued .s regulations. Nevertheless, in our prior opinion in this case, we recognized :e legal significance of the regulations to appellants' cause of action. The ›vernment had initially argued (and the district court had agreed) that the :ecutive Order which appellants promptly [**12] attacked on issuance was not .pe, because the Secretary had not yet "fleshed out" the President's policy .th regulations. We noted that this point was no longer relevant, since by the me the case was heard on appeal the regulations had been issued. Chamber of ›mmerce, 57 F.3d at 1100. Appellants have not, however, amended their complaint rely on the APA--perhaps because they fear any relief short of a declaration .at the Executive Order is illegal would be inadequate. The government, for its :rt, [*1327] claims that a cause of action under the APA is not available, ·en were appellants to rely on it, because a challenge to the regulation should regarded as nothing more than a challenge to the legality of the President's :ecutive Order and therefore not reviewable. It would seem that the ›vernment's position is somewhat in tension with its previous claim that the :cretary's regulations were necessary to "flesh out" the Executive Order. And doubt the validity of its unsupported interpretation of the APA; that the :cretary's regulations are based on the President's Executive Order hardly :ems to insulate them from judicial review under the APA, even if the validity [**13] the Order were thereby drawn into question. See Public Citizen v. :ited States Trade Representative, 303 U.S. App. D.C. 297, 5 F.3d 549, 552 ›.C. Cir. 1993) ("Franklin['s denial of judicial review of presidential

tion] is limited to those cases in which the President has final
nstitutional or statutory responsibility for the final step necessary for
e agency action directly to affect the parties."), cert. denied, 126 L. Ed. 2d
2, 114 S. Ct. 685 (1994) (emphasis added). Still, recognizing the anomalous
tuation in which we find ourselves--not able to base judicial review on what
pears to us to be an available statutory cause of action--we go on to the
sue of whether appellants are entitled to bring a non-statutory cause of
tion questioning the legality of the Executive Order.

If a plaintiff is unable to bring his case predicated on either a specific or general statutory review provision, he may still be able to institute non-statutory review action. Byse and Fiocca, Section 1361 of the Mandamus and nue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative :tion, 81 HARV. L. REV. 308, 321 (1967). Until the turn of the century, the 'ailability of non-statutory [**14] review of executive action was :certain. The Supreme Court from 1870 to 1900 "entertained considerable doubt, the absence of statutory provision, as to the propriety of judicial control "executive' action." JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 337 .965). Then came American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, ' L. Ed. 90, 23 S. Ct. 33 (1902). The Postmaster General had barred the .aintiff from advertising, fraudulently in the Postmaster General's view, that could cure disease by the "proper exercise of the faculty of the brain and .nd." Id. at 96. The plaintiff sought an injunction to restrain a subordinate :ficial from carrying out the order of the Postmaster General. The Court, :anting relief, explained that the:

:ts of all [a government department's] officers must be justified by some law, ıd in case an official violates the law to the injury of an individual the ›urts generally have jurisdiction to grant relief.... Otherwise the individual ; left to the absolutely uncontrolled and arbitrary action of a public and ıministrative officer, whose action is unauthorized by any law, and is in .olation of the rights of the individual.

'*15] Id. at 108, 110. The reasoning of McAnnulty has been employed :peatedly. In Stark v. Wickard, 321 U.S. 288, 88 L. Ed. 733, 64 S. Ct. 559 .944), the Court considered a complaint seeking to enjoin the Secretary of ;riculture for allegedly exceeding his statutory authority. The statute in ıestion did not provide judicial review for the complainant, but the Court ›served that "the responsibility of determining the limits of statutory grants authority ... is a judicial function entrusted to the courts by Congress by ıe statutes establishing courts and marking their jurisdiction." Id. at 310. ıd in Harmon v. Brucker, 355 U.S. 579, 581-82, 2 L. Ed. 2d 503, 78 S. Ct. 433 .958), the Court, relying on McAnnulty, stated that "generally, judicial review ; available to one who has been injured by an act of a government official ıich is in excess of his express or implied powers." Perhaps the most dramatic :ample of the application of the general presumption of reviewability is Leedom . Kyne, 358 U.S. 184, 3 L. Ed. 2d 210, 79 S. Ct. 180 (1958). In that case, it ıs undisputed that the National Labor Relations Board flatly violated a :atutory prohibition (putting professional employees into a bargaining group ith non-professional employees). The [**16] plaintiff requested that the ›ard's bargaining unit certification be set [*1328] aside, despite an nplied preclusion of judicial review of that issue--at least in that context. ıe Court framed the legal question as whether "the law, apart from the review :ovisions of the ... [NLRA], affords a remedy?" Id. at 188 (quotation marks ıitted). The Court answered, "We think the answer surely must be yes.... ainly, this was an attempted exercise of power that had been specifically thheld. It deprived the professional employees of a "right' assured to them by ngress. Surely, in these circumstances, a Federal District Court has .risdiction of an original suit to prevent deprivation of a right so given." :. at 188, 189. The message of this line of cases is clear enough: courts will rdinarily presume that Congress intends the executive to obey its statutory mmands and, accordingly, that it expects the courts to grant relief when an .ecutive agency violates such a command." Bowen v. Michigan Academy of Family .ysicians, 476 U.S. 667, 681, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986).

We have previously read McAnnulty as do appellants. In Dart v. United States, 0 U.S. App. D.C. 160, 848 F.2d 217, 224 (D.C. Cir. 1988), we [**17] said ıat "nothing in the subsequent enactment of the APA altered the McAnnulty ctrine of review.... It does not repeal the review of ultra vires actions :cognized long before, in McAnnulty.... When an executive acts ultra vires, urts are normally available to reestablish the limits on his authority." To be ıre, if Congress precluded non-statutory judicial review, a showing the vernment does not even attempt to make, that would be another matter. But we ıve never held that a lack of a statutory cause of action is per se a bar judicial review. See, e.g., Five Flags Pipe Line Co. v. Department of :ansp., 272 U.S. App. D.C. 221, 854 F.2d 1438, 1439 (D.C. Cir. 1988) ("If ngress makes no specific choice of [the court in which judicial review is to :cur] in the statute pursuant to which the agency action is taken, or in ıother statute applicable to it, then an aggrieved person may get "nonstatutory :view' ... in federal district court pursuant to the general "federal question' ırisdiction of that court.") (citation omitted); AFL-CIO v. Kahn, 199 U.S. App. C. 300, 618 F.2d 784, 787-93, 796 (D.C. Cir.) (en banc) (reviewing Procurement :t and NLRA claims without explicitly considering the [**18] cause of :tion), cert. denied, 443 U.S. 915, 61 L. Ed. 2d 879, 99 S. Ct. 3107 (1979); :tional Ass'n of Postal Supervisors v. United States Postal Service, 195 U.S. p. D.C. 242, 602 F.2d 420, 432 (D.C. Cir. 1979) (non-statutory review of ıether agency exceeded its delegated authority); Jordan v. United Ins. Co., 110 S. App. D.C. 112, 289 F.2d 778, 782-83 (D.C. Cir. 1961) ermitting non-statutory review by the district court of administrative :tion). That the "executive's" action here is essentially that of the President es not insulate the entire executive branch from judicial review. We think it : now well established that "review of the legality of Presidential action can :dinarily be obtained in a suit seeking to enjoin the officers who attempt to :force the President's directive." Franklin, 112 S. Ct. at 2790 (Scalia, J., ncurring in part and concurring in the judgment). Even if the Secretary were :ting at the behest of the President, this "does not leave the courts without wer to review the legality [of the action], for courts have power to compel ıbordinate executive officials to disobey illegal Presidential commands." ucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 71).

Nor does sovereign immunity appear to [**19] bar appellants' suit. Section 2 of the APA provides:

. action in a court of the United States seeking relief other than money :mages and stating a claim that an agency or an officer or employee thereof :ted or failed to act in an official capacity or under color of legal authority ıall not be dismissed nor relief therein be denied on the ground that it is

;ainst the United States or that the United States is an indispensable party.

U.S.C. @ 702 (emphases added). The APA's waiver of sovereign immunity applies , any suit whether under the APA or not. See, e.g., Clark v. Library of ›ngress, 242 U.S. App. D.C. 241, 750 F.2d 89, 102 (D.C. Cir. 1984); Sea-Land :rv., Inc. v. Alaska R.R., 212 U.S. App. D.C. 197, 659 F.2d 243, 244 (D.C. Cir. ›81), cert. denied, 455 U.S. 919, 71 L. Ed. 2d 459, 102 S. Ct. 1274 (1982); see .so BATOR, MELTZER, MISHKIN, & SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS ID THE FEDERAL SYSTEM, 1154 (3d ed. 1988). [*1329] The government argues, ι a slight variation of its argument challenging appellants' cause of action, ιat the APA's waiver of sovereign immunity does not apply since the "plaintiffs :e challenging the President's statutory authority to issue the Executive :der, and not any action [**20] of the Secretary in implementing or ιterpreting the Order." The government believes it follows, under Franklin's ›lding--that the President is not an "agency" for APA purposes--that @ 702's ιiver is not applicable in a case where the legality of the President's action ; challenged. In Franklin, however, the Court first determined that the actions : the Secretary of Commerce in reporting census data to the President was not .nal agency action, and therefore not reviewable under the APA. With the :cretary out of the picture only the President's decision was called into ιestion. The Court concluded that it could "only review the APA claims here if ιe President, not the Secretary of Commerce, is an "agency' within the meaning : the Act." Franklin, 112 S. Ct. at 2775. In this case, as we have noted, we ιve the reverse pattern. The President's Executive Order, which initiated this ›licy, was subsequently implemented by the Secretary's regulations. Although ›pellants do not rely on the Secretary's regulations to bring an APA cause of :tion, they do assert that the APA's waiver of sovereign immunity applies and ι that respect the regulations appear relevant. [**21]

Be that as it may, under Larson v. Domestic & Foreign Commerce Corp., 337 S. 682, 690-91, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949), if the federal officer, ;ainst whom injunctive relief is sought, allegedly acted in excess of his legal ιthority, sovereign immunity does not bar a suit. See also Dugan v. Rank, 372 S. 609, 621-22, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963); Malone v. Bowdoin, 369 .S. 643, 647, 8 L. Ed. 2d 168, 82 S. Ct. 980 (1962). Since "the [Secretary of ιbor's] powers are [allegedly] limited by [the NLRA], his actions beyond those .mitations [viz., enforcing the Executive Order] are considered individual and ›t sovereign actions. The officer is not doing the business which the sovereign ιs empowered him to do ..." Larson, 337 U.S. at 689. So, there is no sovereign ιmunity to waive--it never attached in the first place.

Although the government's brief advanced a breathtakingly broad claim of ›n-reviewability of presidential actions, the government does not seriously :ess its argument that we may not exercise jurisdiction over appellants' claim :cause they lack a cause of action or cannot point to a waiver of sovereign ιmunity. At oral argument counsel relied instead on the more limited notion, .so advanced in the brief, that [**22] the Procurement Act delegated wide .scretion to the President and we were not authorized to review his exercise of ιat discretion so long as he did not violate a direct prohibition of another :atute (or the Constitution).

›UNSEL: I just wanted to make clear that our position is that it is possible ιat an Executive Order under the Procurement Act, that would violate either an :pressed prohibition in the Procurement Act or another expressed prohibition ı statute, could be reviewable. But our position--

:E COURT: Like, for example, a Procurement Act Executive Order that says that : shall only buy goods from companies whose average age of the work force is 40 :ars old, because we all know that younger workers are more efficient. Would :at be reviewable?

›UNSEL: I believe that that most probably would. I think--

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łE COURT: No, but would you concede that, if it violates the National Labor :lations Act, it's reviewable?

›UNSEL: If it were to violate a prohibition in the National Labor Relations :t, then I think you would have a reviewable claim. Our point is--

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łE COURT: [**23] Are you saying you would have to find an express :ohibition in the National Labor Relations Act to make it reviewable, as to ıether or not he had violated that law, as opposed to an implicit protection ıch as preemption?

·1330] COUNSEL: I think for reviewability, yes, sir.

łE COURT: So if the National Labor Relations Act had specifically said that ıployers are entitled to permanently replace strikers in an economic strike, as ›posed to an unfair labor practice strike, then this case would be reviewable?

›UNSEL: No, I would not agree with that, either, Your Honor, because--

łE COURT: I don't understand your position.

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›UNSEL: ...

· point, Your Honor, is that we have two statutes that, on their face, do not ›nflict....

:. of Oral Arg. at 39-42 (emphasis added).

From that dialogue, it appears that the government concedes that a cause of :tion would lie and sovereign immunity be waived if the President issued an :ecutive Order under the Procurement Act that violated or caused others to .olate an express prohibition of that Act or another statute. We frankly do not ıderstand [**24] how a distinction--in terms of reviewability--can be drawn :tween a claim that the President's Executive Order (and the :cretary's implementing regulations) transgresses or causes a contractor to .olate a prohibition of another statute and one that deprives a contractor of a .ght expressly or impliedly granted by another statute. To be sure, in Leedom Kyne, the NLRB violated a specific statutory prohibition, but the case is .so described as depriving the professional employees of a statutory right. See ;8 U.S. at 187. Leedom has come to stand for the proposition that "if an agency ›enly violates a clear mandate of a statute even [an implied] preclusion : judicial review ... will not bar judicial intervention." United States Dep't : Treasury v. FLRA, 310 U.S. App. D.C. 31, 43 F.3d 682, 688 (D.C. Cir. 1994) ›mphasis added). Appellants are similarly alleging a palpable violation of the .RA--the Executive Order's impingement on the long-recognized NLRA right › hire permanent replacements. Nor do we think it can possibly matter for ırposes of reviewability whether the alleged statutory right or mandate is ›und in the statute in so many words or has been so interpreted by [**25] ıe Supreme Court as appellants claim in this case. See Golden State Transit ›rp. v. City of Los Angeles, 493 U.S. 103, 111-12, 107 L. Ed. 2d 420, 110 S. :. 444 (1989).

As for the government's claim that given the discretion Congress has :legated to the President to administer the Procurement Act judicial review is :ecluded here, it is important carefully to distinguish between the ›vernment's argument on the merits and its non-reviewability claim. n3 Granted, ıe Procurement Act does vest broad discretion in the President. Its stated goal ; "to provide for the Government an economical and efficient system for . procurement and supply...." 40 U.S.C. @ 471 (1986). Section 486(a) gives the :esident the authority to prescribe policies and directives "as he shall deem :cessary to effectuate the provisions" of the Act. Indeed, in Kahn, we ›ncluded that President Carter's Executive Order authorizing denial of ›vernment contracts to companies that fail or refuse to comply with 'oluntary" wage and price standards was within the authority delegated by ıe Procurement Act since the Executive Order accorded with the values of :conomy" and "efficiency." We reasoned that encouraging compliance with ıe wage [**26] and price standards would help control inflation and limit ıe ability of contractors with whom the government negotiates to increase :ices thereby resulting in the government "[facing] lower costs in the future ıan it would have otherwise." Kahn, 618 F.2d at 793. But Kahn makes clear that ıe President, even under the Procurement Act, does not have unlimited authority › make decisions he believes will likely result in savings to the government. : cautioned that our decision did not "write a blank check for the President to .ll in at his will. The procurement power must be exercised consistently with ıe structure and purposes of the statute [*1331] that delegates that ›wer." Id. at 793 (emphasis added) (footnote omitted). Despite our expansive :asoning upholding President Carter's Executive Order, we stressed the ıportance of the "nexus between the wage and price standards and likely savings › the government." Id. It will be recalled that one of appellants' claims is ıat the Executive Order did not demonstrate that nexus. It does not follow, ıen, that the President's broad authority under the Procurement Act :ecludes judicial review of executive action for [**27] conformity with that :atute--let alone review to determine whether that action violates another .atute.

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n3 Leedom v. Kyne does seem to meld the two, almost reasoning from the ·oposition that if the government's actions were alleged to be palpably illegal ıere must be review, but it does not follow that there is no reviewability if : conclude that the President's action was authorized.

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Judicial review here, moreover, is entirely consistent with the Court's :atement in Dalton that certain types of statutory claims based on an abuse of .scretion by the President are not reviewable. n4 In Dalton, the Court refused › review President Bush's decision, pursuant to the Defense Base Closure and ›alignment Act of 1990, to approve a Commission's recommendation to close, ıong other bases, the Philadelphia Naval Shipyard. The Court concluded that ›here a statute, such as the 1990 Act, commits decisionmaking to the discretion : the President, judicial review of the President's decision is not available." ·*28] Dalton, 114 S. Ct. at 1728. In reaching this conclusion, the Court ›ted that the statute "does not at all limit the President's discretion in ›proving or disapproving the Commission's recommendations ... nothing in [the :atute] prevents the President from approving or disapproving the ›commendations for whatever reason he sees fit." Id. (emphases added). The ›urt explained that "our conclusion that judicial review is not available for ›spondents' claim follows from our interpretation of [the] Act." Id.

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n4 The Dalton Court did cast some doubt on non-statutory judicial review : presidential action. The Court declined to address the question merely :ating that "we may assume for the sake of argument that some claims that the :esident has violated a statutory mandate are judicially reviewable outside the :amework of the APA." Dalton, 114 S. Ct. at 1727. The Dalton Court's hesitancy › review presidential action appears to be based on the special status of the :esident, a status the Court has recognized before. See, e.g., Franklin, 112 S. :. at 2775 (holding that the President is not an "agency" for APA purposes); .ssissippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L. Ed. 437 (1867) (refusing to ›rmit an injunction to be placed directly against President Andrew Johnson). ıt that concern suggests a reluctance to bring judicial power to bear directly ı the President. Of course, here we are concerned with the long ›tablished non-statutory review of a claim directed at a subordinate executive :ficial.

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The district court appeared concerned that Dalton might be interpreted to ›pudiate Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). See 897 Supp. 570, 576. We think that concern--expressed by the litigants in ılton--is much overdrawn. Dalton's holding merely stands for the proposition ıat when a statute entrusts a discrete specific decision to the President and ›ntains no limitations on the President's exercise of that authority, judicial :view of an abuse of discretion claim is not available. n5 [*1332] Dalton ; inapposite where the claim instead is that the presidential action--not one, : should be added, even contemplated by Congress--independently violates the ,RA, a statute that delegates no authority to the President to interfere with ı employer's right to hire permanent replacements during a lawful strike.

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n5 The Court's citations in Dalton to Chicago & Southern Air Lines, Inc. v. ıterman S.S. Corp., 333 U.S. 103, 92 L. Ed. 568, 68 S. Ct. 431 (1948); United :ates v. George S. Bush & Co., 310 U.S. 371, 84 L. Ed. 1259, 60 S. Ct. 944 ι940); and Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne, 250 U.S. 163, 3 L. Ed. 910, 39 S. Ct. 507 (1919), provide further indications of the Court's ımited holding. In all these cases, special reasons existed for concluding ıat judicial review was precluded. In Waterman, judicial review of presidential decision to deny an international air route to an airline was ıid to be unavailable because it would "embody Presidential discretion as to ›litical matters beyond the competence of the courts to adjudicate." 333 U.S. : 114. The Court in Bush held that judicial review was not available for a ıallenge to the factual basis of the President's decision to change a tariff ıte. It explained that the "judgment of the President that on the facts, ıduced in pursuance of the procedure prescribed by Congress, a change of rate ; necessary is no more subject to judicial review under this statutory scheme ıan if Congress itself had exercised that judgment." 310 U.S. at 379-80 :mphasis added). Finally, Dakota Central concerned an action of the President ıken pursuant to a congressional joint resolution which authorized "the :esident during the continuance of the present war ... whenever he shall deem : necessary for the national security or defense, to supervise or to take ›ssession and assume control of any ... telephone [lines]." 250 U.S. at 181. ıe Court refused to consider a claim that the President abused the discretion :anted him under the joint resolution because "it involves considerations which :e beyond the reach of judicial power." Id. at 184. Such considerations would ›viously involve what was necessary for the "national security" or "defense" ıring wartime--an analysis that the Court was legitimately wary of engaging in. ıgnificantly, the Court did consider, although ultimately rejected, an argument ıat there was an "absence of power in the President" to take the action that he ıd. Id.

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In sum, we think it untenable to conclude that there are no judicially ıforceable limitations on presidential actions, besides actions that run afoul : the Constitution or which contravene direct statutory prohibitions, so long ; the President claims that he is acting pursuant to the Procurement Act in the ırsuit of governmental savings. Yet this is what the government would have us ›. Its position would permit the President to bypass scores of statutory ımitations on governmental authority, and we therefore reject it.

III.

Appellants' most powerful argument on the merits, it strikes us, is their aim that the Executive Order is in conflict with the NLRA. If that is so, it unnecessary to decide whether, in the absence of the NLRA, the President uld be authorized (with or without appropriate findings) under the Procurement t and the Constitution to issue the Executive Order. It is, in that regard, disputed that the NLRA preserves to employers the right to permanently replace onomic strikers as an offset to the employees' right to strike. Almost 60 ars ago, the Supreme Court explained that an employer retained the right "to otect and continue his business [**31] by supplying places left vacant strikers. And he is not bound to discharge those hired to fill the places strikers, upon the election of the latter to resume their employment, in der to create places for them." NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 5-46, 82 L. Ed. 1381, 58 S. Ct. 904 (1938). The Court has repeatedly approved d reaffirmed Mackay Radio. See, e.g., NLRB v. Curtin Matheson Scientific, .c., 494 U.S. 775, 790, 108 L. Ed. 2d 801, 110 S. Ct. 1542 (1990); Trans World .rlines, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426, 433-34, 3 L. Ed. 2d 456, 109 S. Ct. 1225 (1989); Belknap, Inc. v. Hale, 463 U.S. 491, 4-05 n.8, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983); NLRB v. International Van .nes, 409 U.S. 48, 50, 34 L. Ed. 2d 201, 93 S. Ct. 74 (1972); NLRB v. Fleetwood ailer Co., 389 U.S. 375, 379, 19 L. Ed. 2d 614, 88 S. Ct. 543 (1967); NLRB v. own, 380 U.S. 278, 292 & n.6, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965); NLRB v. ie Resistor Corp., 373 U.S. 221, 232, 10 L. Ed. 2d 308, 83 S. Ct. 1139 (1963); RB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96, 1 L. Ed. 2d 676, 77 Ct. 643 (1957).

The government would have us look at the case somewhat differently. Although othing in the Procurement Act, passed in 1949 long after the original version the NLRA, addresses labor relations--let alone the specific issue replacement of strikers--the government, as we have noted, emphasizes the [**32] broad discretion that statute bestows on the President to et procurement policy for the entire government. Presidents have sought to fect, inter alia, the private employment practices of government contractors der that authority by issuing Executive Orders designed to ensure equal nployment opportunities, see E.O. 11,246, 3 C.F.R. 339 (1964-65 Compilation) 1965); E.O. 11,141, 3 C.F.R. 179 (1964-65 Compilation), reprinted in 5 U.S.C. @ 301 Note (1976); E.O. 11,114, 3 C.F.R. 774 (1959-63 Compilation) (1963); E.O. 0,925, 3 C.F.R. 448 (1959-63 Compilation) (1961); E.O. 10,557, 3 C.F.R. 203 1954-58 Compilation) (1954); E.O. 10,479, 3 C.F.R. 961 (1949-53 Compilation) 1953), and to limit the size of wage increases, see E.O. 12,092, 43 Fed. Reg. 1,375 (1978). These Orders were sustained in courts of appeals against attacks hat asserted, inter alia, that the President exceeded his authority under he Procurement Act. See Contractors Ass'n of [*1333] Eastern Pennsylvania . Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied sub nom. Contractors ss'n of Eastern Pennsylvania v. Hodgson, 404 U.S. 854, 30 L. Ed. 2d 95, 92 S. t. 98 (1971); Kahn, 199 U.S. App. D.C. 300, 618 F.2d 784. The government calls ur [**33] attention to two Executive Orders issued by President Bush that ctually dealt with matters covered by the NLRA. One of those barred overnment contractors from signing pre-hire agreements expressly permitted nder the construction industry proviso to @ 8(e) of the NLRA, see E.O. 12,818, 7 Fed. Reg. 48,713 (1992), and another required government contractors to post otices informing their employees that they could not be required to join or emain a member of a union, see E.O. 12,800, 57 Fed. Reg. 12,985 (1992). Neither of these orders provoked litigation so no court passed on heir legality.)

Accordingly, the government suggests that if the authority to issue the :ecutive Order can be found in the broad reaches of the Procurement Act--the :ter statute--that is the end of the matter. The government explains "there can · no conflict between the President's legitimate exercise of authority under :e Procurement Act and [the NLRA rights] relied on by appellants." The ıplication of this argument, if we understand it correctly, is that if there is :nsion, or perhaps even conflict, between the two statutes, the Procurement Act :umps the NLRA. But the government's argument [**34] runs against the canon : statutory construction: "the cardinal rule ... that repeals by implication 'e not favored." Traynor v. Turnage, 485 U.S. 535, 547, 99 L. Ed. 2d 618, 108 Ct. 1372 (1988) (quoting Morton v. Mancari, 417 U.S. 535, 549-50, 41 L. Ed. l 290, 94 S. Ct. 2474 (1974)). The later statute displaces the first only when ıe statute "expressly contradicts the original act" or if such a construction .s absolutely necessary ... in order that [the] words [of the later statute] ıall have any meaning at all." Id. at 548 (quoting Radzanower v. Touche Ross & ›., 426 U.S. 148, 153, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976)); see also Wood United States, 41 U.S. (16 Pet.) 342, 363, 10 L. Ed. 987 (1842) (there should : a "manifest and total repugnancy in the provisions, to lead to the conclusion ıat the [more recent laws] abrogated, and were designed to abrogate the [prior ıws]."). Furthermore, the Supreme Court has emphasized that "where there is no .ear intention otherwise, a specific statute will not be controlled or ıllified by a general one...." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 S. 437, 445, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987) (quoting Radzanower, 426 S. at 153) (emphasis added in Crawford Fitting); see also Green v. Bock ıundry Mach. Co., 490 [**35] U.S. 504, 524, 104 L. Ed. 2d 557, 109 S. Ct. ›81 (1989). The Procurement Act was designed to address broad concerns quite .fferent from the more focused question of the appropriate balance of power :tween management and labor in collective bargaining. The text of ıe Procurement Act and its legislative history indicate that Congress was :oubled by the absence of central management that could coordinate the entire ›vernment's procurement activities in an efficient and economical manner. The :gislative history is replete with references for the need to have an :fficient, businesslike system of property management." S. REP. NO. 475, 81st ›ng., 1st Sess. 1 (1949); see also H.R. REP. NO. 670, 81st Cong. 1st Sess. 2 .949).

The President's authority to pursue "efficient and economic" procurement, see ı U.S.C. @ 486(a), to be sure, has been interpreted to permit such broad ınging Executive Orders as 11,246 and 12,092, respectively guaranteeing equal ıployment opportunities, and restricting wage increases on the part of ›vernment contractors--measures which certainly reach beyond any narrow concept : efficiency and economy in procurement. But in those cases, the Third Circuit ıd this court did not perceive [**36] any conflict with another federal :atute. n6 Here, undeniably there is some tension between the President's :ecutive Order and the NLRA. To determine whether that tension constitutes ıacceptable conflict we look to the extensive [*1334] body of Supreme Court ıses that mark out the boundaries of the field occupied by the NLRA. Since the :ogenitors of these cases originally arose in the context of state actions that :re thought to interfere with the federal statute, they are referred to ›llectively as establishing the NLRA "pre-emption doctrine." The principles :veloped, however, have been applied equally to federal governmental behavior ıat is thought similarly to encroach into the NLRA's regulatory territory.

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n6 In Kahn, we concluded that since the Executive Order did not "subvert the ıtegrity of [the collective bargaining] process" the NLRA was not implicated. .8 F.2d at 796.

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The Supreme Court has crafted two different types of NLRA pre-emption. :tropolitan Life Ins. Co. v. Massachusetts, 471 [**37] U.S. 724, 748, 85 L. l. 2d 728, 105 S. Ct. 2380 (1985). Garmon pre-emption "forbids state and ›cal regulation of activities that are "protected by @ 7 of the [NLRA], or ›nstitute an unfair labor practice under @ 8.'" Building & Constr. Trades ›uncil v. Associated Builders & Contractors of Massachusetts/Rhode Island, 507 S. 218, 113 S. Ct. 1190, 1194, 122 L. Ed. 2d 565 (1993) (Boston Harbor) ɥuoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244, 3 L. Ed. l 775, 79 S. Ct. 773 (1959)); see also Amalgamated Ass'n of St., Elec. Ry. & ›tor Coach Employees v. Lockridge, 403 U.S. 274, 290-91, 29 L. Ed. 2d 473, 91 Ct. 1909 (1971). Justice Frankfurter explained that "administration is more ıan a means of regulation; administration is regulation. We have been concerned .th conflict in its broadest sense; conflict with a complex and interrelated :deral scheme of law, remedy and administration." Garmon, 359 U.S. at 243. ıchinists pre-emption, on the other hand, prohibits regulation of areas that ›ngress intended to be left "unregulated and to be controlled by the free play : economic forces." Lodge 76, International Ass'n of Machinists & Aerospace ›rkers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 144, 49 L. Ed. l 396, 96 S. Ct. 2548 (1976) (holding that a Wisconsin employment [**38] :lations board could not find a refusal to work overtime, an action that did ›t violate the NLRA, an unfair labor practice). The underlying rationale is ıat union and management "proceed from contrary and to an extent antagonistic .ewpoints and concepts of self-interest.... The presence of economic weapons in :serve, and their actual exercise on occasion by the parties, is part and ırcel of the system that the Wagner and Taft-Hartley Acts have recognized." .RB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89, 4 L. Ed. 2d 454, 80 Ct. 419 (1960). In fact, Machinists itself refers to the "hiring of permanent :placements" as an economic weapon available to an employer. 427 U.S. at 153.

Nor, as we have noted, is there any doubt that Machinists "pre-emption" ›plies to federal as well as state action. Insurance Agents', 361 U.S. 477, 4 Ed. 2d 454, 80 S. Ct. 419, concerned the power of the NLRB itself to conclude ıat a union's concerted, on-the-job activities--such as refusing to perform ıstomary duties at work--designed to put pressure on the employer to agree to ı acceptable collective bargaining agreement were in violation of the union's ıties under the NLRA. The Court held that since the union's activities were '*39] economic weapons preserved by the NLRA, the Board (which has the ›rimary responsibility for developing and applying national labor, policy," ırtin Matheson, 494 U.S. at 786) lacked the power to conclude that the :tivities constituted a NLRA violation. The Court has described Machinists :e-emption as creating a "free zone from which all regulation, "whether federal : State,' is excluded." Golden State Transit Corp. v. Los Angeles, 493 U.S. ›3, 111, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989) (quoting Machinists, 427 U.S. : 153) (citation omitted; emphasis added); see also Machinists, 427 U.S. at 141 :xplaining that Machinists pre-emption protects conduct that "Congress intended › be "unrestricted by any governmental power to regulate' ") (quoting

:surance Agents', 361 U.S. at 488-89) (emphasis added in Machinists).

When the government acts as a purchaser of goods and services ,RA pre-emption is still relevant. In Wisconsin Dep't of Indus. v. Gould Inc., 5 U.S. 282, 89 L. Ed. 2d 223, 106 S. Ct. 1057 (1986), the state of Wisconsin .d passed a statute debarring persons or firms that had violated the NLRA three 1335] times within a five year period from selling products to the state. .e Supreme Court rejected Wisconsin's argument that its scheme escaped ,RA pre-emption because it was "an exercise of the State's spending power ther [**40] than its regulatory power." Id. at 287. The Court determined .at, despite the form, "the manifest purpose and inevitable effect of :e debarment rule is to enforce the requirements of the NLRA." Id. at 291. n7

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n7 The Supreme Court's holding in that case was foreshadowed in a footnote, ıich addressed a Gould-like prohibition at the federal level, in our opinion in :hn:

ıicus argues that a decision upholding Executive Order 12092 would give the :esident power, for example, to establish by Executive Order the sort of :ogram proposed in the National Labor Reform Act of 1977, which was not ıacted, that "willful" violators of the National Labor Relations Act should be ıspended from seeking Government contracts for three years. The approach we ıke today might raise serious questions about the validity of such an Order, ıt we need not reach that issue here.

.8 F.2d at 793 n.50 (citation omitted).

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The latest Supreme Court opinion on the subject, on which the government '*41] heavily relies, is Boston Harbor. In that case, an independent agency : the Massachusetts government, The Massachusetts Water Resources Authority IWRA), faced with a federal court order directing it to clean up Boston Harbor, :lected Kaiser Engineers, Inc. as its project manager with responsibility to lvise MWRA as to work site labor-relations policy. Kaiser suggested, and MWRA ıreed, that Kaiser be permitted to enter into a collective bargaining agreement .th the Building and Construction Trades Council (BCTC). The agreement provided ıat all employees hired were obliged to become union members within seven days ' their employment whether they were employed by the general contractor or any ıbcontractor. The bid specifications required that all bidding subcontractors ıree to abide by the agreement. Such a "pre-hire" agreement in the construction ıdustry is a legal option under @ 8(f) of the NLRA as an exception to the :neral prohibition under @ 8(e) against "hot cargo" agreements. Non-union ›nstruction contractors sued, asserting that the actions of the MWRA were :e-empted by the NLRA because the state agency was intruding into the ›llective bargaining process by [**42] forcing subcontractors to exercise ıe @ 8(f) option. The First Circuit agreed over a dissent by then-Chief Judge :eyer and the Supreme Court reversed, determining that the bid specification ıs "not government regulation and that it is therefore subject to neither ırmon nor Machinists pre-emption." Boston Harbor, 113 S. Ct. at 1199.

Of course, appellants argue that the case before us is controlled by Gould :d distinguished from Boston Harbor; the government urges the opposite. The ›vernment points out that in Gould, Wisconsin conceded that its purpose was to :ter labor law violations, see 475 U.S. at 287, so the Court was easily able to :termine that the state sought to address conduct that was "unrelated to the ıployer's performance of contractual obligations to the State..." Boston :rbor, 113 S. Ct. at 1197. Echoing its arguments on reviewability, the ›vernment insists that the Executive Order is premised on the President's :onomic judgment that a government contractor's use of permanent replacements .ll cause longer, more contentious strikes and the loss of the accumulated :ill of the strikers with correspondingly less efficient and [**43] :onomical performance by that contractor. That judgment, we are told, is :rtainly an economically rational one, and it is not up to a court to question .ther the President's motivation or the quality of his reasoning here any more ıan was done in Contractors Ass'n, 442 F.2d 159, or Kahn, 199 U.S. App. D.C.)0, 618 F.2d 784. Appellants, without directly challenging the President's :onomic analysis, observe that a struck company's use of permanent replacements ; a good deal more efficient than temporary replacements; the Executive Order :rationally bars the former but not the latter.

We are similarly quite reluctant to consider the President's motivation in ;suing the Executive Order. Chief Judge Breyer's dissent in Boston Harbor, on ıich the Supreme Court heavily relied, put the issue as [*1336] follows: :n the case before us, the record makes clear that the MWRA is participating in market place as a general contractor, like a private buyer of services. Its ›le as buyer is not, in any sense, a sham designed to conceal an effort to ›gulate." Associated Builders & Contractors of Massachusetts/Rhode Island v. ıssachusetts Water Resources Auth., 935 F.2d 345, 366 (1st Cir. 1991) (en '**44] banc) (Breyer, C.J., dissenting) (emphasis added). We do not think we :e bound to that dichotomy, however--particularly when considering the :esident's Executive Order. It is not necessary for us to question the :esident's motivation in order to determine whether the Order is a regulation ıat is pre-empted by Machinists.

The Supreme Court in Boston Harbor, quoting Chief Judge Breyer, explained, ›hen the MWRA, acting in the role of purchaser of construction services, acts ıst like a private contractor would act, and conditions its purchasing upon the ›ry sort of labor agreement that Congress explicitly authorized and expected :equently to find, it does not "regulate' the workings of the market forces ıat Congress expected to find; it exemplifies them." 113 S. Ct. at 1199 ;uoting Associated Builders, 935 F.2d at 361 (Breyer, C.J., dissenting)). The .strict court here appeared, at points, to read this formulation as suggesting ıat if a private contractor were permitted to refuse to buy goods from an .ployer who permanently replaced strikers--which ordinarily he would be--then) should the federal government. Appellants contend, on the other hand, that ›ston [**45] Harbor's reasoning makes the test turn on how typical the :havior would be as conducted by private contractors. The government--as least ›fore us--disavows the permissibility test by itself and instead offers a ›dification. A public entity exercising its spending power acts as regulator if :s actions "go[ ] beyond the conduct that would be normally or economically ıtional for a private party." The government condemns appellants' typicality ›st as practically unworkable, and appellants argue that it would be hardly ıtional for a private contractor to buy goods from a struck employer who ıs hired temporary replacements, but refuse the goods of a struck employer

10 has hired permanent replacements.

We do not think it is necessary to resolve this doctrinal dispute in this ıse. We would be surprised if private contractors were to care whether a struck ıpplier hired permanent or temporary replacements, so long as the goods or ervices contracted for were provided in a timely fashion and met quality :andards. There may well be, however, some companies who, for political or ıilosophic reasons--what the Supreme Court referred to as a "labor policy oncern," Boston Harbor, [**46] 113 S. Ct. at 1197--would not wish to do ısiness with a struck company that hired permanent replacements. n8 But even if ıat behavior were a good deal more common than we suppose, we would still egard the Executive Order as regulatory in character.

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n8 If the purchaser were obliged to cease doing business with the supplier ecause of coercion from its own union, that would constitute an illegal econdary boycott under @ 8(b)(4) of the NLRA.

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In Boston Harbor, the Court's analysis of the behavior of MWRA was based on ıe premise, stated after its summary of its precedent, that:

ıen the State acts as regulator, it performs a role that is characteristically governmental rather than a private role, boycotts notwithstanding. Moreover, s regulator of private conduct, the State is more powerful than private arties. These distinctions are far less significant when the State acts as a ırket participant with no interest in setting policy. ... We left open [in ould] the question whether a [**47] State may act without offending ıe pre-emption principles of the NLRA when it acts as a proprietor and its acts ıerefore are not "tantamount to regulation," or policy-making.

1. at 1197 (emphases added). The premise on which the Court's further analysis ested, then, was that the Massachusetts governmental entity, MWRA, was not eeking to set general policy in the Commonwealth; it was just trying to operate s if [*1337] it were an ordinary general contractor whose actions were specifically tailored to one particular job, the Boston Harbor clean-up roject." Id. at 1198. n9 Surely, the result would have been entirely different, iven the Court's reasoning, if Massachusetts had passed a general law or the overnor had issued an Executive Order requiring all construction contractors oing business with the state to enter into collective bargaining agreements ith the BCTC or its Massachusetts-wide counterpart containing @ 8(e) pre-hire greements. Accordingly, we very much doubt the legality of President Bush's ecutive Order 12,818--since revoked, but upon which the government elies--that banned government contractors from entering into pre-hire greements [**48] under @ 8(f). n10

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n9 In the Court's discussion of Golden State Transit Corp. v. City of Los ıgeles, 475 U.S. 608, 89 L. Ed. 2d 616, 106 S. Ct. 1395 (1986) (holding that os Angeles could not condition renewal of a taxi cab franchise upon settlement f a labor dispute), it observed that if the taxi company had been providing ervices to the city and "if the strike had produced serious interruptions in ıe services the city had purchased, the city would not necessarily have been :e-empted from advising Golden State that it would hire another company if ıe labor dispute were not resolved and services resumed by a specific ꞓadline." Boston Harbor, 113 S. Ct. at 1196 (emphasis added).

n10 We also are dubious that President Bush's Executive Order 12,800, which equired government contractors to post notices informing their employees that ıey could not be required to join or remain a member of a union, was legal. It ıy well have run afoul of Garmon pre-emption which reserves to NLRB ırisdiction arguably protected or prohibited conduct.

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It does not seem to us possible to deny that the President's Executive Order eeks to set a broad policy governing the behavior of thousands of American ompanies and affecting millions of American workers. The President has, of ourse, acted to set procurement policy rather than labor policy. But the former s quite explicitly based--and would have to be based--on his views of the atter. For the premise of the Executive Order is the proposition that ıe permanent replacement of strikers unduly prolongs and widens strikes and isrupts the proper "balance" between employers and employees. Whether that roposition is correct, or whether the prospect of permanent replacements deters :rikes, and therefore an employer's right to permanently replace strikers is imply one element in the relative bargaining power of management and organized abor, is beside the point. Whatever one's views on the issue, it surely goes to ıe heart of United States labor relations policy. It cannot be equated to the d hoc contracting decision made by MWRA in seeking to clean up Boston Harbor.

That is not to say that the President, in implementing the Procurement Act, ay not draw upon any secondary [**50] policy views that deal with overnment contractors' employment practices--policy views that are directed eyond the immediate quality and price of goods and services purchased. In Kahn, e recognized that the imposition of wage and price controls as a condition of ligibility for government contractors could result in the government actually aying more for individual government contracts than might be so otherwise. 618 .2d at 793. We thought, however, the President's judgment that the overall mpact of those controls would reduce government procurement costs was entitled) deference. Id. And, in Contractor Ass'n, the Third Circuit's opinion ontained only the briefest discussion of the impact on cost of the Executive rder's requirement of an affirmative action covenant in federally assisted onstruction contracts. The court merely noted that this requirement would ıcrease the pool of qualified labor and thereby reduce costs. 442 F.2d at 171. ıt labor relations policy is different because of the NLRA and its broad field f pre-emption. No state or federal official or government entity can alter the elicate balance of bargaining and economic power that the NLRA establishes, **51] whatever his or its purpose may be.

If the government were correct, it follows, as the government apparently onceded, that another President could not only revoke the Executive Order, but ould issue a new order that actually required government contractors) permanently replace strikers, premised on a finding that this would minimize *1338] unions' bargaining power and thereby reduce procurement costs.

rhaps even more confusing, under the government's theory, the states would be rmitted to adopt procurement laws or regulations that in effect choose sides this issue, which would result in a further balkanization of federal labor licy. Yet the whole basis of the Supreme Court's NLRA pre-emption doctrine has om the outset been the Court's perception that Congress wished the "'uniform plication' of its substantive rules and to avoid the "diversities and nflicts likely to result from a variety of local procedures and attitudes ward labor controversies.' " NLRB v. Nash-Finch Co., 404 U.S. 138, 144, 30 L. l. 2d 328, 92 S. Ct. 373 (1971) (quoting Garner v. Teamsters Union, 346 U.S. 5, 490, 98 L. Ed. 228, 74 S. Ct. 161 (1953)).

The government insists that the President's intervention into the area labor relations is quite [**52] narrow. In contrast to the sconsin debarment scheme in Gould, the Executive Order does not provide for itomatic contract termination or debarment of contractors. The government iphasizes the discretion that the Secretary and contracting agencies have in ciding whether to impose the Executive Order's penalties on contractors io hire permanent replacements. The Secretary may terminate a contract if contractor has permanently replaced strikers and only if the agency head does t object. The Secretary is also given discretion as to whether to debar contractor and cannot debar a contractor if an agency head concludes that iere is a compelling reason not to do so. The Executive Order's flexibility is iid to ensure that intervention into labor relations only occurs to the extent cessary to guarantee efficient and economical procurement.

We do not think the scope of the President's intervention into and adjustment labor relations policy is determinative, but despite the government's otestations, the impact of the Executive Order is quite far-reaching. It plies to all contracts over $ 100,000, and federal government purchases taled $ 437 billion in 1994, [**53] constituting approximately 6.5% of the oss domestic product. STATISTICAL ABSTRACT OF THE UNITED STATES 451 (1995). ederal contractors and subcontractors employ 26 million workers, 22% of the ibor force. GAO REPORT. The Executive Order's sanctions for hiring permanent placements, contract debarment and termination, applies to the organizational iit of the federal contractor who has hired permanent replacements. ie organizational unit includes "any other affiliate of the person that could ovide the goods or services required to be provided under the contract." 60 d. Reg. at 27,861 (emphasis added). If a local unit of Exxon had a contract to liver $ 100,001 worth of gas to a federal agency, the organizational unit uld include all the other affiliates of Exxon that could have provided the is; no doubt a significant portion of the Exxon corporation. The broad finition of "organizational unit" will have the effect of forcing corporations shing to do business with the federal government not to hire permanent placements even if the strikers are not the employees who provide the goods or rvices to the government. Indeed, corporations who even hope to obtain a vernment [**54] contract will think twice before hiring permanent placements during a strike. It will be recalled that in Kahn, 618 F.2d at 2-93, the government itself asserted that controls imposed on vernment contractors--given the size of that portion of the economy--would ter the behavior of non-government contractors.

Not only do the Executive Order and the Secretary's regulations have a ibstantial impact on American corporations, it appears that the cretary's regulations promise a direct conflict with the NLRA, thus running 'oul not only of Machinists but the earlier Garmon pre-emption doctrine. Under :e regulations, the Secretary assumes responsibility for determining when a .abor dispute" ends, thereby permitting an employer who is debarred because he :ed permanent replacements to be declared eligible. But the regulations ·ntemplate that the Secretary will not declare the "labor dispute" over without :e striking union's approval (which enables either strikers to return to work :us ousting the replacements or a collective bargaining agreement to be :ached, both of which are factors listed in the regulations for supporting the ·nclusion that a "labor dispute" [**55] [*1339] has ended. See 60 Fed. :g. at 27,862). Under the NLRA, however, an employer's duty to bargain with a .riking union after the strikers have been replaced ends if a year has passed .nce certification and he has a good faith doubt as to the union's majority :atus, or the union does not in fact have majority status. See Curtin Matheson, ı4 U.S. at 778. If after a union lost majority status an employer were to ›ntinue to recognize the union as the exclusive representative--the recognition : which the Secretary's regulations would seem to induce--the employer would be ›mmitting an unfair labor practice. See International Ladies' Garment Workers' NLRB, 366 U.S. 731, 6 L. Ed. 2d 762, 81 S. Ct. 1603 (1961).

* * * *

We, therefore, conclude that the Executive Order is regulatory in nature and ; pre-empted by the NLRA which guarantees the right to hire permanent :placements. The district court is hereby

Reversed.

exec. order req'd A.A. plan (federally assisted) contractors at state level

442 F.2d 159 printed in FULL format.

The Contractors Association of Eastern Pennsylvania, Appellant, v. The Secretary of Labor, George P. Shultz, The Assistant Secretary of Labor, et al., Appellees

No. 19,027

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

442 F.2d 159; 1971 U.S. App. LEXIS 10597; 3 Fair Empl. Prac. Cas. (BNA) 395; 3 Empl. Prac. Dec. (CCH) P8180

April 22, 1971, Decided

DISPOSITION:

Affirmed.

CORE TERMS: contractor, affirmative action, tradesmen, federally, procurement, bidder, federal government, manpower, bid, Civil Rights Act, five-county, regulation, utilization, National Labor Relations Act, amici, covenant, presidential, affirmative action program, construction contracts, summary judgment, hiring, craft, labor pool, seniority, assistant secretary, minority group, non-discrimination, contracting, et seq, authorize

JUDGES: Hastie, Chief Judge, and McLaughlin and Gibbons, Circuit Judges.

OPINIONBY: GIBBONS

OPINION: [*162]

GIBBONS, C. J.:

The original plaintiff, the Contractors Association of Eastern Pennsylvania (the Association) and the intervening plaintiffs, n1 construction contractors doing business in the Philadelphia area (the Contractors), appeal from an order of the district court which denied their motion for summary judgment, granted the motion of the federal defendants n2 to dismiss the Association complaint for lack of standing, and granted the cross-motion of the federal defendants for summary judgment. n3 When deciding these motions, the district court had before it the Association's verified complaint, a substantially identical complaint of the Contractors, the affidavits of Vincent G. Macaluso and Ward McCreedy on behalf of the federal defendants which identified certain relevant documents, a stipulation by the parties as to certain facts, and two affidavits of Howard G. Minckler on behalf of the plaintiffs.

n1 James D. Morrissey, Inc.: The Conduit & Foundation Corp.; Glasgow, Inc.; Buckley & Company; The Nyleve Company; Erb Engineering & Constr. Co.; Perkins, Kanak, Foster, Inc.; and Lansdowne Constructors, Inc.

n2 The Secretary of Labor, George P. Shultz; The Assistant Secretary of Labor, Arthur A. Fletcher; The Director, Office of Federal Contract Compliance, John L. Wilks; The Secretary of Agriculture, Clifford M. Hardin.

n3 An additional defendant, the General State Authority of the Commonwealth of Pennsylvania, has not participated in this appeal.

The complaint challenges the validity of the Philadelphia Plan, promulgated by the federal defendants under the authority of Executive Order No. 11246. n4 That Plan is embodied in two orders issued by officials of the United States Department of Labor, dated June 27, 1969 and September 23, 1969, respectively. Copies of these orders were annexed [*163] to the verified complaint as exhibits 1 and 2, respectively, and to the Macaluso affidavit as appendices B and C respectively. In summary, they require that bidders on any federal or federally assisted construction contracts for projects in a five-county area around Philadelphia, n5 the estimated total cost of which exceeds $500,000, shall submit an acceptable affirmative action program which includes specific goals for the utilization of minority manpower in six skilled crafts: ironworkers, plumbers and pipefitters, steamfitters, sheetmetal workers, electrical workers, and elevator construction workers.

n4 *30 Fed. Reg. 12319* (Sept. 24, 1965), as amended by Exec. Order No. 11375, *32 Fed. Reg. 14303* (Oct. 13, 1967), 3 C.F.R. 406 (1969), *42 U.S.C.A.* § *2000e* (1970), superseded in part by

Exec. Order No. 11478, *34 Fed. Reg. 12985* (Aug. 8, 1969), 3 *C.F.R., 1969 Comp. 133, 42 U.S.C.* § *2000e* (1970).

n5 Encompassing Bucks, Chester, Delaware, Montgomery and Philadelphia Counties in Pennsylvania.

Executive Order No. 11246 requires all applicants for federal assistance to include in their construction contracts specific provisions respecting fair employment practices, including the provision:

"The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." n6

The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. On June 27, 1969 Assistant Secretary of Labor Fletcher issued an order implementing the Executive Order in the five-county Philadelphia area. The order required bidders, prior to the award of contracts, to submit "acceptable affirmative action" programs "which shall include specific goals of minority manpower utilization." The order contained a finding that enforcement of the "affirmative action" requirement of Executive Order No. 11246 had posed special problems in the construction trades. n7 Contractors and subcontractors must hire a new employee complement for each job, and they rely on craft unions as their prime or sole source for labor. The craft unions operate hiring halls. "Because of the exclusionary practices of labor organizations," the order finds "there traditionally has been only a small number of Negroes employed in these seven trades." n8 The June 27, 1969 order provided that the Area Coordinator of the Office of Federal Contract Compliance, in conjunction with the federal contracting and administering agencies in the Philadelphia area, would determine definite standards for specific goals in a contractor's affirmative action program. After such standards were determined, each bidder would be required to commit itself to specific goals for minority manpower utilization. The order set forth factors to be considered in determining definite standards, including:

" (1) The current extent of minority group participation in the trade.
(2) The availability of minority group persons for employment in such trade.
(3) The need for training programs in the area and/or the need to [*164] assure demand for those in or from existing training programs.
(4) The impact of the program upon the existing labor force."

Acting pursuant to the June 29, 1969 order, representatives of the Department of Labor held public hearings in Philadelphia on August 26, 27 and 28, 1969. On September 23, 1969, Assistant Secretary Fletcher made findings with respect to each of the listed factors and ordered that the following ranges be established as the standards for minority manpower utilization for each of the designated trades in the Philadelphia area for the following four years:

Identification of Trade	Range of Minority Group Employment Until 12/31/70	for 1971	for 1972	for 1973
Ironworkers	5%-9%	11%-15%	16%-20%	22%-26%
Plumbers & Pipefitters	5%-8%	10%-14%	15%-19%	20%-24%
Steamfitters	5%-8%	11%-15%	15%-19%	20%-24%
Sheetmetal workers	4%-8%	9%-13%	14%-18%	19%-23%
Electrical workers	4%-8%	9%-13%	14%-18%	19%-23%
Elevator construction workers	4%-8%	9%-13%	14%-18%	19%-23%

n6 § 202(1). This wording comes from Exec. Order No. 11375, see note 4 supra, and represents a minor change from the original designed to parallel the classes of discrimination prohibited by Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e* et seq.

n7 Recognition of this problem antedated the present Plan. Under the Philadelphia Pre-Award Plan, which was put into effect on November 30, 1967 by the Philadelphia Federal Executive Board, each apparent low bidder was required to submit a written affirmative action program assuring minority group representation in eight specified trades as a precondition to qualifying for a construction contract or subcontract. This predecessor Plan was suspended due to an Opinion letter by the Comptroller General stating that it violated the principles of competitive bidding. *48 Comp. Gen. 326 (1968).*

n8 The order of June 27, 1969 listed "roofers and water proofers" among the trades underrepresented by minority craftsmen. The order of September 23, 1969 dropped this category from the list, leaving the six trades previously named.

The order of September 23, 1969 specified that on each invitation to bid each bidder would be required to submit an affirmative action program. The order further provided:

"4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth . . . above . . .

* * *

6. The purpose of the contractor's commitment to specific goals as to minority manpower utilization is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee. Whenever it comes to the bidder's attention that the goals are being used in a discriminatory manner, he must report it to the Area Coordinator of the Office of Federal Contract Compliance of the U.S. Department of Labor in order that appropriate sanction proceedings may be instituted.

* * *

8. The bidder agrees to keep such records and file such reports relating to the provisions of this order as shall be required by the contracting or administering agency."

In November, 1969, the General State Authority of the Commonwealth of Pennsylvania issued invitations to bid for the construction of an earth dam on Marsh Creek in Chester County, Pennsylvania. Although this dam is a Commonwealth project, part of the construction cost, estimated at over $3,000,000 is to be funded by federal monies under a program administered by the Department of Agriculture. n9 The Secretary of Agriculture, one of the federal defendants, as a condition for payment of federal financial assistance for the project, required the inclusion in each bid of a Philadelphia Plan Commitment in compliance with the order of September 23, 1969. On November 14, 1969, the General State Authority issued an addendum to the original invitation for bids requiring all bidders to include such a commitment in their bids. It is alleged and not denied [*165] that except for the requirement by the Secretary of Agriculture that the Philadelphia Plan Commitment be included, the General State Authority would not have imposed such a requirement on bidders.

n9 Federal assistance was authorized under the Watershed Protection and Flood Prevention Act, *16 U.S.C. § 1001* et seq.

The Association consists of more than eighty contractors in the five-county Philadelphia area who regularly employ workers in the six specified crafts, and who collectively perform more than $150,000,000 of federal and federally assisted construction in that area annually. Each of the contractor plaintiffs is a regular bidder on federal and federally assisted construction projects. The complaint was filed prior to the opening of bids on the Marsh Creek dam. It sought injunctive relief against the inclusion of a Philadelphia Plan Commitment requirement in the invitation for bids. By virtue of a stipulation that the General State Authority would issue a new and superseding invitation for bids if the district court held the Plan to be unlawful, the parties agreed that bids could be received without affecting the justiciability of the controversy. Bids were received on January 7, 1970. One of the intervening contractor plaintiffs submitted a low bid and appeared at the time of the district court decision to be entitled to an award of the contract.

The complaints of the Association and the Contractors refer to the fact that the Comptroller General of the United States has opined that the Philadelphia Plan Commitment is illegal and that disbursement of federal funds for the performance of a contract containing such a promise will be treated as unlawful. n10 The plaintiffs point out that the withholding of funds after a contractor has commenced performance would have catastrophic consequences, since contractors depend upon progress payments, and are in no position to complete their contracts without such payments. They allege that the Philadelphia Plan is illegal and void for the following reasons:

1. It is action by the Executive branch not authorized by the constitution or any statute and beyond Executive power.
2. It is inconsistent with Title VII of the Civil Rights Act of 1964. n11
3. It is inconsistent with Title VI of the Civil Rights Act of 1964. n12
4. It is inconsistent with the National Labor Relations Act. n13
5. It is substantively inconsistent with and was not adopted in procedural accordance with Executive Order No. 11246.
6. It violates due process because

(a) it requires contradictory conduct impossible of consistent attainment;
(b) it unreasonably requires contractors to undertake to remedy an evil for which the craft unions, not they, are responsible;
(c) it arbitrarily and without basis in fact singles out the five-county Philadelphia area for discriminatory treatment without adequate basis in fact or law; and
(d) it requires quota hiring in violation of the Fifth Amendment.

The federal defendants moved both to dismiss the complaint under Rule 12(b)(1), Fed. R. Civ. P. and for summary judgment under Rule 56(b) Fed. R. Civ. P. [*166] They asserted that the plaintiffs lacked standing and that they were entitled to judgment as a matter of law. The plaintiffs moved for summary judgment. The district court held that the Association lacked standing to maintain the suit, that the Contractors had such standing, and that the Plan was valid *311 F. Supp. 1002*. It granted summary judgment for the federal defendants, and the plaintiffs appeal.

n10 Comp. Gen. Op., Letter to Sec. of Labor George P. Shultz, August 5, 1969, 115 Cong. Rec. 17,201-04 (daily ed. Dec. 18, 1969). The Comptroller General had objected to earlier efforts at implementing the "affirmative action" aspect of Exec. Order No. 11246 on the ground that these plans failed to inform prospective bidders of definite minimum standards for acceptable programs. In his negative opinion letter in response to the original Philadelphia Pre-Award Plan, he had also adverted to the possibility of conflict with Title VII of the Civil Rights Act of 1964. See note 7 supra. The Title VII objections became the heart of the opinion of August 5, 1969 which challenged the validity of the Revised Philadelphia Plan.

n11 *42 U.S.C.* § *2000e* et seq.

n12 *42 U.S.C.* § *2000d* et seq.

n13 *29 U.S.C.* § *151* et seq.

Standing

The district court's holding that the Association lacked standing to sue was handed down prior to that of the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)*, and in the light of that decision and the more recent decision in *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136, 39 U.S.L.W. 4287* (U.S. March 2, 1971), is at least doubtful. We need not reach this issue, however, since the Contractor plaintiffs who as bidders are directly impacted by the requirement that they agree in their bid to comply with the Plan, clearly have standing. *Abbott Laboratories v. Gardner, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)*. All plaintiffs have been represented by the same attorney, and the presence or absence of the Association as a plaintiff has no practical significance.

Executive Power

The plaintiffs contend that the Philadelphia Plan is social legislation of local application enacted by the Executive without the benefit of statutory or constitutional authority. They point out, probably correctly, that the Plan imposes on the successful bidder on a project of the Commonwealth of Pennsylvania record keeping and hiring practices which violate Pennsylvania law. n14 If the Plan was adopted pursuant to a valid exercise of presidential power its provisions would, of course, control over local law. See *United States v. City of Chester, 144 F.2d 415, 420 (3d Cir. 1944)*; cf. *United States v. Allegheny County, 322 U.S. 174, 183, 88 L. Ed. 1209, 64 S. Ct. 908 (1944)*; *Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 221, 72 L. Ed. 857, 48 S. Ct. 451 (1928)*. But, say the plaintiffs, where there is neither statutory authorization nor constitutional authority for the Executive action, no substantive federal requirements may be imposed upon a contract between the Commonwealth and its contractor.

n14 The Pennsylvania Human Relations Act, 43

P.S. § 951 et seq. (Supp. 1970), specifically prohibits an employer from keeping any record of or using any form of application with respect to the race, color, religion, ancestry, sex or national origin of an applicant for employment. 43 P.S. § 955(b)(1). The Act also prohibits the use of a quota system for employment based on the same criteria. 43 P.S. § 955(b)(3). The record keeping prohibition may be of limited force due to certain requirements of Title VII of the Civil Rights Act of 1964. *42 U.S.C. § 2000e-8*(c). Moreover, we do not know how the Pennsylvania courts or the Pennsylvania Human Relations Commission would react to a scheme of "benign" quota hiring.

The district court's answer is that the federal government "has the unrestricted power to fix the terms, conditions and those with whom it will deal." n15 For this proposition it cites *Perkins v. Lukens Steel Co., 310 U.S. 113, 84 L. Ed. 1108, 60 S. Ct. 869 (1940)* and *King v. Smith, 392 U.S. 309, 333, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968).* Neither case is in point, however on the issue of Executive as distinguished from federal power. King v. Smith held that the Alabama substitute father regulation was inconsistent with the Social Security Act, *42 U.S.C. § 606*(a), and points out that the federal government may impose the terms and conditions upon which its money allotments may be disbursed. The conditions referred to were imposed by Congress, not by the Executive branch. Perkins v. Lukens Steel Co. interprets the Public Contracts Act of June 30, 1936 n16 [*167] which requires that sellers to the federal government pay prevailing minimum wages. It holds that an administrative determination of prevailing wages in a given industry made by the Secretary of Labor is not subject to judicial review on behalf of a potential seller. n17 The opinion contains the language:

"Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." n18

The quoted language refers to federal power exercised pursuant to a statutory mandate. The case is not in point on the issue of Executive power absent such a mandate.

n15 *311 F. Supp. 1002, 1011 (E.D. Pa. 1970).*

n16 49 Stat. 2036-39, *41 U.S.C. §§ 35*-45.

n17 The actual holding of Perkins was subsequently nullified by Congress. 66 Stat. 308 (1952), *41 U.S.C. § 43a.* See 4 K. Davis, Administrative Law § 28.06 (1958).

n18 *310 U.S. at 127.*

The federal defendants and several amici n19 contend that Executive power to impose fair employment conditions incident to the power to contract has been upheld in this Circuit and in the Fifth Circuit. They cite *Farmer v. Philadelphia Electric Company, 329 F.2d 3 (3d Cir. 1964)* and *Farkas v. Texas Instrument, Inc., 375 F.2d 629* (5th Cir.), cert. denied, *389 U.S. 977, 19 L. Ed. 2d 471, 88 S. Ct. 480 (1967).* Both cases discussed the Executive Order program for achieving fair employment in the context of Government contracts rather than federally assisted state contracts, and both assumed the validity of the Executive Order then applicable. n20 Both cases held that even assuming the validity of the Executive Order, it did not give rise to a private cause of action for damages by a party subjected to discrimination. Discussion of the validity of the Executive Order was in each case dictum. Moreover, both Farmer and Farkas refer to *40 U.S.C. § 486*(a) as the source of the Executive power to issue the order. That subsection authorizes the President to prescribe such policies and directives as he deems necessary to effectuate the provisions of Chapter 10 of Title 40 n21 and Chapter 4 of Title 41. n22 These chapters deal with procurement of Government property and services, not with federal assistance programs. Thus even if Farmer and Farkas were holdings rather than dicta as to Executive power, the holdings would not reach the instant case. The validity of the Executive Order program as applied to the construction industry in state government contracts by virtue of federal assistance has not been litigated, so far as we have been able to determine, in any case reaching the courts of appeals. n23 Certainly no case has arisen which considers Executive power to impose, by virtue of federal assistance, contract terms in a state construction contract which are at variance with state law.

n19 Amici favoring the Plan include the City of Philadelphia, the Urban League of Philadelphia, Wives for Equal Employment Opportunity, the Lawyers' Committee for Civil Rights Under Law, and the N.A.A.C.P. Appearing as amici in opposition to the Plan are the Building and Construction Trades Dep't, AFL-CIO, the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO, the General Building Contractors Ass'n, Inc., the National Electrical Contractors Ass'n, and the Associated General

Contractors of America.

n20 Exec. Order No. 10925, *26 Fed. Reg. 1977* (March 6, 1961), 3 *C.F.R., 1961 Comp. 86.*

n21 Management and Disposal of Government Property.

n22 Procurement Procedures.

n23 But cf. *Weiner v. Cuyahoga Community College, 19 Ohio St. 2d 35, 249 N.E. 2d 907 (1969),* cert. denied, *396 U.S. 1004, 24 L. Ed. 2d 495, 90 S. Ct. 554 (1970); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).*

The limitations of Executive power have rarely been considered by the courts. One of those rare instances is *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 [*168] (1952).* From the six concurring opinions and one dissenting opinion in that case, the most significant guidance for present purposes may be found in that of Justice Jackson:

"We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily on any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." n24

n24 *343 U.S. at 635-38.*

Plaintiffs contend that the Philadelphia Plan is inconsistent with the will of Congress expressed in several statutes. We deal with these statutory contentions hereinafter. Thus for the moment we may set to one side consideration of Justice Jackson's third category, and turn to category (1), action expressly or impliedly authorized, and category (2), action in which the President has implied power to act in the absence of congressional preemption. To determine into which category the Philadelphia Plan falls a review of Executive Orders in the field of fair employment practices is helpful.

The first such order, Executive Order No. 8802, n25 was signed by President Roosevelt on June 25, 1941. It established in the Office of Production Management a Committee on Fair Employment Practice, and it required that all Government contracting agencies include in all defense contracts a covenant not to discriminate against any worker because of race, creed, color, or national origin. The order contained no specific statutory reference, and describes the action "as a prerequisite to the successful conduct of our national defense production effort." In December 1941 Congress enacted "An Act to expedite the [*169] prosecution of the war effort," n26 and on December 27, 1941, pursuant to that Act the President issued Executive Order No. 9001 n27 which granted to the War and Navy Departments and the Maritime Commission broad contracting authority. This order among other provisions stated that a nondiscrimination clause would be deemed incorporated by reference in all such contracts. On May 27, 1943, Executive Order No. 8802 was amended by Executive Order No. 9346 n28 which established in the Office for Emergency Management of the Executive Office of the President a Committee on Fair Employment Practice. This order required the antidiscrimination clause in all government contracts rather than in defense contracts only. Still, the order was quite clearly bottomed on the

President's war mobilization powers and was by its terms directed toward enhancing the pool of workers available for defense production.

n25 *6 Fed. Reg. 3109, 3 C.F.R. 1938-43 Comp. 957.*

n26 Act of Dec. 18, 1941, ch. 593, 55 Stat. 838.

n27 *6 Fed. Reg. 6787, 3 C.F.R. 1938-43 Comp. 1054.*

n28 *8 Fed. Reg. 7183, 3 C.F.R. 1938-43 Comp. 1280.*

On December 18, 1945, President Truman signed Executive Order No. 9664, n29 which continued the Committee established by Executive Orders Nos. 8802 and 9346 "for the periods and subject to the conditions stated in the National War Agencies Appropriation Act, 1946 (Public Law 156, 79th Cong., 1st Sess., approved July 17, 1945)." On February 2, 1951, the President signed Executive Order No. 10210, n30 which transferred to the Department of Defense the contracting powers referred to in Executive Order No. 9001. The order continued the provision that a non-discrimination clause would be deemed incorporated by reference in all defense contracts. It referenced the First War Powers Act, 1941, as amended. By a subsequent series of Executive Orders, Executive Order No. 10210 was extended to other government agencies engaged in defense related procurement. n31 On December 3, 1951 the President signed Executive Order No. 10308, n32 creating the Committee on Government Contract Compliance, which was charged with the duty of obtaining compliance with the non-discrimination contract provisions. The statutory authorities referenced in Executive Order No. 10308 are the Defense Production Act of 1950 n33 and *31 U.S.C. § 691.* n34 Reference to the Defense Production Act of 1950 shows that the President was still acting, pursuant to his national defense powers, to assure maximum utilization of available manpower.

n29 *10 Fed. Reg. 15301, 3 C.F.R., 1943-48 Comp. 480.*

n30 *15 Fed. Reg. 1049, 3 C.F.R., 1949-53 Comp. 390.*

n31 Exec. Order No. 10216, *16 Fed. Reg. 1815* (Feb. 23, 1951), 3 *C.F.R., 1949-53 Comp. 732* (Department of Agriculture, Atomic Energy Commission, National Advisory Committee for Aeronautics, and Government Printing Office); Exec. Order No. 10227, *16 Fed. Reg. 2675* (Mar. 24, 1951), 3 *C.F.R., 1949-53 Comp. 739* (General Services Administration); Exec. Order No. 10231, *16 Fed. Reg. 3025* (April 5, 1951), 3 *C.F.R., 1949-53 Comp. 741* (Tennessee Valley Authority); Exec. Order No. 10243, *16 Fed. Reg. 4419* (May 17, 1951), 3 *C.F.R. 1949-53 Comp. 752* (Federal Civil Defense Administration); Exec. Order No. 10281, *16 Fed. Reg. 8789* (Aug. 28, 1951), 3 *C.F.R., 1949-53 Comp. 781* (Defense Materials Procurement Agency).

n32 *16 Fed. Reg. 12303, 3 C.F.R., 1949-53 Comp. 837.*

n33 *50 U.S.C. App.* § *2061* et seq.

n34 This latter reference is to the source of appropriations for salaries and expenses for committee members and staff. It appears in numerous subsequent Executive Orders, but has no significance other than fiscal.

President Eisenhower on August 13, 1953, by Executive Order No. 10479 n35 revoked Executive Order No. 10308 and transferred the compliance functions of the Committee on Government Contract Compliance to the Government Contract [*170] Committee. n36 In this order for the first time there is no mention of defense production. For the first time the Committee is authorized to receive complaints of violations, n37 and to conduct activities not directly related to federal procurement. n38 On September 3, 1954, by Executive Order No. 10557 n39 the required form of Government contract provision was revised. The new provision was much more specific, required the imposition of the contractor's obligation on his subcontractors, and required the posting of appropriate notices. The Eisenhower orders, while they did not refer to defense production and did authorize the Compliance Committee to encourage nondiscrimination outside the field of Government contracts, were still restricted in direct application to federal government procurement. While the orders do not contain any specific statutory reference other than the appropriations statute, *31 U.S.C. § 690,* they would seem to be authorized by the broad grant of procurement authority with respect to Titles 40 and 41. n40 No less than in the case of defense procurement it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. In the area of Government procurement Executive authority to impose non-discrimination contract provisions falls in Justice Jackson's first category: action pursuant to the express or implied authorization of Congress.

n35 *18 Fed. Reg. 4899, 3 C.F.R., 1949-53 Comp. 961.*

n36 The new committee was composed of 15 members, 9 named by the President and one representative each from the Atomic Energy Commission, the Department of Commerce, the Department of Defense, the Department of Justice, the Department of Labor and the General Services Administration. Id. § 3, as amended by Exec. Order No. 10482, *18 Fed. Reg. 4944* (Aug. 15, 1953), 3 *C.F.R., 1949-53 Comp. 968.*

n37 Id. § 5.

n38 "Sec. 6. The Committee shall encourage the furtherance of an educational program by employer, labor, civic, educational, religious, and other voluntary nongovernmental groups in order to eliminate or reduce the basic causes and costs of discrimination in employment.

"Sec. 7. The Committee is authorized to establish and maintain cooperative relationships with agencies of state and local governments, as well as with nongovernmental bodies, to assist in achieving the purposes of this order."
Id. §§ 6, 7.

n39 *19 Fed. Reg. 5655, 3 C.F.R., 1954-58 Comp. 203.*

n40 See *40 U.S.C.* § *486*(a).

Executive Order No. 10925 n41 signed by President Kennedy on March 6, 1961, among other things enlarged the notice requirements and specified that the President's Committee on Equal Employment Opportunity could by rule, regulation or order impose sanctions for violation. Coverage still extended only to federal government contracts. Significantly for purposes of this case, however, the required contract language was amended to add the provision:

"The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." n42

The Philadelphia Plan is simply a refined approach to this "affirmative action" mandate. Applied to federal procurement the affirmative action clause is supported by the same Presidential procurement authority that supports the non-discrimination clause generally.

n41 *26 Fed. Reg. 1977, 3 C.F.R., 1959-63 Comp. 448.*

n42 Id., pt. III, § 301(1).

The most significant change in the Executive Order program for present purposes occurred on June 22, 1963 when the President signed Executive Order No. 11114, n43 which amended Executive Order No. 10925 by providing that the same [*171] non-discrimination contract provisions heretofore required in all federal procurement contracts must also be included in all federally assisted construction contracts. By way of Executive Order No. 11246 n44 issued in 1965, President Johnson transferred to the Secretary of Labor the functions formerly specified in Executive Order Nos. 10925 and 11114, and he continued both the affirmative action requirement and the coverage of federally assisted construction contracts.

n43 *28 Fed. Reg. 6485, 3 C.F.R., 1959-63 Comp. 774.*

n44 See note 4 supra.

While all federal procurement contracts must include an affirmative action covenant, n45 the coverage on federally assisted contracts has been extended to construction contracts only. This choice is significant, for it demonstrates that the Presidents were not attempting by the Executive Order program merely to impose their notions of desirable social legislation on the states wholesale. Rather, they acted in the one area in which discrimination in employment was most likely to affect the cost and the progress of projects in which the federal government had both financial and completion interests. In direct procurement the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects. It has the identical interest with respect to federally assisted construction projects. When the Congress authorizes an appropriation for a program of federal assistance, and authorizes the Executive branch to implement the program by arranging for assistance to specific projects, in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests. In the case of Executive Order Nos. 11246 and 11114 three Presidents have acted by analogizing federally assisted construction to direct federal procurement. If such action has not been authorized by Congress (Justice Jackson's first category), at the least

* This is only discus of "cos etc. Carri

it falls within the second category. If no congressional enactments prohibit what has been done, the Executive action is valid. Particularly is this so when Congress, aware of Presidential action with respect to federally assisted construction projects since June of 1963, has continued to make appropriations for such projects. We conclude, therefore, that unless the Philadelphia Plan is prohibited by some other congressional enactment, its inclusion as a pre-condition for federal assistance was within the implied authority of the President and his designees. We turn, then to a consideration of the statutes on which plaintiffs rely.

n45 Section 204 of Exec. Order No. 11246 provides that the Secretary of Labor may exempt certain contracts and purchase orders from the requirements of the order because of special circumstances in the national interest and that he may by rule or regulation exempt certain classes of contracts (1) to be performed outside the United States, (2) for standard commercial supplies or raw materials, (3) involving insubstantial amounts of money or workers, or (4) involving subcontracts below a specified tier.

The Civil Rights Act of 1964

Plaintiffs suggest that by enacting Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e* et seq., which deals comprehensively with discrimination in employment, Congress occupied the field. The express reference in that statute to Executive Order No. 10925 or any other Executive Order prescribing fair employment practices for Government contractors, *42 U.S.C. § 2000e-8*(d), indicates, however, that Congress contemplated continuance of the Executive Order program. Moreover we have held that the remedies established by Title VII are not exclusive. *Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971).*

But while Congress has not prohibited Presidential action in the area of fair employment on federal or federally assisted contracts, the Executive is bound by the express prohibitions [*172] of Title VII. The argument most strenuously advanced against the Philadelphia Plan is that it requires action by employers which violates the Act. Plaintiffs point to § 703(j), *42 U.S.C. § 2000e-2*(j):

"Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or groups on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community . . . or other area."

The Plan requires that the contractor establish specific goals for utilization of available minority manpower in six trades in the five-county area. Possibly an employer could not be compelled, under the authority of Title VII, to embrace such a program, although § 703(j) refers to percentages of minorities in an area work force rather than percentages of minority tradesmen in an available trade work force. We do not meet that issue here, however, for the source of the required contract provision is Executive Order No. 11246. Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal.

Plaintiffs, and more particularly the union amici, contend that the Plan violates Title VII because it interferes with a bona fide seniority system. Section 703(h), *42 U.S.C. § 2000e-2*(h), provides:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to employ different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ."

The unions, it is said, refer men from the hiring halls on the basis of seniority, and the Philadelphia Plan interferes with this arrangement since few minority tradesmen have high seniority. Just as with § 703(j), however, § 703(h) is a limitation only upon Title VII, not upon any other remedies. n46

n46 This same subsection refers to ability tests. The Supreme Court recently in *Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849, 39 U.S.L.W. 4317 (1971)* considered the extent to which such tests are permissible. The Court said:

"But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *39 U.S.L.W. at 4319.*

It held that the tests must be job related. Nor can seniority make permanent the effects of past discrimination. *Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969)*, cert. denied, *397 U.S. 919, 25 L. Ed.*

2d 100, 90 S. Ct. 926 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

Plaintiffs contend that the Plan, by imposing remedial quotas, requires them to violate the basic prohibitions of Section 703(a), *42 U.S.C.* § *2000e-2*(a):

"It shall be an unlawful employment practice for an employer --
(1) to fail or refuse to hire . . . any individual . . . because of such individual's race . . . or
(2) to . . . classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race . . ."

Because the Plan requires that the contractor agree to specific goals for minority employment in each of the six trades and requires a good faith effort to achieve those goals, they argue, it requires (1) that they refuse to hire some white tradesmen, and (2) that they classify their employees by race, in violation of § 703(a). This argument rests on an overly simple reading both of the Plan [*173] and of the findings which led to its adoption.

The order of September 23, 1969 contained findings that although overall minority group representation in the construction industry in the five-county Philadelphia area was thirty per cent, in the six trades representation was approximately one per cent. It found, moreover, that this obvious underrepresentation was due to the exclusionary practices of the unions representing the six trades. It is the practice of building contractors to rely on union hiring halls as the prime source for employees. The order made further findings as to the availability of qualified minority tradesmen for employment in each trade, and as to the impact of an affirmative action program with specific goals upon the existing labor force. The Department of Labor found that contractors could commit to the specific employment goals "without adverse impact on the existing labor force." Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen.

To read Section 703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Clearly the Philadelphia Plan is color-conscious. Indeed the only meaning which can be attributed to the "affirmative action" language which since March of 1961 has been included in successive Executive Orders is that Government contractors must be color-conscious. Since 1941 the Executive Order program has recognized that discriminatory practices exclude available minority manpower from the labor pool. In other contexts color-consciousness has been deemed to be an appropriate remedial posture. *Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969)*, aff'd, *431 F.2d 1254 (3d Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968); Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967)*. It has been said respecting Title VII that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." *Quarles v. Philip Morris, Inc., supra, 279 F. Supp. at 514*. The Quarles case rejected the contention that existing nondiscriminatory seniority arrangements were so sanctified by Title VII that the effects of past discrimination in job assignments could not be overcome. n47 We reject the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades.

n47 The federal courts in overcoming the effects of past discrimination are expressly authorized in Title VII to take affirmative action. *42 U.S.C.* § *2000e-5*(g). See *Vogler v. McCarty, 294 F. Supp. 368 (E.D. La. 1968)*, aff'd sub nom. *International Ass'n Heat & Frost Insulators & Asbestos Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969)*.

What we have said about Title VII applies with equal force to Title VI of the Civil Rights Act of 1964, *42 U.S.C.* § *2000d* et seq. That Title prohibits racial and other discrimination in any program or activity receiving federal financial assistance. n48 This general prohibition against discrimination cannot be construed as limiting Executive authority in defining appropriate affirmative action on the part of a contractor.

n48 Section 604 of Title VI, *42 U.S.C.* § *2000d-3*, states that nothing in the Title authorizes agency action under the Title with respect to employment practices of any employer, except where federal assistance is primarily aimed at providing employment. However, since the Philadelphia Plan does not purport to derive its authorization from Title VI, this section does not affect its validity.

[*174] We hold that the Philadelphia Plan does not violate the Civil Rights Act of 1964.

The National Labor Relations Act

The June 27, 1969 order, par. 8(b) provides:

"It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in federally involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders."

The union amici vigorously contend that the Plan violates the National Labor Relations Act by interfering with the exclusive union referral systems to which the contractors have in collective bargaining agreements bound themselves. Exclusive hiring hall contracts in the building and construction industry are validated by Section 8(f) of the National Labor Relations Act, *29 U.S.C. § 158*(f). In *Teamsters Local 357 v. NLRB, 365 U.S. 667, 6 L. Ed. 2d 11, 81 S. Ct. 835 (1961)*, the Supreme Court held that the National Labor Relations Board could not proscribe exclusive hiring hall agreements as illegal per se since Congress had not chosen to prohibit hiring halls. It is argued that the President is attempting to do what the Supreme Court said the National Labor Relations Board could not do -- prohibit a valid hiring hall agreement. Of course collective bargaining agreements which perpetuate the effects of past discrimination are unlawful under Title VII. *Local 189, United Papermakers & Paperworkers v. United States, supra; United States v. Sheet Metal Workers, Local 36, 416 F.2d 123, 132 (8th Cir. 1969)*. The findings of past discrimination which justified remedial action in these cases were made in judicial proceedings, however. See *42 U.S.C. § 2000e-5*(g). The amici contend that the Assistant Secretary's nonjudicial finding of prior exclusionary practices is insufficient to support the Plan's implied requirement that the contractor look to other sources for employees if the unions fail to refer sufficient minority group members.

It is clear that while hiring hall arrangements are permitted by federal law they are not required. Nothing in the National Labor Relations Act purports to place any limitation upon the contracting power of the federal government. We have said hereinabove that in imposing the affirmative action requirement on federally assisted construction contracts the President acted within his implied contracting authority. The assisted agency may either agree to do business with contractors who will comply with the affirmative action covenant, or forego assistance. The prospective contractors may either agree to undertake the affirmative action covenant, or forego bidding on federally assisted work. If the Plan violates neither the Constitution nor federal law, the fact that its contractual provisions may be at variance with other contractual undertakings of the contractor is legally irrelevant. Factually, of course, that variance is quite relevant. Factually it is entirely likely that the economics of the marketplace will produce an accommodation between the contract provisions desired by the unions and those desired by the source of the funds. Such an accommodation [*175] will be no violation of the National Labor Relations Act.

The absence of a judicial finding of past discrimination is also legally irrelevant. The Assistant Secretary acted not pursuant to Title VII but pursuant to the Executive Order. Regardless of the cause, exclusion from the available labor pool of minority tradesmen is likely to have an adverse effect upon the cost and completion of construction projects in which the federal government is interested. Even absent a finding that the situation found to exist in the five-county area was the result of deliberate past discrimination, the federal interest in improving the availability of key tradesmen in the labor pool would be the same. While a court must find intentional past discrimination before it can require affirmative action under *42 U.S.C. § 2000e-5*(g), that section imposes no restraint upon the measures which the President may require of the beneficiaries of federal assistance. The decision of his designees as to the specific affirmative action which would satisfy the local situation did not violate the National Labor Relations Act and was not prohibited by *42 U.S.C. § 2000e-5*(g).

Consistency with Executive Order No. 11246

The plaintiffs argue that the affirmative action mandate of § 202 of Executive Order No. 11246 is limited by the more general requirement in the same section. "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin." They contend that properly construed the affirmative action referred to means only policing against actual present discrimination, not action looking toward the employment of specific numbers of minority tradesmen.

Section 201 of the Executive Order provides:

"The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof."

Acting under this broad delegation of authority the Labor Department in a series of orders of local application made it clear that it interpreted "affirmative action" to require more than mere policing against actual present discrimination. n49 Administrative action pursuant to an Executive Order is invalid and subject to judicial review if beyond the scope of the Executive Order. *Peters v. Hobby, 349 U.S. 331, 99 L. Ed. 1129, 75 S. Ct. 790 (1955)*. But the courts should give more than ordinary deference to an administrative agency's interpretation of an Executive Order or regulation which it is charged to administer. *Udall v. Tallman, 380 U.S. 1, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)*. The Attorney General has issued an opinion that the Philadelphia Plan is valid, n50 and the President has continued to acquiesce in the interpretation of the Executive Order made by his designee. The Labor Department interpretation of the affirmative action clause must, therefore, be deferred to by the courts.

n49 See United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort at 167-72 (1970).

n50 Att'y Gen. Op., Letter to Sec. of Labor Shultz, Sept. 22, 1969, 115 Cong. Rec. 17,204-06 (daily ed. Dec. 18, 1969).

Plaintiffs also contend that the signing of the June 27, 1969 and September 23, 1969 orders by an assistant secretary rather than by the Secretary of Labor makes those orders procedurally invalid. Here they rely on § 401 which provides:

"The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the [*176] Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature."

The Plan, they say, is a rule or regulation of a general nature, and could have been issued only by the Secretary. In the first place the Plan is not general. It is based upon findings as to the available construction manpower in a specific labor market. Moreover, the interpretation of § 401 made by the administrator requires the same deference from the courts as is required toward his other interpretations of the order. We will not second guess his delegation to the Assistant Secretary of the duty of enforcing the affirmative action covenant.

The Due Process Contentions

Plaintiffs urge that the Plan violates the Due Process Clause of the Fifth Amendment in several ways.

First, they allege that it imposes on the contractors contradictory duties impossible of attainment. This impossibility arises, they say, because the Plan requires both an undertaking to seek achievement of specific goals of minority employment and an undertaking not to discriminate against any qualified applicant or employee, and because a decision to hire any black employee necessarily involves a decision not to hire a qualified white employee. This is pure sophistry. The findings in the September 23, 1969 order disclose that the specific goals may be met, considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force. According to the order the construction industry has an essentially transitory labor force and is often in short supply in key trades. The complaint does not allege that these findings misstate the underlying facts.

Next the plaintiffs urge that the Plan is arbitrary and capricious administrative action, in that it singles out the contractors and makes them take action to remedy the situation created by acts of past discrimination by the craft unions. They point to the absence of any proceedings under Title VII against the offending unions, and urge that they are being discriminated against. This argument misconceives the source of the authority for the affirmative action program. Plaintiffs are not being discriminated against. They are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance.

Some amici urge that selection of the five-county Philadelphia area was arbitrary and capricious and without basis in fact. The complaint contains a conclusive allegation to this effect. No supporting facts are alleged. It is not alleged, for example, that the specific goals for minority manpower utilization would be different if more or fewer counties were to be included in the

September 23, 1969 order. The union amici do question the findings made by the Assistant Secretary of Labor, but the complaint, fairly read, does not put these findings in issue. We read the allegation with respect to the five-county area as putting in issue the legal authority of the Secretary to impose a specific affirmative action requirement in any separate geographic area. The simple answer to this contention is that federally assisted construction contracts are performed at specific times and in specific places. What is appropriate affirmative action will vary according to the local manpower conditions prevailing at the time.

Finally, the plaintiffs urge that the specific goals specified by the Plan are racial quotas prohibited by the equal protection aspect of the Fifth Amendment. See *Shapiro v. Thompson, 394 U.S. 618, 641-42, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969); Schneider v. Rusk, 377 U.S. 163, [*177] 12 L. Ed. 2d 218, 84 S. Ct. 1187 (1964); Bolling v. Sharpe, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).* The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action.

One final point. The plaintiffs contend that although there were cross-motions for summary judgment the district court, while it should have entered summary judgment in their favor, could not properly enter summary judgment against them. Several amici press this point on appeal even more strenuously than do plaintiffs. They contend that neither the finding of past discrimination by the craft unions made in the June 27, 1969 order nor the statistical findings as to availability of minority tradesmen, employee attrition, and industry growth made in the September 23, 1969 order should be accepted as true.

The federal defendants conceded in the district court that the affidavit of Mr. Macaluso, to which copies of both orders were attached, was offered not for the truth of the underlying facts but only to identify the orders. This concession was not significant for the decisions on the motions under Rule 12(b)(1) and Rule 56(b). The complaint to which the motions by the federal defendants was addressed nowhere challenges the factual underpinnings of the specific goals set forth in the September 23, 1969 order. Rather the complaint makes a legal attack upon the power of the Department of Labor to impose these goals as contractual commitments. Read generously the complaint can be construed to challenge the administrative procedures followed by the Assistant Secretary in determining these goals. We have dealt hereinabove with that challenge insofar as it questions compliance with the procedures specified in Executive Order No. 11246. Insofar as the complaint challenges on broader administrative law grounds the method by which the Assistant Secretary assembled the data for the September 23, 1969 order, we hold that public hearings after notice were an appropriate means for the administrative agency to obtain the information needed for informed judgment. Cf. *Shannon v. Department of Housing & Urban Development, 436 F.2d 809 (3d Cir. 1971).* No public hearing was held prior to the issuance of the June 27, 1969 order, which contains the Assistant Secretary's finding of past exclusionary union practices. He relied upon published data, however, which itself may have been sufficient to justify administrative action leading to the specification of contract provisions. We need not decide that issue, however, for in our view the data in the September 23, 1969 order revealing the percentages of utilization of minority group tradesmen in the six trades compared with the availability of such tradesmen in the five-county area, justified issuance of the order without regard to a finding as to the cause of the situation. The federal interest is in maximum availability of construction tradesmen for the projects in which the federal government has a cost and completion interest. A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action.

The judgment of the district court will be affirmed.

618 F.2d 784 printed in FULL format.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al. v. ALFRED E. KAHN, Chairman, Council on Wage and Price Stability, et al., APPELLANTS

No. 79-1564

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT

199 U.S. App. D.C. 300; 618 F.2d 784; 1979 U.S. App. LEXIS 13761

Argued en banc June 13, 1979
June 22, 1979; As Amended September 14, 1979

IOR HISTORY: [**1]

Appeal from the United States District Court for the District of Columbia '.C. Civil Action No. 79-0802)

'RE TERMS: procurement, wage, executive order, federal government, contractor, .ndatory, presidential, guidelines, delegation, supplier, stabilization, gulation, directive, bidder, rec, doing business, authorize, prescribe, .d, price controls, negotiated, nexus, legislative history, economical, legate, lowest, promulgate, inflation, negotiate, widget

UNSEL: Benjamin R. Civiletti, Deputy Attorney General, of the bar of the preme Court of Maryland, pro hac vice, by special leave of court, with whom .rbara Allen Babcock, Assistant Attorney General, Earl J. Silbert, United ates Attorney, Robert E. Kopp and Burton D. Fretz, Attorneys, Department of stice, Sally Katzen, General Counsel, Council on Wage and Price Stability, and omas F. Williamson, General Counsel, Office of Federal Procurement Policy, fice of Management and Budget, were on the brief, for appellants.

Laurence Gold, with whom J. Albert Woll, Jerry D. Anker, Winn Newman, Woody terson, Thomas X. Dunn, Plato E. Papps, Elliot Bredhoff, Isaac N. Groner, and orge Kaufmann were on the brief, for appellees American Federation of Labor .d Congress of Industrial Organizations et al.

Laurence Silberman, a member of the bar of the Supreme Court of Hawaii, pro .c vice, by special leave of court, for amicus curiae United States Senators d Representatives.

INIONBY: WRIGHT

INION: [*785]

Before WRIGHT, [**2] Chief Judge, and BAZELON, McGOWAN, TAMM, LEVENTHAL, BINSON, MacKINNON, ROBB, and WILKEY, Circuit Judges.

Opinion for the court, concurred in by Circuit Judges BAZELON, McGOWAN, TAMM, VENTHAL, and ROBINSON, filed by Chief Judge WRIGHT.

Concurring opinions filed by Circuit Judges BAZELON and TAMM.

Dissenting opinions filed by Circuit Judges MacKINNON and ROBB. Circuit dge WILKEY joins in Circuit Judge ROBB's dissenting opinion.

WRIGHT, Chief Judge: This case presents the question whether Congress has thorized the President to deny Government contracts above $5 million to mpanies that fail or refuse to comply with the voluntary wage and price andards. We answer that question in the affirmative.

After presenting the facts of the case, we examine in Part II the authority anted to the President under the Federal Property and Administrative Services t of 1949 (FPASA or Procurement Act). n1 In Part III we evaluate the ntention of appellees, a group of labor unions, that the procurement mpliance program is barred by the Council on Wage and Price Stability Act OWPSA), n2 while in Part IV we review the claim that the program thwarts the tional labor policy. [**3]

n1 40 U.S.C. @ 486(a) (1976).

n2 Pub. L. No. 93-387, 88 STAT. 750 (1974), 12 U.S.C. @ 1904 note (1976), as ended, [1979] U.S. CODE CONG. & AD. NEWS .

I. FACTS

On November 1, 1978 President Carter signed Executive Order 12092 directing e Council on Wage and Price Stability (Council) to establish voluntary wage d price standards for noninflationary behavior for [*786] the entire onomy. n3 For a business, the Order stated that non-inflationary price creases would be no more than 0.5 percent less than that company's recent rate average price increase; for workers, noninflationary wage increases were fined as no more than a seven percent annual rise. The President ordered the airman of the Council to monitor compliance with these standards and to blish the names of noncomplying companies. The Executive Order also structed the head of each Executive agency and Military Department to require at all contractors certify that they are in compliance with the wage and price andards. The Office of Federal Procurement Policy (OFPP) was charged with plementation of the procurement aspect of the program. The initial wage and ice standards [**4] announced by the Council on December 21, 1978 largely llowed the outline of the President's November 1 Order, n4 with the added ovision that a company may be excepted from compliance in order to "avoid tuations [of] undue hardship or gross inequity." n5

n3 43 FED. REG. 51375 (1978), reprinted in IV Legislative Appendix egis.App.) at 29.

n4 43 FED. REG. 60772 (1978) (to be codified in 6 C.F.R. @ 705), IV-A Legis. p. at 7. Among the exceptions to the general standards program are an tional modified price standard for the wholesale and retail trade industry and e food manufacturing and processing industries, id. at 60775, IV-A Legis. App. 10, and a profit margin limitation standard for companies that have controllable costs or that cannot calculate their average price change. Id. 60774, IV-A Legis. App. at 9.

Special rules cover health benefits and pension plans under the wage andard. If the cost of maintaining existing health benefits increases by less an 7%, more than a 7% increase may be granted in the other wage components. . at 60781 (Interpretive Questions and Answers), IV-A Legis. App. at 16. If a nsion plan is not amended during the effectiveness of Executive Order 12092 d the benefit structure remains unchanged, the pension funding costs are cludable from all wage calculations. Id.

n5 Id. at 60775, IV-A Legis. App. at 10. See also id. at 60774 IV-A Legis. p. at 9. [**5]

OFPP issued a policy letter on January 4, 1979, requiring that Government ntracts worth more than $5 million and signed after February 15 must include rtification that the contractor is in compliance with the wage and price andards. n6 The letter provides that if the Council finds that the standards ve not been respected by any such contractor or first-tier subcontractor whose ntract exceeds $5 million, the relevant agency head may terminate the contract d the company may be ruled ineligible for future Government business. n7 The licy letter established three grounds for waiving either termination or a nding of ineligibility: (1) if "the product or service is essential to tional security or public safety," and there are no feasible alternative urces of supply; (2) if Government action would "threaten the contractor's or bcontractor's ability to survive"; and (3) if the contractor agrees both to mply with the wage and price standards and to make an "equitable" reduction of e contract price. n8 The procurement compliance program is expected to reach to 70 percent of all Government procurement dollars, or about $50 billion rth. n9

n6 44 FED. REG. 1229-1230 (1979), IV-A Legis. App. at 19-20.

n7 Id. at 1230, IV-A Legis. App. at 20. The letter also stated that as the vernment gained experience with the compliance program, contracts worth less an $5 million might be included. Id.

n8 Id. at 1231, IV-A Legis. App. at 21.

n9 Affidavit of Charles L. Schultze (Chairman of Council of Economic lvisers) at 3, II Appendix (App.) at 438, 440; Affidavit of James D. Currie cting Head of OFPP), at 3, III App. at 647, 649. [**6]

On March 31, 1979 plaintiff labor unions challenged the program in District urt as interfering with the exercise of the right to bargain collectively and beyond the power of the President to initiate. The District Court granted e unions' motion for summary judgment on the latter ground on May 31, 1979, d enjoined the procurement compliance program. n10 That injunction was 787] stayed pending the outcome of this expedited appeal. n11

n10 AFL-CIO v. Kahn, D. D.C. Civil Action No. 79-802 (May 31, 1979). The strict Court's opinion in this case was flawed in several material respects:) it concluded that the situation here parallels that in Youngstown Sheet & be Co. v. Sawyer, 343 U.S. 579 (1952), see pp. 6-7 & n.13 infra; (2) it found, thout actually examining congressional materials, that the legislative history the FPASA demonstrated that Congress intended in that Act to prohibit the use the procurement power to affect general price levels, see pp. 7-11 & n.24

fra; (3) it neglected the historical uses of the President's powers under the 'ASA, see pp. 12-17 infra; (4) it offered an unlikely interpretation of a key urt of Appeals decision on Executive Power under the FPASA, see pp. 16-17 & 40 infra; (5) it misunderstood the likely impact of Executive Order 12092 on vernment procurement costs, see pp. 17-20 infra; and (6) it incorrectly viewed is program as "mandatory" within the meaning of COWPSA, see pp. 21-26 infra.

n11 Twenty-four senators and members of Congress have filed a brief amicus riae generally in support of appellees. [**7]

II

We note at the outset our disagreement with the contention that this case 'esents the same issue decided by the Supreme Court in Youngstown Sheet & Tube '. v. Sawyer. n12 In Youngstown President Truman argued that he could nstitutionally seize and operate the steel mills, which had been closed by a .bor dispute, under his "inherent powers" to deal with national emergencies and .rtime situations. In arguing for the validity of Executive Order 12092, wever, the Government relies entirely upon authority said to be delegated by :atute, and makes no appeal to constitutional powers of the Executive that have ›t been confirmed by legislation. Thus, although both cases involve challenges › Executive actions, they raise sharply different legal questions. n13 .though the separation of powers between Congress and the President was the minant issue in Youngstown, here we primarily face a difficult problem of :atutory interpretation. Appellees' challenge to the Executive Order is .rected at the procurement aspect of the Order, not at the Council's authority ;der COWPSA to promulgate voluntary standards. n14 Thus the central issue in iis case is whether the FPASA indeed [**8] grants to the President the wers he has asserted.

n12 Supra note 10.

n13 The contrast between the cases is highlighted by the three-part analysis : Executive powers put forth by Justice Jackson in Youngstown:

1. When the President acts pursuant to an express or implied authorization : Congress, his authority is at its maximum * * *. * * *

2. When the President acts in absence of either a congressional grant or :nial of authority, he can only rely upon his own independent powers * * *. * *

3. When the President takes measures incompatible with the expressed or iplied will of Congress, his power is at its lowest ebb * * *. * * *
:3 U.S. at 635-637. The Supreme Court in Youngstown held that the seizure of ie steel mills might fall in Justice Jackson's second category, but most likely :longed in the third. See id. at 602-605 (Frankfurter, J., concurring). But :e Government here claims to be within the first category, where the :esident's power is greatest.

On the constitutional issue of legislative delegation in this case, see note infra .

n14 See AFL-CIO v. Kahn, supra note 10, slip op. at 9.

A

The FPASA was a response to the recommendation [**9] of the Hoover mmission in 1949 that the Government's method of doing business be streamlined d modernized. n15 The statute was designed to centralize Government property nagement and to introduce into the public procurement process the same exibility that characterizes such transactions in the private [*788] ction. n16 These goals can be found in the terms "economy" and "efficiency" ich appear in the statute and dominate the sparse record of the congressional liverations.

n15 The Concluding Report of the Hoover Commission espoused the goal of a overnment which will act with dispatch, with greater internal coordination and rmony, with consistency of administrative policy, and economy of operation." ncluding Report to the Congress by the Commission on Organization of the ecutive Branch of Government at 3 (May 1949).

n16 H.R. Rep. No. 670, 81st Cong., 1st Sess. 2-5 (1949), I-A Legis. App. at -32. The Senate Report refers to the need for an "efficient, business-like stem of property management." S. Rep. No. 475, 81st Cong., 1st Sess. 1 (1949), A Legis. App. at 88. See 95 CONG. REC. 7438, I-A Legis. App. at 131 (remarks Rep. Brown) (nation needs "sound, businesslike" procurement system); id. at 41, I-A Legis. App. at 134 (remarks of Rep. Holifield). See also The ganization and Management of Federal Supply Activities, A Report to the ngress by the Commission on Organization of the Executive Branch of Government 25-27, 35-37 (Feb. 1949). [**10]

The most important provision of the Act for this case, Section 205(a), ovides that the President "may prescribe such policies and directives, not consistent with the provisions of this Act, as he shall deem necessary to fectuate the provisions of said Act * * *." n17 Because this language is en-ended, it is important to examine its genesis. The initial Hoover mmission study of procurement recommended that a General Services Agency ersee Government acquisitions, and that the Agency be placed within the ecutive Office of the President to bolster its authority and to ensure central rection of the bureaucracy. n18 Congress, however, was reluctant to saddle e relatively small Executive Office with such a vast administrative burden, so set up the General Services Administration as an independent agency. n19 But response to the Hoover Commission's concern that the strength of the esidency support the new agency, Congress added Section 205(a) to guarantee at "Presidential policies and directives shall govern -- not merely guide -- " e agencies under the FPASA. n20 We believe that by emphasizing the leadership le of the President in setting Government-wide [**11] procurement policy on tters common to all agencies, Congress intended that the President play a rect and active part in supervising the Government's management functions.

n17 Federal Property and Administrative Services Act of 1949 (FPASA), ch. 8, @ 205(a), 63 STAT. 389, codified at 40 U.S.C. @ 486(a) (1976) (emphasis ded).

n18 See Office of General Services, A Report to the Congress by the mmission on Organization of the Executive Branch of the Government at 1 'eb. 1949).

n19 Representative Holifield, the House sponsor of FPASA, pointed out in oor debate that the proposed General Services Administration (GSA) would have out 35,000 employees, while the President's personal staff numbered just over 000. To place GSA within the Executive Office, Holifield argued, would be idiculous" and "an unworkable extreme." 95 CONG. REC. 7441 (1949), I-A Legis. p. at 134.

n20 Id. (remarks of Rep. Holifield) (emphasis added). See S. Rep. No. 475, pra note 16, at 3, I-A Legis. App. at 90. In the words of Representative lling:

In drafting this legislation the President was given the power to prescribe licies and directives which he may deem necessary to carry out the provisions ereunder. These policies and directives must govern the action of the ministrator and the executive agencies. This accomplishes for all intents and rposes the same objective that could be obtained by placing the General rvices Administration in the Office of the President.
CONG. REC. 7542 (1949), I-A Legis. App. at 145. [**12]

To define the President's powers under Section 205(a), some content must be jected into the general phrases "not inconsistent with" the FPASA and "to fectuate the provisions" of the Act. The congressional declaration of policy r the FPASA sets forth the goal of an "economical and efficient system for * * procurement and supply." n21 Section 201 directs that the Administrator of neral Services chart policy and procure supplies in a manner "advantageous to e Government in terms of economy, efficiency, or service, and with due regard the program activities of the agencies concerned." n22 This language '789] recognizes that the Government generally must have some flexibility to ek the greatest advantage in various situations. "Economy" and "efficiency" e not narrow terms; they encompass those factors like price, quality, itability, and availability of goods or services that are involved in all quisition decisions. Similar concerns can be seen in the specific direction contracting officers in Section 303(b) that contracts should be awarded bidders whose terms "will be most advantageous to the Government, price and her factors considered." n23

n21 FPASA of 1949, ch. 288, @ 2, 63 STAT. 378, codified at 40 U.S.C. @ 471 976).

n22 Id. @ 201(a), codified at 40 U.S.C. @ 481(a) (1976) (emphasis added). e words "economy" and "efficiency" echo through the legislative history. See, g., H.R. Rep. No. 670, supra note 16, at 2, 7, I-A Legis. App. at 29, 34; S. p. No. 475, supra note 16, at 6, 8, I-A Legis. App. at 93, 95.

n23 41 U.S.C. @ 253(b) (1976). The Armed Services Procurement Act of 1947, ose "principles" were to be applied under FPASA, see H.R. Rep. No. 670, supra te 16, at 6, I-A Legis. App. at 33; S. Rep. No. 475, supra note 16, at 5, I-A gis. App. at 92, was also designed to encourage procurement officers to nsider "need, quality of product, or lower ultimate cost" as well as price. S. p. No. 571, 80th Cong., 1st Sess. 2 (1947), I Legis. App. at 42. [**13]

Although the terms and legislative record of the FPASA are not unambiguous, e relationship of the Act to this case can be outlined. Section 205(a) grants e President particularly direct and broad-ranging authority over those larger ministrative and management issues that involve the Government as a whole. d that direct presidential authority should be used in order to achieve a exible management system capable of making sophisticated judgments in pursuit economy and efficiency. n24

n24 The District Court relied on a report by the General Accounting Office AO) for the conclusion that in enacting FPASA Congress specifically did not tend to authorize the President to use the procurement system to regulate ices. AFL-CIO v. Kahn, supra note 10, slip op. at 10. See GAO, Authority for esident's Program Applying Mandatory Wage and Price Standards to Government ocurement (Executive Order 12092) at 14-18 (Feb. 5, 1979), Supplemental gis. App. at 80-84. The GAO Report, however, is extremely unreliable on this int. The Report spotlights Representative Holified's endorsement of granting thority to the proposed GSA to contract with regulated transportation common rriers. 95 CONG. REC. 8277-8278 (1949), I-A Legis. App. at 176-177. Such thority, Holifield said, would not disrupt the regulation of such carriers by e Interstate Commerce Commission (ICC). There is certainly on basis in those marks for GAO's conclusion that Congress intended to bar the use procurement to influence general price levels in the economy. See GAO port, supra, at 17, Supp. Legis. App. at 83. Rather, Representative Holifield s addressing one discrete issue -- GSA jurisdiction over the purchase of ansportation services -- and he simply stated the obvious point that such a nction would not intrude on the ICC's regulatory role. The GAO Report also inted to 40 U.S.C. @ 474 (1976), which states that nothing in the EPASA shall mpair or affect" programs of, inter alia, "price support" or "stabilization." O Report, supra, at 18, Supp. Legis. App. at 84. This provision would appear refer to the farm commodity support programs of the federal government, thout any direct relevance for procurement policy generally. Even if it fers to general price control measures, it hardly supports GAO's view. The o impairment" provision has meant substantial freedom from GSA regulations for fected programs. 1 Report of Commission on Government Procurement 17 (1972). us the statute prescribed only that procurement shall not struct stabilization programs, not that procurement policy cannot support such ograms. [**14]

In light of the imprecise definition of presidential authority under the ASA, it is useful to consider how the procurement power has been exercised der the Act. As the Commission on Government Procurement pointed out in its 72 report, Congress itself has frequently imposed on the procurement process cial and economic programs somewhat removed from a strict view of efficiency d economyt. n25 More significant for this case, however, several Executive tions taken explicitly or [*790] implicitly under Section 205 of the FPASA ve also imposed additional considerations on the procurement process. n26 Of urse, the President's view of his own authority under a statute is not ntrolling, but when that view has been acted upon over a substantial period of me without eliciting congressional reversal, it is "entitled to great spect." n27 As the Supreme Court observed this Term, the "construction of a atute by those charged with its execution should be followed unless there are mpelling indications that it is wrong." n28 n25 For example, the FPASA itself included a directive that a fair portion of vernment purchases and contracts be placed with small businesses. Act of June , 1949, ch. 288, Title II, @ 302, 63 STAT. 393, currently codified at 41 S.C. @ 252(b) (1976). Other prominent examples enacted since 1949 clude directives that Government service contractors meet minimum standards r wages and working conditions, Service Contract Act of 1965, @ 2, 41 U.S.C. 351 (1976), and that the Government not contract with any company that has en found in criminal violation of air pollution standards, Clean Air endments of 1970, @ 12(a), 42 U.S.C. @ 7606 (Supp. I 1977).See 1 Report of e Commission on Government Procurement 114-115 (1972).

n26 See Northeast Construction Co. v. Romney, 485 F.2d 752, 760-761 (D.C. r. 1973).

n27 Board of Governors of the Federal Reserve System v. First Lincolnwood rp., 439 U.S. 234, 248, 99 S.Ct. 505, 513, 58 L.Ed.2d 484, 47 U.S. L. week/ 48, 4052 (Dec. 11, 1978). See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 1 (1969).

n28 Miller v. Youakim, 440 U.S. 125, 144 n.25, 99 S.Ct. 957, 59 L.Ed.2d 194, U.S. L. WEEK 4185, 4190 n.25 (Feb. 22, 1979) (quoting Red Lion Broadcasting . v. FCC, supra note 27, 395 U.S. at 381 (footnote omitted)). [**15]

In February 1964 President Johnson directed by Executive Order that deral contractors not "discriminate against persons because of their age cept upon the basis of a bona fide occupational qualification, retirement an, or statutory requirement * * *." n29 In order to ease this nation's lance of payments problem in 1967, the General Services Administrator issued regulation requiring that procurement of materials and supplies for use tside the United States be restricted to goods produced in this country, cept when the Government has excess foreign currencies available for purchases erseas. n30 And through Executive Order 11755 in 1973 President Nixon ntinued in effect the exclusion from employment on federal contract work of rtain state prisoners. n31

n29 Executive Order 11141, 3 C.F.R. 179 (1964-65 Compilation), reprinted in 5 S.C. @ 3301 note (1976). Although the Order can now be justified under the e Discrimination in Employment Act of 1967, 29 U.S.C. @@ 621-634 (1976), and e Age Discrimination Act of 1975, 42 U.S.C. @@ 6101-6107 (1976), for the rst three years of its operation this Order was apparently based on only the ASA.The Executive Order itself simply cites "the authority vested in [the esident] by the Constitution and statutes of the United States."

n30 See 32 FED. REG. 5622 (1967), see 41 C.F.R. @ 1-6.8 (1978). is regulation specifically invokes only the 1949 Act as authority (citing 40 S.C.@ 486(c)), see 32 FED. REG. 5622 (1967). (The Buy American Act, 41 U.S.C. 10a-10d (1976), could not justify the Order since it expressly does not apply use of goods outside the United States. Id. @ 10a.)

n31 President Nixon's Order derived from Executive Order 325A issued by esident Theodore Roosevelt in 1905, which forbade employment of all state isoners on federal contract work. Roosevelt's Order, in turn, was inspired by e Act of February 23, 1887 (codified at 18 U.S.C. @ 436 (1976)), which banned ployment of Federal prisoners by federal contractors. By Act of September

, 1965, codified at 18 U.S.C. @ 4082(c)(2) (1976), the restriction against ployment of federal prisoners was somewhat relaxed, so President Nixon's ecutive Order 11755, 3 C.F.R. 837 (1971-75 Compilation) (1973), made a rresponding change in the way state prisoners would be treated, see 41 C.F.R. 1-12.2 (1978). The only authority claimed for the Nixon Order and e regulations thereunder is the FPASA (specifically, 40 U.S.C. @ 486(c) 976), see 39 FED. REG. 24009 (1974)). See also Executive Order 11598, 3 C.F.R. 5 (1971-75 Compilation) (1971) (requiring that Government contractors list uitable employment openings with the appropriate office of the State ployment service system" in order to encourage employment of returning terans; claiming only authority of President of the United States). [**16]

Since 1941, though, the most prominent use of the President's authority under e FPASA has been a series of anti-discrimination requirements for vernment contractors. The early anti-discrimination orders were issued under e President's war powers and special wartime legislation, n32 but for 791] the period from 1953 to 1964 only the FPASA could have provided atutory support for the Executive action. n33

n32 President Franklin Roosevelt issued three Executive Orders dealing with ir employment practices. See Executive Order 8802, 3 C.F.R. 957 (1938-43 mpilation) (1941) (citing no specific statutory authority); Executive Order 01, 3 C.F.R. 1054 (1938-43 Compilation) (1941) (citing Act of Dec. 18, 1941, b. L. No. 77-354, ch. 593, 55 STAT. 838); Executive Order 9346, 3 C.F.R. 1280 938-43 Compilation) (1943) (apparently premised on President's war powers). esident Truman also signed three Executive Orders concerning fair employment actices which continued the policies embodied in President Roosevelt's Orders. e Executive Order 9664, 3 C.F.R. 480 (1943-48 Compilation) (1945) (citing no ecific statutory authority); Executive Order 10210, 3 C.F.R. 390 (1949-53 mpilation) (1951) (citing Act of Jan. 12, 1951, Pub. L. No. 81-921, ch. 1230, STAT. 1257); Executive Order 10308, 3 C.F.R. 837 (1949-53 Compilation) (1951) iting Defense Production Act of 1950, Pub. L. No. 81-774, ch. 932, 64 STAT. 8, now codified at 50 U.S.C. App. @@ 2061-2169 (1976)).

n33 Two Eisenhower Executive Orders and one Kennedy Executive Order bstantially continued the anti-discrimination policy, Executive Order 10479, 3 F.R. 961 (1949-53 Compilation) (1953); Executive Order 10557, 3 C.F.R. 203 954-58 Compilation) (1954); Executive Order 10925, 3 C.F.R. 448 (1959-63 mpilation) (1961), but none of them referred to substantive states. President nnedy extended the anti-discrimination policy to construction contracts, see ecutive Order 11114, 3 C.F.R. 774 (1959-63 Compilation) (1963), and in 1965 esident Johnson transfrred enforcement of the policy to the Secretary of bor, see Executive Order 11246, 3 C.F.R. 339 (1964-65 Compilation) (1965). In e early 1970s Congress indicated its approval of the antidiscrimination ders. See AFL-CIO v. Kahan, supra note 10, slip op. at 15. [**17]

The anti-discrimination orders were not tested in the courts until 1964, when e Third Circuit held that they did not grant a private right of action to an ployee alleging racial discrimination in work assignment. n34 The court ncluded that those orders were a proper exercise of presidential authority der Section 205 of the FPASA and the "declaration of policy" in the Defense oduction Act of 1950. n35 In a 1967 ruling on the private cause of action estion, the Fifth Circuit observed that the FPASA supported President nnedy's 1961 Order directing affirmative action by contractors to hire nority workers.

n34 Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964).

n35 Id. at 8.
would be hesitant to say that the antidiscrimination provisions of Executive der No. 10925 are so unrelated to the establishment of "an economical and ficient system for * * * the procurement and supply" of property and services, U.S.C.A. @ 471, that the order should be treated as issued without statutory thority. * * * n36

n36 Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir.), cert. nied, 389 U.S. 977 (1967).
ter pointing out that [**18] the parties did not contest the validity of e Order, the court added, "We, therefore, conclude that Executive Order No. 925 was issued pursuant to statutory authority, and has the force and effect law." n37

n37 Id.

The only direct court holding on the validity of the anti-discrimination ders was provoked by a challenge to the "Philadelphia Plan," which required at bidders for federal or federally-assisted construction contracts submit an firmative action program. n38 In Contractors Ass'n of Eastern Pennsylvania v. cretary of Labor n39 the Court of Appeals rejected a claim that the President ceeded his powers in issuing the affirmative action Order. Judge Gibbons, iting for a unanimous panel, offered serveral alternative holdings. Although e vitality of two of the claimed bases of decision is subject to question, n40 [*792] note as relevant to the instant case his view that the Orders were uthorized by the broad grant of procurement authority" under the Fpasa/. n41 stated, "[it] is in the interest of the United States in all procurement to e that its suppliers are not over the long run increasing its costs and laying its programs [**19] by excluding from the labor pool available nority workmen," and concluded that "[in] the area of Government procurement ecutive authority to impose non-discrimination contract provisions epresents] action pursuant to the express or implied authorization of ngress." n42

n38 The Philadelphia Plan regulations, issued by the Secretary of Labor in 69 for certain projects in a five-county area around Philadelphia, required at contractors set specific goals for utilization of minority manpower in rtain crafts. The regulations were based on Executive Order 11246, supra note .

n39 442 F.2d 159, 170 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

n40 Judge Gibbons suggested that, even if the Fpasa/ did not apply, the esident acted within his "implied authority," and that the Orders were pliedly ratified when Congress approved appropriations for construction ojects covered by the Philadelphia Plan. Id. at 171. Unlike the District urt in this case, we find that these portions of Judge Gibbons' opinion are t only of little relevance to the instant case, but also of doubtful force. e Supreme Court has recently criticized the interpretation of appropriations asures as implied approvals of substantive administrative action, see TVA v.

ll, 437 U.S. 153, 190 (1978), and much uncertainty attends any claim of .mplied" or "inherent" presidential authority under the Constitution.

n41 442 F.2d at 170.

n42 Id.; see id. at 171 (anti-discrimination orders not based on "notions of :sirable social legislation," but instead involved "the one area in which .scrimination in employment was most likely to affect the cost and the progress : [federal] projects * * *."). [**20]

C

This survey of the terms of the Epasa/, its legislative history, and :ecutive practice since its enactment suggests that the District Court .sapprehended the President's statutory powers in this case. Any order based ı Section 205(a) must accord with the values of "economy" and "efficiency." :cause there is a sufficiently close nexus between those criteria and ıe procurement compliance program established by Executive Order 12092, we find ıat program to be authorized by the FPASA.

The District Court was alarmed by the prospect of Government contracts being .verted from low bidders who are not in compliance with the wage and price :andards to higher bidders. n43 The result, it might seem, could be an ıwarranted drain on the public fisc. Yet it is important to consider ıe procurement compliance program in its real-world setting. Much ›vernment procurement takes place through the processes of negotiation rather ıan formal advertisement and competitive bidding. Military procurement, which ; the largest single component of Government purchasing, is conducted almost :clusively through negotiated arrangements. n44 In the context of a negotiated ›ntract, the procurement [**21] program announced by Executive Order 12092 :ll likely have the direct and immediate effect of holding down the ›vernment's procurement costs.

n43 AFL-CIO. Kahn, supra note 10, slip op. at 11.

n44 BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978 at '6 (in 1977, 91.5% of all military procurement, or $41.7 billion worth, was :complished by negotiated contract rather than through advertising and ›mpetitive bidding). Although figures are not available on the portion of ›nmilitary procurement taking place through negotiated contracts, the practice ; widespread in that area as well.

Moreover, to the extent that compliance with the wage and price standards is ւdespread, a corresponding reduction (or more gentle increase) in Government :penses should take place. n45 There is every reason to anticipate general ›mpliance throughout the economy. Executive officials have cited initial ıdications that most large companies will comply with the standards, n46 and ıe inflation problem is too serious for businessmen and workers not to ıderstand the importance of compliance. In addition, by setting standards for ›th wages and prices [*793] Executive [**22] Order 12092 attempts to :iminate the need for either business or labor to seek price and wage ıcreases. Finally, if the voluntary restraint program is effective in :owing inflation in the economy as a whole, the Government will face lower ›sts in the future than it would have otherwise. n47 Such a strategy of eking the greatest advantage to the Government, both short- and long-term, is tirely consistent with the congressional policies behind the FPASA. n48

n45 See Currie Affidavit, supra note 9, III App. at 650:
rms that meet the President's price and pay standards will be reducing their erall rate of increase in costs and prices. By directing procurement toward ch firms an incentive will be provided to large numbers of vernment suppliers to meet the standards. To the extent that this occurs, the flationary element in overall Government procurement costs will be lessened, d the cost of procurement reduced.

n46 See Adequacy of the Administration's Anti-Inflation Program (Part I), arings Before a Subcommittee of the House Committee on Government Operations, th Cong., 1st Sess. 293-294 (1979) (testimony of A. Kahn, Chairman, Council Wage and Price Stability) (hereinafter cited as 1979 Hearings).

n47 See Currie Affidavit, supra note 9, Ill App. at 650:
bservance] of the [wage and price] [standards] by large numbers of individual rms who supply the Government will put competitive pressure on other suppliers do the same, tending to spread the cost-reducing consequences more broadly ross the spectrum of procurement.

n48 See text at and note 23 supra. [**23]

We do not deny that under Executive Order 12092 there may be occasional stances where a low bidder will not be awarded a contract. Nevertheless, we nd no basis for rejecting the President's conclusion that any higher costs curred in those transactions will be more than off-set by the advantages ined in negotiated contracts and in those cases where the lowest bidder is in mpliance with the voluntary standards and his bid is lower than it would have en in the absence of standards. n49 Consequently, we conclude that Executive der 12092 is in accord with the "economy and efficiency" touchstone of the ASA. By acting to restrain procurement costs across the entire Government, e President was within his Section 205(a) powers.

n49 "Given that some remedial measure was authorized, the question remaining whether the measure chosen is reasonably related to its objectives." Mourning Family Publications Service, Inc., 411 U.S. 356, 371 (1973).

We wish to emphasize the importance to our ruling today of the nexus between e wage and price standards and likely savings to the Government. As is clear om the terms and history of the statute and from experience [**24] with its plementation, our decision today does not write a blank check for the esident to fill in at his will. n50 The procurement power must be exercised nsistently with the structure and purposes of the statute that delegates that wer. n51

n50 Amicus argues that a decision upholding Executive Order 12092 would give e President power, for example, to establish by Executive Order the sort of ogram proposed in the National Labor Reform Act of 1977, which was not acted, that "willful" violators of the National Labor Relations Act should be spended from seeking Government contracts for three years. See H.R. 8410, @ 3), 95th Cong., 1st Sess. (1977), printed in Labor Reform Act of 1977 Part I, arings Before the Subcommittee on Labor-Management Relations of the House mmittee on Education and Labor, 95th Cong., 1st Sess. 13 (1977). The approach take today might raise serious questions about the validity of such an Order, t we need not reach that issue here.

n51 Amicus argues that if the FPASA gives the President authority to adopt e procurement compliance program, the Act must run afoul of the constitutional ohibition against excessive delegation of legislative power to the President. articulated by the Supreme Court, the delegation doctrine requires that gislation provide some standards, albeit not necessarily precise or specific es, by which administrative actions may be judged. See 1 K. DAVIS, MINISTRATIVE LAW TREATISE 149-223 (2d ed. 1978).

The FPASA requires the President to make procurement policy decisions based . considerations of economy and efficiency. Although broad, this standard can : applied generally to the President's actions to determine whether those ·tions are within the legislative delegation.At a more particular level, lministrative standards exist to test the President's actions. Executive Order '092 specifies percentage increases as standards for judging compliance with :e program. Where noncompliance is found, moreover, exceptions to the policy ·n be granted on the basis of "undue hardship or gross inequity," or if a ·rporation's survival is at stake. See pp. 3-5 supra. These are factual :terminations not unlike those reviewed by courts every day.The standards for ιis program compare favorably with those found sufficient for purposes of ιdicial review of administrative action in Amalgamated Meat Cutters & Butcher ·rkmen v. Connally, 337 F.Supp. 737, 744-763 (D. D.C. 1971) (three-judge ·urt). That the procurement compliance program involves governmental ·ntracting practices would not immunize actions under it from court challenge : arbitrary and capricious or contrary to law. See M. Steinthal & Co. v. :amans, 455 F.2d 1289, 1298-1299 (D.C. Cir. 1971); Scanwell Laboratories, Inc. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970); Gonzalez v. Freeman, 334 F.2d 0, 575-576 (D.C. Cir. 1964). [**25] [*794]

III

The District Court concluded that the compliance program involved here .s mandatory. As a result, that court found the program barred by this :atement in Section 3(b) of COWPSA:

·thing in this Act * * * authorizes the continuation, imposition, or :imposition of any mandatory economic controls with respect to prices, :nts, wages, salaries, corporate dividends, or any similar [transfers.] n52

n52 12 U.S.C. @ 1904 note (1976). See AFL-CIO v. Kahn, supra note 10, slip ·. at 19-23.

: disagree with the District Court's conclusion. Although every denial of a :nefit may be viewed in some sense as a sanction, we do not find in ιe procurement compliance program those elements of coercion and enforceable :gal duty that are commonly understood to be part of any legally mandatory :quirement. n53 The situation in this case seems analogous to those federal ograms that offer funds to state and local governments on certain conditions. .e Supreme Court has upheld such conditional grants, observing on one occasion ιrough Justice Cardozo that "to hold that motive or temptation is equivalent to ·ercion is to plunge the law in endless difficulties." [**26] n54 n53 Mandatory has been defined as "[containing] a command; preceptive; perative; peremptory." BLACK'S LAW DICTIONARY 1114 (rev. 4th ed. 1968). Cf. ams v. Tackett, 365 S.W.2d 125 (Ark. 1963); State v. Barnell, 142 N.E. 611 hio 1924); Muskego-Norway Consolidated Schools Joint School District No. 9 v. sconsin Employment Relations Board, 145 N.W.2d 680 (Wis. 1966).

n54 Steward Machine Co. v. Davis, 301 U.S. 548, 589-590 (1937). In Steward e Court upheld as noncoercive a federal statute conditioning tax credits for ivate employers upon enactment by the state of a federally-approved employment compensation law. See Oklahoma v. United States Civil Service mm'n, 330 U.S. 127 (1947); City of New York v. Richardson, 473 F.2d 923 (2d r.), cert. denied, 412 U.S. 950 (1973); State of North Carolina ex rel. Morrow Califano, 445 F.Supp. 532 (E.D. N.C. 1977) (three-judge court), aff'd, 435 S. 962 (1978); Dupler v. City of Portland, 421 F.Supp. 1314 (D. Me. 1976).

Further, any alleged mandatory character of the procurement program is belied the principle that no one has a right to a Government contract.As the Supreme urt ruled in Perkins v. Lukens Steel [**27] Co., "[The] Government enjoys e unrestricted power * * * to determine those with whom it will deal, and to x the terms and conditions upon which it will make needed purchases." n55 ose wishing to do business with the Government must meet the Government's rms; others need not.

n55 310 U.S. 113, 127 (1940). Although the holding in Perkins at contractors lack standing to challenge arbitrary contracting decisions has thered, see Scanwell Laboratories, Inc. v. Shaffer, supra note 51, nothing has dercut the Perkins Court's view of the Government's contracting power. United ates Brewers Ass'n, Inc. v. EPA, 600 F.2d 974, 984 (D.C. Cir. No. 77-1867, cided May 23, 1979) (slip op. at 19-20). See United States v. New Orleans blic Service, Inc., 553 F.2d 459, 469 (5th Cir. 1977), vacated on other ounds, 436 U.S. 942 (1978); Southern Illinois Builders Ass'n v. Ogilvie, 327 Supp. 1154, 1161 (S.D. Ill. 1971), aff'd, 471 F.2d 680 (7th Cir. 1972).

The question presented by this case, however, is not whether in some abstract nse President Carter's program is mandatory or voluntary, but whether it is rred by Section 3(b) of COWPSA. In our view, that provision [**28] refers the sort of mandatory economic controls imposed during World War II, the rean War, and the early 1970s. The statute covers "prices, rents, wages, laries, [and] corporate dividends," n56 a likely reference to a similar list Section 203(a) of the Economic Stabilization Act Amendments of 1971 which tablished legally enforceable wage and price controls. n57 Because COWPSA was acted [*795] just a few months after the Economic Stabilization Act pired, it is reasonable to conclude that the language of Section 3(b) looks ck to the provisions of the earlier Act. In addition, the standards in ecutive Order 12092, which cover only wages and prices, are not as extensive the list in Section 3(b). Consequently, we do not think the procurement mpliance program falls within the coverage of Section 3(b), but rather is a lfway measure outside the contemplation of Congress in that enactment. This terpretation is reinforced by the fact that Executive Order 12092, unlike the rlier wage and price programs, makes no provision for civil or criminal nalties or injunctions.

n56 Pub. L. No. 93-387, @ 3(b), 88 STAT. 751 (1974), III Legis. App. at 2, dified at 12 U.S.C. @ 1904 note (1976).

n57 Pub. L. No. 92-210, @ 203, 85 STAT. 744 (1971), II Legis. App. at 8. der the Economic Stabilization Act Amendments, economic controls could be forced by criminal penalty, civil fine, injunction, or private treble damage tion. [**29]

Perhaps more important, Section 3(b) is irrelevant to the esident's procurement compliance program. The statutory provision states that nothing] in this Act * * * authorizes * * * mandatory economic controls" mphasis added). Executive Order 12092 relies on COWPSA for the Council's wer to establish the voluntary wage and price standards, but the Order rests the FPASA for implementation of the procurement compliance program. Since we ink the procurement feature of the President's Order is supported by FPASA, it . of no concern that Section 3(b) may not also grant him that authority. n58

n58 We are also not persuaded that the President's program is barred by the ore Amendment of 1946 to the Second War Powers Act, Act of June 29, 1946, ch. .6, @ 2, 60 STAT. 346, 50 U.S.C. App. @ 645b (1976), as suggested by pellees. The amendment states:

Nothing contained in this Act [the Second War Powers Act] or any other deral Act * * * shall be construed to authorize the establishment by any ficer or agency of the Government of maximum prices for any commodity or ximum rents for any housing accommodations.
e statute prohibits only the "establishment * * * of maximum prices for any mmodity." President Carter has not established any maximum prices, but has ly restricted Government contracting to those firms in compliance with luntary standards. In addition, because the language of the Amendment refers .rectly to language used in legislation establishing wage and price controls ring World War II, see, e.g., Emergency Price Control Act of 1942, @@ 2, 205, b. L. No. 77-421, 56 STAT. 24-27, 33-35; Act of Oct. 2, 1942, Pub. L. No. -729, 56 STAT. 765, 766, we think the Moore Amendment bans only that sort mandatory control. Finally, the legislative history of this section suggests at Congress intended the phrase "any other federal Act" to refer to enexisting acts, not laws subsequently enacted. See 92 CONG. rec./ 7872 (June , 1946) (statement of Senator Joseph O'Mahoney, Manager of the Senate bill) [the] purpose of the amendment was to make certain that none of the war powers ould be used for the purpose of carrying into effect any of the powers granted the Price Control Act [and] the Stabilization Act") (emphasis added). *30]

Finally, it is important to point out that just two months ago the Congress proved a one-year extension of COWPSA, a tripling of its budget, and a sixfold crease in its staff.n59 The legislative history of this 1979 extension of WPSA, which was approved while this suit was pending in the District Court, ntains several assertions that Congress did not intend to make any statement the issues raised in this case. n60 Yet it strains credulity to maintain at [*796] COWPSA bars the procurement compliance program when Congress has st extended that statute knowing that the Council it established is charged th implementing the wage and price guidelines on which the procurement program based. n61 Congress can reverse incorrect Executive interpretations of its atutes and has used that power in the past. n62 Congress, fully aware of e procurement program, renewed COWPSA without significant modification. In is context, a court could only in the most extreme case find that the ecutive has violated the statute.

n59 See 125 CONG. REC. H1545-H1546 (daily ed. March 21, 1979); id. at S3769 :aily ed. April 2, 1979); id. at H2324-H2325 (daily ed. April 25, 1979); id. at 759 (daily ed. April 26, 1979), III-C Legis. App. at 92-93, 143, 145. The rms of the 1979 extension are set out in H.R. Rep. No. 96-33, 96th Cong., 1st ss. 12-13 (1979), and the Conference Report, H.R. Rep. N3. 96-93, 96th Cong., t Sess. 1-2 (1979).

In September 1978, before the President's program was announced, the Senate proved a "Sense of the Senate" resolution stating that neither the FPASA nor y other statute empowered the President to impose mandatory economic controls. 4 CONG. REC. S16781 (daily ed. Sept. 30, 1978). The resolution, however, has force of law, predates the President's program, and, most important, is not plicable to the nonmandatory program that we review today.

n60 See, e.g., H.R. Rep. No. 96-33, supra note 59, at 3, III-C Legis. App. at (committee "did not seek to resolve" controversy "on the issue of whether the ecutive * * * has exceeded the authority granted by Congress"); 125 CONG. REC. 322 (daily ed. April 25, 1979), III-C Legis. App. at 95 (remarks of Rep. orhead).

n61 In fact, the final version of the 1979 extension acknowledges that the uncil will be "[determining] compliance with promulgated standards." See H.R. p. No. 96-93, supra note 59, at 1, III-C Legis. App. at 1. Other factors dicate that Congress well understood the Council's role in the procurement mpliance program. Administration officials made no secret of the fact that me of the additional funding for the Council would go to the contract mpliance aspect of the Council's mission. See 1979 Hearings, supra note 46, 291-294 (testimony of A. Kahn, Chairman, Council on Wage and Price ability). And in an exchange with Senator Heinz in floor debate Senator oxmire, a sponsor of the measure, assured his colleague that if the courts und that the procurement compliance program was illegal, Congress could educe the personnel assigned to the agency." 125 CONG. REC. S3745 (daily ed. ril 2, 1979), III-C Legis. App. at 119. In view of these indications, and the rvasive public attention directed to the procurement program in recent months, have no concern that Congress as a whole was not aware of the intimate lationship between the 1979 extension and the procurement program. See SEC v. oan, 436 U.S. 103, 120-122 (1978).

n62 For example, the Motor Vehicle and Schoolbus Safety Amendments of 1974 versed the requirement of the Secretary of Transportation that automobile nitions not function until passengers put on their seatbelts. Pub. L. No. -492, @ 109, 88 STAT. 1482 (codified at 15 U.S.C. @ 1410b (1976)). [**31]

IV

Appellees also argue that Executive Order 12092 contravenes the policy of ee collective bargaining embodied in the National Labor Relations and Railway bor Acts. Although the Executive Order represents an important external ctor in the economic environment surrounding collective bargaining, it does t subvert the integrity of that process. n63 Accordingly, we find this ntention to be without merit.

n63 Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, supra te 39, 442 F.2d at 174-175. See Amalgamated Meat Cutters & Butcher Workmen

Connally, supra note 51, 337 F.Supp. at 763-764.

V

The people of this country are experiencing a cruel period of
onomic inflation. In an effort to relieve the distress caused by
at inflation, Congress has authorized the President to issue wage and price
andards and to encourage voluntary compliance as an act of good citizenship.
4 The President has pursued this goal through his statutory authority over
vernment procurement. Given this cooperative effort by the legislative and
ecutive branches of our government, it would be ironic indeed for the third
anch to ignore the legal basis for the program [**32] challenged here and
ld that the President may not deny Government contracts above $5 million to
ose who flout the voluntary standards.

n64 See note 61 supra.

Consequently, the order of the District Court is reversed and its injunction vacated. n65

n65 We note our disagreement with the view taken by Judge MacKinnon in his
ngthy dissent as to the role of Congress with respect to this case. We do not
ink it without any significance at all that the FPASA has not been revised in
action to Executive Orders by Presidents Eisenhower, Kennedy, Johnson, and
xon that explicitly or implicitly relied on the statute, and which deployed
e procurement power in pursuit of ends that might not strictly be defined as
onomy or efficiency. See Part II-B supra; MacKinnon dissent at 29-30.

So ordered.

NCURBY:

BAZELON; TAMM

NCUR: BAZELON, Circuit Judge, concurring: I concur in Judge Wright's careful
alysis of the statutory authority for Executive Order 12092. I write only to
phasize the [*797] close nexus between the Order and the objectives of
e Procurement Act, and to underscore my understanding that nothing in the
urt's opinion intimates any views on [**33] the validity of other Executive
ders issued explicitly or implicitly pursuant to the authority granted by
e Procurement Act in general, or by @ 205(a) of that statute in particular.

TAMM, Circuit Judge, concurring: I concur in Judge Wright's opinion for the
urt. Lest we later be construed as having broadly interpreted the Procurement
t, I write separately only to emphasize my belief that the opinion we issue
day is a narrow one. It does not allow the President to exercise powers that
ach beyond the Act's express provisions. In my view, the decision to uphold
ecutive Order 12092 is predicated upon the close nexus between the purpose of
e voluntary guidelines and the goal of the Act to secure economy and
ficiency in federal procurement.

SSENTBY: MacKINNON; ROBB

SSENT: MacKINNON, Circuit Judge, dissenting: In 1949 Congress enacted the deral Property and Administrative Services Act for the stated purpose of simplifying] the procurement, utilization, and disposal of Government operty" and ["reorganizing] certain agencies of the Government." Act of June , 1979, chap. 288, 63 Stat. 377. Section 205(a) of this "1949 Act" grants the esident the power to "prescribe [**34] such policies and directives, not consistent with the provisions of this Act, as he shall deem necessary to fectuate the provisions of said Act." 40 U.S.C. @ 486(a) (1976). Today the jority, with two tepid separate concurrences, holds that the President can voke this power to require adherence to a national system of wage and price andards as a condition of doing business with the federal government. The jority achieves this result despite the fact that the President's action is consistent with explicit provisions of the 1949 Act and is unrelated to the ngressional purpose underlying it. I delete can find no license in the esident's important but modest powers under the 1949 Act to support his position of wage and price controls on federal government contractors. reover, I believe that were the majority's construction of section 205(a) rrect, then the 1949 Act would amount to an unconstitutional delegation of gislative authority to the executive branch. Accordingly, I dissent.

A. Preliminary Considerations

My views do not disagree with the majority's statement that this case esents an issue different from that decided in Youngstown Steel & Tube *35] Co. v. Sawyer, 343 U.S. 579 (1952), though I believe that decision has me pertinence to our analysis here, and certainly far more than the majority knowledges. In Youngstown, the President issued an executive order directing e Secretary of Commerce to seize control of and to operate the Nation's steel lls in order to avert a nationwide strike which the President feared would opardize national defense efforts during the Korean Crisis. The President so ordered the Secretary to prescribe the terms and conditions of employment der which the mills were to be operated, and empowered him to promulgate y regulations and orders necessary to carry out the executive order. The eel companies challenged the President's order on the ground that he lacked e authority to issue it. The district court tentatively agreed and eliminarily enjoined the Secretary from enforcing it. 103 F. Supp. 569, 3-77 (D.D.C. 1952). This court stayed the injunction. 197 F.2d 582, 584-85 .C. Cir. 1952) (en banc). On certiorari, the Supreme Court affirmed the dgment of the district court. 343 U.S. at 589.

Justice Black's opinion for the Court began with the observation that "[the] *36] President's power, if any, to issue the order must stem either from an t of Congress or from the Constitution itself." Id. at 585. The President ecifically disclaimed reliance on any statutory authority, and the Court found ne to support his action. Indeed, the Court said, five years [*798] rlier Congress had expressly declined to grant the President the power he now aimed. Id. at 586. The legality of the steel mill seizure, then, turned on ether some constitutional provision authorized the President to act as he did. e Court held that the Constitution contained no such reservoir of presidential wer.

Basic to the Youngstown Court's reasoning was the character of the power the esident had sought to exercise. The structure of our constitutional system aces the legislative power -- that is, the power to make law -- in Congress, ile the President is charged with executing the laws so made. Had the esident merely been carrying out an otherwise lawful legislative directive en he ordered the seizure of the mills, his action could not have been allenged on the ground that he lacked the authority to act. The defect in the esident's action in Youngstown [**37] was his attempt to exercise gislative power where none had been lawfully delegated.Justice Black's opinion plained:

The President's order does not direct that a congressional policy be executed a manner prescribed by Congress -- it directs that a presidential policy be ecuted in a manner prescribed by the President. The preamble of the order self, like that of many statutes, sets out the reasons why the President lieves certain policies should be adopted, proclaims these policies as rules conduct to be followed, and again, like a statute, authorizes a government ficial to promulgate additional rules and regulations consistent with the licy proclaimed and needed to carry that policy into execution. The power of ngress to adopt such public policies as those proclaimed by the order is yond question. It can authorize the taking of property for public use. It n make laws regulating the relationships between employers and employees, escribing rules designed to settle labor disputes, and fixing wages and rking conditions in certain fields of our economy. The Constitution does not bject this lawmaking power of Congress to presidential or military supervision *38] or control.
. at 588.

Executive Order 12092, in issue here, does not direct that a congressional licy be executed in a manner prescribed by Congress. Instead, exhibiting what essentially legislative power, it directs that a presidential policy be ecuted in a manner prescribed by the President. The preamble of the order, ke that of many statutes, sets out the reasons why the President believes e wage and price guidelines are necessary, proclaims these standards as rules conduct to be followed by federal government procurement officers, and again, ke a statute, authorizes a government official to promulgate additional rules d regulations consistent with the policy proclaimed and needed to carry the licy into execution.

The power of Congress to adopt such public policies as those proclaimed in ecutive Order 12092 is beyond question. Congress and Congress alone has the nstitutional authority to direct that adherence to wage and price controls be mandatory condition of doing business with the federal government. The nstitution does not prevent Congress from delegating this legislative power to e President within limits. See Norwegian Nitrogen [**39] Products Co. v. ited States, 288 U.S. 294, 305 (1933). The question in this case is whether rough the vehicle of the 1949 Act Congress intended to delegate to the esident the power to establish compliance with wage and price controls as a ndition of doing business with the federal government. If Congress intended do so, and did so in conformity with constitutional principles, then the esident's action must stand. If Congress did not intend to delegate that thority, or purported to delegate it without constitutionally sufficient andards, then the President's action amounts to lawmaking in violation of ticle I of the Constitution.

Thus the question is indeed initially one of statutory interpretation. There e well established rules to govern judicial [*799] interpretation of atutes. One axiom is that the intent of Congress governs interpretation of e statute. See Richards v. United States, 369 U.S. 1, 9 (1961); Jay v. Boyd, 1 U.S. 345, 357 (1956). The ambit of a delegated power is controlled by the rposes of the statute which delegates it. See Mastro Plastics Corp. v. tional Labor Relations Board, 350 U.S. 270 (1956); Addition v. Holly Hill *40] Fruit Products, Inc., 322 U.S. 607 (1944). Another vitally important le is that when one among alternative constructions would involve serious nstitutional difficulties, a court should construe the statute to avoid these fficulties. See National Cable Television, Inc. v. United States, 415 U.S. 6, 342 (1974); Crowell v. Benson, 285 U.S. 22, 62 (1932); In re Evans, 452 2d 1239, 1243 (D.C. Cir. 1971); 2A C. Sands, Sutherland Statutory Construction 45.11 (4th ed. 1973). This elementary principle of statutory interpretation unsels a narrow reading of a congressional enactment when a broader nstruction would endanger the statute's constitutionality.

The implications of these rules for this case are clear. This court must lentify the congressional purpose in enacting the 1949 Act and define the esident's power under section 205(a) with reference to that purpose.It must so construe the President's power under section 205(a) in a manner consistent th the constitutional doctrine circumscribing the means by which Congress n delegate legislative authority to executive officers. In my judgment, the jority's opinion not only flouts the intent Congress expressed [**41] in acting the 1949 Act, but it also ignores the constitutional limits on ngress' power to delegate its lawmaking prerogatives.

B. Executive Order 12092 and the Purposes of the 1949 Act

1. The Scope of Section 205(a) of the 1949 Act

It is no accident that the majority opinion cannot point to any legislative story of the 1949 Act to justify its holding that the President can use s procurement power to control wage and prices of federal government ntractors, for there is not a single passage in that history -- not even an f-hand remark -- remotely supporting the use of the procurement power to hieve nonprocurement objectives. Congress did not enact the 1949 Act to give e President an unguided instrument with which to establish price and wage ntrols on business which have no bearing on federal government procurement eds. The problem faced by the Government in 1949 was the disorderly lministration of mammoth federal supply operations that were uncoordinated, plicative, and without rational procedures. The legislative history of the 49 Act is replate with indications of congressional concern about the absence central management of the federal government's [**42] purchasing and operty maintenance mechanisms, with all the attendant inefficiencies. See, g., S. Rep. No. 475, 81st Cong., 1st Sess., 1-6, 8 (1949); H.R. Rep. No. 670, st Cong. 1st Sess. 2-7 (1949); 95 Cong. Rec. 7441-43 (1949) (remarks of Rep. lifield). It is in the context of these problems, and these problems alone, at the 1949 Act must be read.

In response to these problems, Congress created the General Services lministration and coordinated the procurement and management of federal vernment property under that new agency. In Title II of the statute, under e heading of "Property Management," section 201(a) provides that the lministrator shall prescribe policies and procedures relating to "procurement, rehousing, and related activities" to the extent he determined "that so ing is advantageous to the Government in terms of economy, efficiency, or rvice." Act of June 30, 1949, chap. 288, @ 201, 63 Stat. 383 (codified at 40 S.C. @ 481(a) (1976)) (emphasis added). In this same title, Congress legated to the President the authority to "govern" the Administrator's cision with policies of his own. Id. @ 205(a), 63 Stat. 389 (codified at 40 S.C. [**43] @ 486(a) (1976)). [*800]

It is clear from these provisions and from the context in which they appear at Congress intended to provide the President with the significant but mparatively narrow authority to manage the procurement of federal government operty, supplies, and services. As the House sponsor of the 1949 Act plained, the "key" to the new property management scheme was the lministrator's power in section 201 to provide for a "uniform yet flexible stem -- Government-wide -- for procurement, warehousing, property lentification, supply, traffic management, and management of public utility rvices." 95 Cong. Rec. 7442 (1949) (remarks of Rep. Holifield). It was the iformity of policies and procedures that was "absolutely essential to achieve onomy, efficiency, and substantial savings." Id. Congress was not reordering e national economy in an effort to save money; it was clearing out the vernment's house, fashioning the government's procurement and property nagement system in accordance with sound business principles. S. Rep. No. '5, supra, at 1.

Consistent with sound business principles, Congress wanted to ensure iformity in procurement decisions [**44] and to clearify the chain of mmand. Therein lies the sole purpose of section 205(a). Congress intended to roid any implications that the General Services Administration was an dependent administrative agency free from direct presidential control. It nted to vest the President with the ultimate authority to control procurement licy while giving the General Services Administration the day-to-day sponsibility for managing federal government property. 95 Cong. Rec. 7441 .949) (remarks of Rep. Holifield); d. at 7452 (remarks of Rep. Bolling). It rtainly did not envision the General Services Administration or any her federal government procurement office acting as a kind of partner to the deral Reserve Board in managing the Nation's economic affairs, and a fortiori did not intend the President to use his procurement oversight powers as an strument to that effect. Section 205(a) merely permits the President to ersee and to promulgate policies relating to procurement, warehousing, operty identification, supply, traffic management, and the like. As long as e President prescribes polices and directives bearing an actual and logical lationship to these items [**45] of property management, he lawfully ercises his powers under section 205(a).

Executive Order 12092, which professes to rest exclusively on this moderate wer, is a general nationwide edict that materially affects the entire economy the United States. See 43 Fed. Reg. 51375 (1978), reprinted in Appendix. e purpose of this Order is not to streamline federal government procurement. is not to ensure the efficient management of government property. It is not guarantee that the government receives the best possible product at the west possible cost. It is not to regulate the operations of the federal vernment's various purchasing entities. While the Order deals with federal vernment procurement, its aims are unrelated to any pressing procurement need. though the Order's impact is in large measure uniform, uniformity itself is t the supposed advantage in terms of "economy and efficiency." Rather the der is an attempt to grapple with the admittedly obstinate problem inflation, and to do so through sub rosa controls of wages and prices. wever noble that effort may seem, the 1949 Act contains no warrant for using e procurement process as a tool for [**46] controlling the Nation's onomy. Presidential attempts to handle inflation must occur within a amework of powers provided by Congress and the Constitution. There may be veral ways to skin a cat, but the President here has reached into an arsenal ngress did not provide for that purpose to unsheathe a knife designed for and stricted to more limited chores.

2. The Consistency of Executive Order 12092 with Other Provisions of the 49 Act.

Not only is the President's action well beyond the congressionally-intended ope of power conferred on him by section 205(a), but it is also inconsistent th other [*801] provisions of the 1949 Act. Whether or not section 205(a) lows the President to pursue nonprocurement objectives through the procurement ocess, under the express terms of that section he may only act in a fashion ot inconsistent with the provisions of this [1949] Act." 40 U.S.C. @ 486(a) 976). Hence any inconsistency between Executive Order 12092 and the 1949 Act fatal to the presidential action. In this case, Executive Order 12092 is consistent with the 1949 Act in at least three respects.

a. Section 502(d) -- The President's Order is [**47] inconsistent with ction 502(d) of the 1949 Act. That provision states:

Nothing in this [1949] Act shall impair or affect any authority of

. . .

(2) any executive agency with respect to any phase (including, but not mited to, procurement, storage, transportation, processing, and disposal) of y program conducted for purposes of resale, price supports, grants to rmers, stabilization, transfer to foreign governments, or foreign aid, relief, rehabilitation: Provided, That the agency carrying out such program shall, to e maximum extent practicable, consistent with the fulifillment of the purposes the program and the effective and efficient conduct of its business, ordinate its operations with the requirements of said chapters and the licies and regulations prescribed pursuant thereto.

t of June 30, 1949, chap. 288, @ 502(d), 63 Stat. 401 (codified at 40 U.S.C. 474 (1976)) (emphasis added). The unmistakable import of this language is at the 1949 Act was not intended to expand (or for that matter diminish) the esident's power to accomplish price and wage stabilization. The President's wer, if any, to bring about price and wage stabilization [**48] must stem om an act of Congress. Congress has not granted the President that power, and ction 502(d) denies the President the power under section 205(a) to use e procurement process to stabilize wages and prices.Yet that is precisely what e President seeks to do in Executive Order 12092.

The majority rejects this inconsistency on two grounds. It first claims that e term "stabilization" was only meant to "refer to the farm commodity support ograms of the federal government, without any direct relevance to procurement licy generally." Maj. Op. at p. 11 n.24. This reasoning ignores the use of e word "procurement" in section 502(d), and also fails to heed the common derstanding of the word "stabilization." The majority cites no support for its vel interpretation, and of course there is none either in the text of section 2(d) -- which lists matters well beyond "farm commodity support programs" -- in the legislative history. Having enacted some from of wage and ice stabilization program to govern most of the decade of the 1940's, Congress s well aware of what the word "stabilization" meant. see, e.g., ergency Price Control Act of 1942, Pub. L. No. 421, [**49] 56 Stat. 23; t of July 25, 1946, Pub L. No. 548, 60 Stat. 664.

Acknowledging that "stabilization" could indeed refer to price and wage ntrols, the majority next offers the disingenuous suggestion that section 2(d) "prescribes only that procurement shall not obstruct stabilization ograms." Maj. Op. at p. 11 n.24. Where? The statute itself says that nothing the 1949 Act shall "impair or affect" stabilization programs. 40 U.S.C. @ 4 (1976) (emphasis added). One might be inclined to agree with the majority's ading if only the first of these two words appeared in section 502(d), but at is not the case. There is simply no basis for converting the verb "affect" to the verb "obstruct." The dictionary defines "to affect" as "to produce an fect upon" or "to produce a material influence upon or alternation in." bster's New Collegiate Dictionary 19 (1977). It is fundamental that the plain d ordinary meaning of statutory language controls.See 2A C. Sands, supra @ .08 at 24. Section 502(d) provides that nothing in the 1949 Act shall produce effect upon, influence, or alter any stabilization program. The President's der is in violation of that prohibition, [**50] and it is therefore lawful. [*802]

b. Section 303(b) -- Executive Order 12092 is also inconsistent with section 3(b) of the 1949 Act. That provision states in pertinent part:
ard [of all bids] shall be made with reasonable promptness by written notice the responsible bidder whose bid, conforming to the invitation for bids, will most advantageous to the Government, price and other factors considered.
t of June 30, 1949, chap. 288, @ 303(b), 63 Stat. 395 (codified at 41 U.S.C. 253(b) (1976)). This provision, like every other provision of the statute, st be read in the context from which it derives. That context indicates that ngress intended federal government procurement officers to consider, in dition to price, such factors as the quality of the goods, their suitability r government purposes, and the general availability of those goods in the rket. The majority does not disagree. See Maj. Op. at 10. Each of these ctors makes sense in the procurement setting.When a purchaser is looking for ods and services to meet special needs, and particularly when he is dealing in e kind of volume the federal government requires, price alone [**51] will t in every case dictate buying behavior. Congress recognized that procurement ficers had to have some measure of flexibility. See 95 Cong. Rec. 7442 (1949) emarks of Rep. Holifild). But that does not mean that Congress tended federal government procurement officers to consider factors completely traneous to the procurement setting. Indeed in that setting the very essence the concepts of "economy" and "efficiency," which as the majority notes are e concepts that dominated the congressional discussion of the 1949 Act, erate to confine consideration to those factors having some relevance to the

·ice of the good, its quality, and its suitability for government purposes.

The extent of the majority's treatment of this question is worth repeating ·re.It is as follows:

:conomy" and "efficiency" are not narrow terms; they encompass factors like ·ice, quality, suitability, and availability of goods and services that are ıvolved in all acquisition decisions. Similar concerns can be seen in the ›ecific direction to contracting officers in Section 303(b) that contracts ıould be awarded to bidders whose terms "will be most advantageous to the ›vernment, price [**52] and other factors considered."

ıj. Op. at 10 (quoting 40 U.S.C. @ 471 (1976)) (footnote omitted). This much ; fine. Previous to this the majority had emphasized the importance of giving ›me content to the terms "economy" and "efficiency," and in this qouted passage : appears to be doing so by focusing on factors like the quality of the good ıd its suitability for government purposes. This in turn would seem to belie ıe existence of any power to order disregard of these factors in favor of other ›nprocurement considerations.

Immediately following the quoted passage, however, the majority concludes:

Although the terms and legislative record of the [1949 Act] are not ıambiguous, the relationship of the Act to this case can be outlined. Section)5(a) grants the President particularly direct and broad-ranging authority over ıose larger administrative and management issues that involve the Government as whole. And that direct presidential authority should be used in order to :hieve a flexible management system capable of making sophisticated judgments ı pursuit of economy and efficiency.

ı. at 10-11. It is on this basis that the majority proceeds to hold [**53] ıat Executive Order 12092 is a lawful exercise of the President's section)5(a) power. Yet it immediately follows and draws its support from a statement ıat the concepts of "economy" and "efficiency" permit consideration of :ocurement-directed factors like price and quality, not factors like wage and :ice guidelines that are unrelated to the price and the quality of a good in ıy given setting. Having given the governing concepts a content restricted) procurement purposes, the majority contradicts that content by extending the :esident's power to [*803] act in a manner unrelated to the content the ıjority describes.

The majority elsewhere notes that Congress has in times past imported ›nprocurement goals into procurement decisions, Maj. Op. at 12; see, e.g., 41 .S.C. @ 252(b) (1976), and doubtlessly Congress has the power to do so. But ıe President is not Congress. Our concern is not with what the legislature may) in the exercise of its lawmaking powers, but with what the President may do ı exercising restricted delegated authority. The only value in noting what ›ngress has done to expand the range of factors that may enter into procurement ›cisions [**54] lies in the recognition that when Congress intends to have ›nprocurement objectives considered, it will enact positive law dictating :ecisely what objectives it wants pursued.

c. Section 303(a) -- Finally, the President's Order is inconsistent with ›ction 303(a) of the 1949 Act. The majority completely ignores this provision, ıd the text of the section reveals why:

ıe advertisement for bids shall be made a sufficient time previous to the ırchase or contract, and specifications and invitations for bids shall permit ch full and free competition as is consistent with the procurement of types of pplies and services necessary to meet the requirements of the agency ncerned.

t of June 30, 1949, chap. 288, @ 303(a), 63 Stat. 395 (codified at 40 U.S.C. 253(a) (1976)) (emphasis added). Except for the substitution of the word roperty" for the word "supplies" that Congress made by Act of July 12, 1952, ap. 703, 66 Stat. 594, this quoted portion of section 303 remains unchanged nce the adoption of the 1949 Act. It therefore continues to express Congress' termination that there shall be "full and free competition" for federal vernment procurement contracts. [**55] Whatever else Executive Order 12092 y do, it plainly does not permit full and free competition among businesses shing to obtain federal procurement contracts. Indeed it is the very tithesis of that congressional command, for it restricts such competition on e basis of what everyone concedes are arbitrary wage and price guidelines.The ncept of full and free competition presupposes the existence of free market rces. It is apparent from the statute that Congress envisioned the federal vernment purchasing its goods and services at fair market value, and that the 49 Act was fashioned to ensure that the federal government's purchasing cisions were economical and efficient within the market structure. The esident's attempt to bludgeon the market for government contracts is mpletely foreign to the expressed legislative intent.

C. The Majority's "Close Nexus" Test

To my mind the sharp divergence between the purposes of the 1949 Act and the aracter of the authority the President seeks to exercise pursuant to section 5(a) renders clear the invalidity of Executive Order 12092. Additionally, any the foregoing inconsistencies between the explicit terms of [**56] the 49 Act and Executive Order 12092 provides an adequate foundation for holding e President's Order unlawful and further enjoining its enforcement. The jority scarcely addresses these points, preferring instead to hold that the esident may implement any policy or directive, however related or unrelated to e true purposes of the 1949 Act, as long as his action is consistent with what e majority describes as the "not narrow" concepts of "economy" and fficiency." The majority finds in two respects a "sufficiently close nexus" tween these two concepts and Executive Order 12092.

1. The Direct Impact of Executive Order 12092

The majority first appears to reason that Executive Order 12092 will have the rect effect of lowering the federal government's cost of doing business. This so, the majority contends, because most federal government procurement is ne by negotiated contract, and thus any program designed to limit contractor's ability to raise his prices will likely have an immediate impact the cost of the contracts the federal government negotiates. In the 804] bidding context, the majority says that even though there may be ccasional instances" [**57] when federal government procurement by bid sults in a contract award to someone other than the lowest bidder, owing to e President's Order, the federal government will still benefit because the west complying bidder might have a bid lower than it would have been in the sence of the guidelines.

There is no support in the record to justify these claims by the majority. e majority makes much of its distinction between negotiated contracts and

›ntracts awarded by bid, perhaps because it simply cannot explain away the fact ıat Executive Order 12092 is a flat and direct contradiction of the principle ıat economy and efficiency compels an award of a contract to the lowest :sponsible bidder, that is, the bidder who, operating on a sound financial ›undation, is able to offer the most economical and efficient goods and :rvices. The majority notes in this connection that most procurement contracts 'e negotiated because the military departments, which dominate federal ›vernment procurement, usually negotiates its contracts. It neglects to point ıt, however, that the rules governing the President's procurement program :empt from coverage not only goods and services essential [**58] to the ıtional defense, but also situations in which there is no feasible alternative ›urces of supply or the application of the program would threaten ıe contractor's ability to survive, both of which are commonplace in the area : military procurement and both of which are the common circumstances in which contract would be negotiated rather than let out to bid.

Even assuming that the majority's emphasis on negotiated contracts has some ıbeit modest validity, the distinction it draws between negotiated contracts ıd those awarded by bid is meaningless. If there is only one /ailable supplier of the goods or services for which the federal government ɜeds to negotiate, the wage and price guidelines will likely not even apply ıder the express terms of the procurement program's regulations. Even if they) apply, the President's program does not enhance the federal government's ›sition at the bargaining table; it just provides that whatever and however ıgh a price the contractor puts forth for the goods or services will not be ıised beyond the limits provided in the guidelines.

Far more important is the situation in which there is more than one /ailable supplier of [**59] the goods or services for which the federal ›vernment needs to negotiate, and here the speciousness of the majority's ıstinction is obvious. The majority focuses only on the contractor with whom ıe federal government actually negotiates. This focus permits it to advance ıe self-fulfilling prophecy that whenever the federal government negotiates a ›ntract under Executive Order 12092 the result will be lowered government costs ɜcause the contractor will have to adhere to the President's wage and :ice guidelines. The crucial point, however, is not with whom does the federal ›vernment actually negotiate but with whom can the federal government negotiate ıder the President's Order in the first place. In the process of screening ıose contractors with whom it can negotiate and those with whom it cannot, ıe federal government under Executive Order 12092 necessarily ignores factors ıke which contractors can offer the best goods or services at the lowest price ɜcause its concentration must be solely on which contractors are in compliance ıth the wage and price guidelines. Interests of economy and efficiency yield) the interest of obedience vel non to the President's Order. [**60] Thus ıe same logical defect that infects the bid context exists when negotiated ›ntracts are restricted to those who comply with Executive Order 12092.

The logical defect is that compliance with the President's wage and :ice guidelines bears at the very best a wholly coincidental relationship to ıe efficiency with which a government contractor performs his work and the cost : which he offers it. Under Executive Order 12092, procurement contracts do ›t necessarily go to the lowest responsible bidder or to the potentially '805] lowest negotiator, but only to bidders and negotiators who first and ›remost abide by the President's wage and price standards. Thus, for

:ample, the supplier who is in fact able to provide the most efficient d economical goods or services at the lowest price can nevertheless be squalified from seeking government contracts because, either voluntarily or by mpulsion of a labor strike, he gave his employees a long overdue st-of-living increase that exceeds the President's guidelines.

Executive Order 12092 is not confined to the government work done by deral contractors but reaches all facts of their business.Hence a prospective vernment [**61] contractor may in fact be in compliance with the guidelines th respect to goods and services he offers the federal government, but may ill be precluded from seeking government contracts because his wage and price cisions on nongovernment matters do not comport with the President's uggestions" about what those decisions ought to be.

Indeed Executive Order 12092 penalizes the economical and efficient supplier goods and services under predictable and common circumstances, thereby dermining the very purposes of the statute on which it professes to rest. ke for instance Supplier A and Supplier B, each of whom produces widgets for le to the federal government.The cost of producing a widget is the same to ch, say, $25. For reasons of their own, the two suppliers operate at very fferent profit margins: Supplier A charges a modest $26 per widget, leaving a ofit of one dollar, while Supplier B greedily charges $30. Under normal nditions, one can safely assume that a federal government procurement officer th a charter to seek the most economical and efficient supplier of widgets uld hasten to Supplier A's door. But suppose that after the imposition of the esident's [**62] guidelines inflation causes a relatively dramatic increase the costs of producing widgets, say $3 worth. Supplier A cannot survive oducing widgets at a loss, so he must increase the cost of his widgets by an iount greater than $2 and likely by as much as $3. This increase aces Supplier A in violation of the guidelines. Supplier B, on the other nd, can absorb the increased costs while still enjoying a profit, and, being eedy, is likely to raise the cost of his widgets by some amount within e guidelines. Despite his increases, Supplier A remains the most economical d efficient supplier of widgets, for his product still costs at least one llar less than Supplier B's. Nonetheless, under Executive Order 12092, e federal government officer cannot approach his door. Thus the President's der rewards bidders and potential negotiators with high preexisting price vels who are able to certify compliance with the President's procurement ogram while it punishes those potential suppliers with low profit margins who e unable to do so owing to intervening increases in costs.

2. The Indirect Impact of Executive Order 12092

Perhaps recognizing the weaknesses inhering [**63] in a claim that ecutive Order 12092 will have a direct and immediate impact on federal vernment procurement, the majority retreats to the notion that if the esident's Order is ultimately successful in steming the tide of inflation e federal government's cost of doing business will be correspondingly reduced. is reasoning acknowledges that the President is using the procurement power r something other than a direct procurement objective, i.e., to attempt to rb inflation. This contradicts its earlier conception of the content of conomy" and "efficiency." See pp. 11-12 supra. Far more troubling, however, is e exceedingly attenuated character of the nexus between procurement policy d presidential action which the majority deems sufficient. This reading of ction 205(a) admits to no boundaries on presidential action but instead rmits the President to effect any social or economic goal he chooses, however lated or unrelated to the true purposes of the 1949 Act, as long as he can nceive of some residual consequences of the order that might in the long run lp [*806] the Nation's economy and thereby serve the "not narrow" and defined concepts of "economy" [**64] and "efficiency" in federal vernment procurement.

The recent history of our civilization records so many horribles committed in e name of economy and efficiency that it simply defies common sense and sound dgment to suggest that the Eighty-First Congress contemplated delegating power that scope to the President. It is essential to realize that the validity of particular presidential order cannot turn on whether we view the action as ood" or "worthy," for the meaning of a statutory delegation of authority nnot vary depending on judicially-conceived policy judgments about the wisdom the exercise of power in a given circumstance. Likewise the effectiveness of e program must be irrelevant to judicial consideration (though it is teworthy that part of the evidence the majority cites to show the fectiveness of Executive Order 12092 is the testimony before Congress of one the defendants in this case, testimony that is daily rebutted by newspaper ports to the contrary). The determination that legislative power was lawfully legated cannot hinge on whether a court decides that the power as exercised s a chance of accomplishing its objectives. The previous [**65] discussion out the lack of direct impact on the procurement process of Executive Order 092 is only to show that the Order has no relationship to procurement needs, t to show that a clearly procurement-directed policy will not work.

Apparently concerned about the limitless nature of the power the majority scribes, two judges within the majority restrict their support by attaching parate concurrences stressing the narrowness of the majority's holding. The jority itself strains to emphasize the proximity of the nexus it approves. t as the majority says, this court's task is to construe a statute, not to dorse a particular program. No number of caveats, no amount of denials, no lls of "Narrow!" can conceal the actual course of reasoning the majority llows.

The shifting nature of the majority's analysis is evident in its use of the ior executive orders allegedly based on the President's section 205(a) wers.I shall turn presently to the value of those orders in determining the ope of the presidential procurement power, but it is useful now to pause on w these orders fit into the majority's interpretation of that power. Since e majority employs -- indeed [**66] practically rests on -- these earlier ders to arrive at its judgment about what constitutes a "sufficiently ose nexus," it presumably believes that these orders too are justified purely resort to section 205(a). But how? The merits of the orders aside, for they e not before us, what conceivable relationship does an affirmative action ogram requirement have to the federal government's cost of doing business? rhaps the answer is that such a program will lead to reduced unemployment and ereby occupy some role in improving the Nation's economy. I imagine the swer continues with the argument that this improvement in the economy will in rn have some benefit for the terms and conditions on which the federal vernment purchases and maintains its goods and services. The turns of logic is reasoning compels and the conjecture propelling them are, I suggest, mpant with possibilities that stagger the imagination.

For example, suppose the President issued an order declaring that federal vernment contractors could only buy American goods or could only hire American rkers. He could offer the same reasoning he uses here to justify those tions. Or suppose, on [**67] the same reasoning, the President decided at government contractors must pay a certain minimum wage to their employees. deed it is not unreasonable to ask why under the majority's reasoning the esident could not direct the Secretary of Commerce to seize control of the oil mpanies doing business with the federal government. The President could ason that oil, natural gas, and gasoline (much like steel during the Korean isis) are crucial to the Nation's economy, and seizure followed by government ntrol [*807] would lead to improved economic conditions, which in turn uld engender a lowering of the federal government's cost of doing business. light of the majority's view, discussed below, that whether or not it is voked the President's section 205(a) power can spring into action to support y directive he terms related to economy or efficiency, one wonders why the ungstown Court did not uphold the Steel Seizure on the basis of the 1949 Act. the majority here is taken at its word, it is clearly prepared to uphold such order relying only on the President's procurement power.

These examples are no different in kind and only slightly different in degree *68] from the exercise of power the President has taken through the vehicle Executive Order 12092. Plainly there is no difference in the fact that ngress has traditionally exercised authority over minimum wage and the taking property, for it has played an equally vigorous role in determining if, when, d under what conditions wages and prices could be stabilized. Nor is there y qualitative difference in the nature of the relationship between the 1949 t's goals as defined (or left undefined) by the majority and the potential sidual consequences for the Nation's economy (and from there to e procurement program) of any one of the examples. As noted above, the fectiveness of any program in achieving its objective is outside the scope of dicial consideration, and thus matters of degree are immaterial. That the izure of oil companies might be a more efficacious tool is surely no basis for nding it unlawful under the majority's approach. Thus nothing in the jority's test militates against the use of the President's section 205(a) wers for these purposes. Nothing in the test preserves the traditional ngressional authority over these fields.

Apart from its [**69] disclaimers, the majority makes only one substantive fort to limit the reach of its reasoning. Appellees argued here as below that e President's interpretation of section 205(a) would permit him to suspend llful violators of the National Labor Relations Act from seeking government ntracts, a provision Congress considered but did not enact two years ago. The jority says that it need not decide that question, but observes that "[the] proach we take today might raise serious questions about the validity of such Order." Maj. Op. at p. 20 n.50. But why? The majority ends on that note, so more than a hint of a limitation emerges. The distinction between the NLRA der and the one under review cannot reside in Congress' failure to adopt the rmer as positive law, for Congress has similarly avoided the imposition of any ogram like the one contained in Executive Order 12092. The "approach" the jority takes approves the President's Order on the ground that its provisions ght have some incidental consequences for the national economy and thereby timaterly lead to a reduction in the government's procurement costs. It is, wever, equally plausible that the NLRA [**70] order might have some cidental consequences on the economy by promoting industrial peace and

·ducing losses due to strikes, and thus also favorably affect the government's ·st of doing business. In my judgment, at least a court reviewing the NLRA ·der would be assured that the President was acting to enhance a clearly and ·ecisely defined congressional policy. This court acts today without any mparable assurance. In fact, it acts in the face of considerable expressions adverse congressional intent.

It is not necessary to wander beyond the specific context of Executive Order 092 itself to discover that the majority's reasoning knows no bounds. .though the Executive Order confines its scope to government contractors and .eir first-tier subcontractors and suppliers, and in any event to contracts in :cess of $5 million, these limitations play no role in the majority's analysis. :cordingly under today's ruling the President could immediately extend ıe guidelines to any contractor or subcontractor regardless of the value of ıeir contract. In addition, because the majority focuses exclusively on the ›nceivable consequences of the President's action rather than [**71] on the ›nformance of that action with the [*808] expressed purposes of the 1949 :t, there would be no reason why the President could not also immediately :quire as a condition of doing business with the government that .1 contractors now covered by his Order refuse to do business with any other ıtity not in compliance with the President's guidelines. Using only his :ction 205(a) power, then, the President could in effect impose a secondary ›ycott on any business that did not accept his wage and price "suggestions." .early a conceivable consequence of such an order would be at least a temporary :duction in the government's cost of doing business. And because the President ›uld be using his procurement power rather than imposing a direct "legal ›ligation" as the majority defines it, such an order would not by the ıjority's standard amount to forbidden "mandatory" controls.

D. Congressional Intent on Wage & Price Controls

This last example not only again demonstrates that the majority draws on :ction 205(a) at Congress' expense to sign a blank check made out to the :esident, but it also underscores the futility of its efforts to confine the :finition of "mandatory [**72] controls."

Section 3(b) of the Council on Wage and Price Stability Act of 1974 provides ıat nothing therein authorizes the "continuation, imposition, or reimposition : any mandatory economic controls with respect to prices, rents, wages, ılaries, [and] corporate dividends." Act of August 24, 1974, Pub. L. No. :-387, @ 3(b), 88 Stat. 751 (codified at 12 U.S.C. @ 1904 note (1976)) :mphasis added). The majority first holds that this provision is inapplicable :re because Executive Order 12092 does not establish "mandatory" controls. The ıjority reasons that the President's guidelines establish no direct legal ›ligation and threaten no civil penalty for non-compliance. The majority adds ıat because no one has a "right" to a government contract, the government can ıalify its willingness to do business on any condition it pleases. Then the ıjority holds that in any event section 3(b) is "irrelevant" to the :esident's procurement program because it merely represents a guide to the :aning of the Council on Wage and Price Stability Act of 1974 and ergo has no .plications for an action premised on the 1949 Act.

It is odd that the majority can rely on the 1979 extension [**73] of the ›uncil on Wage and Price Stability Act of 1974 to support its interpretation section 205(a), but rejects any reliance on the substantive provisions of the iginal enactment, though the latter established the mechanism the President is ing to implement Executive Order 12092. Even recognizing that some striction should be placed on the intent expressed in a statute, the intent pressed in section 3(b) is not "irrelevant" to our consideration of the esident's procurement program. In analyzing what kinds of policies d directives the President can issue pursuant to his procurement power it is eful to examine other congressional enactments to explore whether Congress has pressly or impliedly intended to limit the President's options. Viewing ction 3(b) from this perspective, I find inescapable the conclusion that the story of congressional control over and regulation of programs of wage and ice stabilization, and especially its recent condemnations of such programs, dicate that Congress did not intend to permit the use of section 205(a) to tablish the kinds of wage and price requirements the President has established re.

This conclusion emerges [**74] from the consistent pattern, stretching ck over more than three decades, of complete and zealously guarded ngressional control of wage and price stabilization. It exists in section b) and its legislative history. I find it in Congress' refusal, after careful nsideration and thorough debate, to extend the Economic Stabilization Act of 71, an extension which would have permitted the President to order controls ke those imposed pursuant to statutory authority by President Nixon in 1971. find it in the Senate's adoption last September of a "Sense of the Senate" solution -- concededly not a complete expression of congressional [*809] tent -- expressing the view that neither the 1949 Act nor any other statute nctioned the imposition of wage and price standards. I find it in Congress' equivocal statements that nothing in its recent extension of the Council Wage and Price Stability Act was to be in any way construed as an endorsement the President's procurement program. H.R. Rep. No. 96-93, 96th Cong., 1st ss. 3 (1979) (Conference Report).

The majority seeks solace in the last of this list, reasoning that Congress s by then aware of the President's [**75] procurement program and meant to splay its approval of the program by extending the statute, tripling the uncil's staff, and substantially increasing its budget. With clear and ambiguous statements to the contrary, it is a gross distortion of legislative tent to suggest that Congress' extension of the Council on Wage and Price ability Act was a sub silentio endorsement of the President's procurement ogram. Even were the expressions of congressional intent less clear, and even re it appropriate to rely on the extension, the extension would still be sufficient to indicate an abrupt abdication of the authority to regulate wages d prices that Congress has so carefully and sparingly used over the past four cades. Similarly, I reject the majority's Rip Van Winkle theory that ngress' failure to overturn the President's program is an implied ratification it.Congressional inaction does not strip courts of their responsibility to nstrue statutes. Congress was aware of the grave questions surrounding the esident's use of the procurement power to promulgate Executive Order 12092, d it full expected courts to fulfill their duty to resolve those questions. [**76] is Congress' job to make law; it is the courts' job to say what the w is.

It is obvious to me that the President's procurement program falls within the ecies of mandatory controls that Congress has condemned in section 3(b) and sewhere, and that therefore the Executive Order contradicts the expressed will Congress. I arrive at this judgment categorically, without the need to lentify what section 3(b) actually prohibits. But even engaging in the kind of mantical exercises in which the majority indulges, I conclude that these ntrols are "mandatory" in every meaningful sense of that term. We are not alyzing here some abstract notion of constitutional deprivation.We are stead, to borrow the majority's phrase, operating in a "real-world setting." matters little whether there exists a pristine "right" to a Government ntract when the thrust of the President's Order is to deny contractors sobeying the guidelines any opportunity even to compete for a government ntract. For a program to be mandatory it need not compel every person in the tion to conform to a particular requirement. It is sufficiently "mandatory" those within its orbit are compelled to [**77] comply with the requirement der the pain of suffering a denial of some benefit that would have been open them.

Here the President has identified a discrete class of Americans and has posed on that class a system of wage and price controls by which it must abide the risk of a sanction far more onerous than a civil penalty. It cannot be ubted that a corporation would prefer to pay a $10,000 penalty for sobeying wage guidelines than to lose a government contract in excess of $400 llion. Newspaper accounts have already detailed such sanction being ught.The President is in effect clubbing an identifiable group of Americans to submission, all the while claiming that the blows those Americans so werfully feel are mere "suggestions." They are not suggestions; realistically, ey operate as mandatory economic controls.

E. Section 205(a) & Earlier Executive Orders

For a variety of reasons I am also unpersuaded by the majority's reliance on evious executive orders allegedly promulgated under section 205(a). First, ly two of the majority's examples actually cites section 205 (a) as a source authority, and one of these continued and expanded a long-term [**78] ngressional policy. See 39 Fed. Reg. 24009 [*810] (1974). None of the maining orders make reference to the presidential procurement power in section 5(a). Second, all the remaining orders either had another source of authority initio or were subsequently ratified by Congress. Executive Order 12092 is this respect sui generis, for it relies only on section 205(a) and has not en impliedly been ratified by any subsequent congressional action. Third, ile the majority reasons that those orders not specifically supported must ve relied on section 205(a), that conclusion is conjectural. Moreover, it tails a sort of jack-in-the-box theory of presidential procurement power. parently whenever a court needs it to play a part in presidential power lating to the imposition of social and economic goals on federal government ntractors, section 205(a) can spring up out of the otherwise confined quarters the 1949 Act to fill the bill.

This leads to a fourth difficulty with the majority's use of the previous ders. Usually when a court defers to an executive agency's interpretation of s own powers, it does so because it finds that a nearly contemporaneous *79] construction of the powers by the executive agency has been nsistently applied over time. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 965); Power Reactor Development Co. v. International Union of Electrical, dio & Machine Workers, 367 U.S. 396, 408 (1961); see 2A C. Sands, supra, @

.03-.07.There is no such contemporaneous construction here, for none of the ders actually referred to section 205(a). Nor is there a consistent plication, for as the majority acknowledges, different orders -- indeed, even sentially the same orders -- at different times may or may not have been ounded on section 205(a). Thus the ostensible pattern of presidential use of e procurement power the majority seeks to weave is simply not clear enough to dicate what the majority wants to see in it.

Fifth and finally, assuming arguendo that the President has in the past voked section 205(a) to achieve objectives comparable to those sought in ecutive Order 12092, that is no basis for concluding that the practice is wful. No federal court has ever held that section 205(a) alone can support ch an order. In Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 64), and in Farkas [**80] v. Texas Instruments, Inc., 375 F.2d 629 (5th r.), cert. denied, 389 U.S. 977 (1967), the courts' discussion of the scope of e procurement power was dicta, assumptions employed for the purpose of termining whether anti-discrimination orders presumed to be promulgated in rt under section 205(a) created a private cause of action. Both courts held at it did not. In the case on which the majority chiefly relies, Contractors sociation of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir. 71), it was simply unnecessary for the court to rely exclusively on e presidential procurement power to upheold an affirmative action plan imposed federal contractors, and, recognizing as much, the court did not do so.

The majority's attempt to piece together a picture of past executive actices justifying Executive Order 12092 is thus unpersuasive. Indeed I would ld that if the past executive orders are useful at all it is only to show that e presidential action sub judice lacks the kind of expressed or implied proval that Congress typically supplies presidential procurement orders that ceed the narrow purposes of the 1949 Act. Cf. United States v. New [**81] leans Public Services, Inc., 553 F.2d 459 (5th Cir. 1977), vacated on other ounds, 436 U.S. 942 (1978) (upholding executive order requiring ndiscrimination clauses in federal contracts by noting "implied congressional proval" and suggesting it could "even be argued that there has been express ngressional ratification"). Executive Order 12092 not only lacks any dication of congressional approval, it flies directly into the face of cently expressed congressional antipathy for wage and price measures of any nd. Cf. United States v. East Texas Motor Freight Systems, Inc., 564 F.2d 179 th Cir. 1977) (congressional policy favoring [*811] protection of bona de seniority plans overrides contrary executive order requiring affirmative tion by federal procurement contractors).

F. The Delegation Doctrine

If the presidential procurement power in section 205(a) were construed in a nner faithful to the purposes underlying the 1949 Act no constitutional escriptions would imperil the congressional scheme. As the majority construes e statute serious constitutional questions arise, for assuming that Congress d indeed intend to grant the President the power [**82] to impose mandatory ge and price standards on government contractors, the terms it used to do so not provide a constitutionally sufficient standard for delegating legislative thority. The close nexus test the majority advances cannot supply an adequate andard. Mere proximity may count in horseshoes and dancing, but adherence to ngressionally-prescribed standards is required for valid lawmaking by ecutive officers.

I agree with the author of the majority opinion that "the reported demise of e delegation doctrine is a bit premature." Wright, Beyond Discretionary stice, 81 Yale L.J. 575, 582 (1972). The Supreme Court invalidated ngressional enactments on the grounds of excessive delegation in Schechter ultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. an, 293 U.S. 388 (1935). Neither it nor any other federal court has rejected e doctrine. As recently as National Cable Television Association, Inc. v. ited States, 415 U.S. 336 (1974), the Court quoted extensively and approvingly om Schechter . The Court did not reach the delegation issue in that case, but stice Douglas' majority opinion cautioned that "the hurdles revealed [**83] [Schechter and Hampton & Co. v. United States, 276 U.S. 394 (1928)] lead us read the Act narrowly to avoid constitutional problems." 415 U.S. at 342.

The Supreme Court's approach in National Cable Television is a useful uchstone for analysis of the delegation problem here. The statute involved in at case was the Independent Officers Appropriation Act of 1952, 31 U.S.C. @ 3a (1976), which as abbreviated and quoted by the Court provides:

It is the sense of the Congress that any work, service,... benefit,... cense,... or similar thing of value or utility performed, furnished, provided, anted... by any Federal agency... to or for any person (including... rporations...)... shall be self-sustaining to the full extent possible, and e head of each Federal agency is authorized by regulation... to prescribe erefor... such fee, charge, or price, if any, as he shall determine... to be ir and equitable taking into consideration direct and indirect cost to the vernment, value to the recipient, public policy or interest served, and other rtinent facts....
ting on this authority, the Federal Communications Commission, in the process revising fees imposed [**84] upon cable television systems, first computed s direct and indirect costs for cable television regulations and then, while taining filing fees, added an annual fee for each cable television system at e rate of 30~ per subscriber. On certiorari from a court of appeals' denial a petition to set aside the Commission's schedule, the Supreme Court versed.

The issue for the Court was whether the amount of the fee was computed in cordance with the proper standard. One possible standard was the "value to e recipient"; the other was "public policy or interest served." The Court rst noted the distinction between taxation, which it described as purely gislative prerogative to be levied more or less arbitrarily without any cessary connection to a particular benefit bestowed by the taxing government, d the imposition of a fee, which it described as an incident to a voluntary quest for a benefit betwoed by, for example, a public agency. The Court then refully noted [*812] what the purpose of the Federal Communications mmission was, namely, to safeguard the public interest in broadcasting. If e Commission were in a position to tax (as opposed to requiring [**85] a e), it would in effect be charging for the protective services it offered the blic.

The Court would not hear of it. Observing that Article I of the Constitution forded Congress the exclusive power to "lay and collect" taxes, Justice uglas wondered aloud whether a standard permitting an administrative agency

› impose taxes in the name of "public policy or interest served" could pass ›nstitutional muster. In light of the alternative language in the statute and ›e legislative history indicating the relatively modest scope of what Congress ›tended agencies to be able to collect, the Court opted to avoid the ›nstitutional obstacles by adopting the narrower standard, namely, "the value › the recipient."

The Supreme Court's approach to statutory construction in National Cable ›levision is applicable here. Certainly no difference exists because that case ›volved an administrative agency and this case involves the President. ›e delegation doctrine applies with equal force to both.Moreover, one of the ›tonishing things about this case is that whatever power the majority grants ›e President in section 205(a), a fortiori it grants the Administrator the same ›wer [**86] (in the absence of contrary presidential orders) in section ›1.Here as in National Cable Television there is a statute that demands a ›ntext. Here as in National Cable Television there is a power that must derive ›om and be limited by that context. Here as in National Cable Television a ›oad reading of the statute risks constitutional condemnation while a narrower ›ading preserves the statute's validity and fully serves the purposes for which › was designed.

The celebrated Schechter case on which Justice Douglas relied for his ›alysis of the delegation question involved a "Live Poultry Code'" promulgated › President Roosevelt pursuant to the National Industrial Recovery Act. That ›atute authorized the President to issue "codes of fair competition" upon a ›nding, among other things, that such codes would "tend to effectuate the ›licy of" the statute. Chief Justice Hughes posed the analytical framework for ›e Court as follows:

›he] Constitution has never been regarded as denying to Congress the necessary ›sources of flexibility and practicality, which will enable it to perform its ›nction in laying down policies and established standards, while leaving to ›lected [**87] instrumentalities the making of subordinate rules within ›escribed limits and the determination of facts to which policy as declared by ›e legislature is to apply. But... the constant recognition of the necessity ›d validity of such provisions, and the wide range of administrative authority ›ich has been developed by means of them, cannot be allowed to obscure the ›mitations of the authority to delegate....

Accordingly, we look to the statute to see whether Congress has overstepped ›ese limitations -- whether Congress in authorizing "codes of fair competition" ›s itself established the standards of legal obligation, thus performing its ›sential legislative function, or by failure to enact such standards, has ›tempted to transfer that function to others.

›5 U.S. at 530 (emphasis added). This same concern with the congressional ›rformance of its legislative role was expressed almost four decades later by ›e suggestion that Congress should not "be permitted, in effect, to vote itself ›t of business" through excessive delegation. Wright, Beyond Discretionary ›stice, supra, at 582.

Within the framework it constructed, the Schechter Court focused on whether ›ngress [**88] had given any meaningful content to the term "unfair ›mpetition." It noted that the statute did not define the term, nor could the ›rm be defined by any existing body of law. The Court believed that if the ›esident's discretion to impose the codes was circumscribed by some ıdicially [*813] cognizable limits exhibited in the overall congressional :actment or its declaration of policy, then perhaps Congress had indeed :rformed its constitutional responsibility. But it found no such limits in the .atutory scheme, and was thus compelled to conclude:

'he statute] provides no standards for any trade, industry, or activity. It ·es not undertake to prescribe rules of conduct to be applied to particular .ates of fact determined by appropriate administrative procedure. Instead of ·oscribing rules of conduct, it authorizes the making of codes to prescribe :em. For that legislative undertaking, [the statute] sets up no standards, .ide from the general aims of rehabilitation, correction and expansion.... In .ew of the scope of that broad discretion, and of the nature of the few :strictions that are imposed, the discretion of the President in approving or ·escribing [**89] codes and thus enacting laws for the government of trade ıd industry throughout the country, is virtually unfettered. We think the ›demaking authority thus conferred is an unconstitutional delegation of :gislive power.

l. at 541-42. Accord, Panama Refining Co. v. Ryan, supra, 293 U.S. at 415-18.

The majority holds that section 205(a) of the 1949 Act permits the President › prescribe any policy or directive that might have conceivable consequences ›r the Nation's economy and thereby reduce the federal government's cost : doing business. On that view, Congress did not set down any standards on ıat kinds of consequences could be produced, or what kinds of facts must be :esent before the President's authority is triggered. The only terms in the :atute confining the President's power are "economy" and "efficiency." The :atute does not define those terms, nor does the majority's reading relate them › a pre-existing and judicially cognizable body of law. Because the majority ıposes only the most distant requirement of a nexus on presidential behavior, ıe President's discretion is virtually unfettered. In short, I see no .fference between the vices the Schechter Court [**90] saw in the NRA and ıe reading of section 205 (a) the majority adopts.

Whether or not the President happens to act on a praiseworthy course or ıether he does so effectively are matters outside the judicial competence to :sess. Coupling this with the majority's inability meaningfully to delimit the ›wer it approves raises the question whether a court can perform its function : ensuring executive compliance with legislative will. This is the concern :rmeating the Supreme Court's analysis of delegation in Yakus v. United States, :1 U.S. 414 (1944). In that case, the Court dealt with whether Congress had ıconstitutionally delegated legislative power to the executive branch when it ıacted the Emergency Price Control Act, Act of Jan. 30, 1942, ch. 26, 56 Stat. :, as amended by The Stabilization Act of 1942, chap. 578, 56 Stat. 765. That :atute created the Office of Price Administration, and authorized the lministrator to promulgate regulations and orders fixing prices and rents. Id. : 2, 201; see 321 U.S. at 419. In upholding the delegation of authority, Chief ıstice Stone declared that the separation of powers doctrine does not :ny to Congress the power to direct [**91] that an administrative officer :operly designated for that purpose have the ample latitude within which to :certain the conditions which Congress has made prerequisite to the operation : its legislative command.... [The] only concern of the courts is to ascertain ıether the will of Congress has been obeyed. This depends not on the breadth : the definition of facts or conditions which the administrative officer is to .nd but upon the determination whether the definition sufficiently marks the .eld within which the Administrator is to act so that it may be known whether

: has kept within it in compliance with the legislative will.
'1 U.S. at 426.

The Yakus Court fully analyzed the Emergency Price Control Act and carefully 814] weighed the judicial ability to guarantee that the administrative ficers stayed within the zone of the discretion Congress meant to delegate. :e id. at 423-27. Here the majority does not deal with the statute. Instead it .lms the delegation issue in a footnote. Maj. Op. at p. 20 n.51. The thrust · the footnote is that because the courts can test whether the President's :ents are executing the President's program in an arbitrary [**92] and :pricious manner, no constitutional difficulties arise. But that has little to ı with the delegation doctrine. The question is not whether a court can assess ιe compliance of an executive's actions with executive branch policies, but ιether it can determine executive conformity with legislative branch polices. :hechter and Yakus each referred to the kinds of standards Congress imposed on ιe President and his agents; they did not focus on the standards the President :omulgated. Indeed to even speak of a President formulating policies to be ›eyed presupposes the existence of lawfully delegated legislative power. The ιjority skids over any effort at determining whether the delegation was in fact ιwful and reduces the inquiry to a commonplace examination of administrative :havior under the Administrative Procedure Act. That approach reads the :paration of powers principles out of the Constitution, something the Supreme ›urt refused to do as recently as 1974.

Nothing in Judge Leventhal's opinion in Amalgamated Meat Cutters & Butcher ›rkmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court), ırrants resort to the analysis the majority elects. It [**93] is noteworthy ιat Amalgamated Meat Cutters was decided before National Cable Television, and ιus did not have the benefit of the Supreme Court's most recent treatment of ιe delegation doctrine. Nevertheless, Judge Leventhal observed that ›nstitutional mandates required Congress to articulate "some intelligible :inciple" to permit a court to determine whether the executive officer was in ›mpliance with congressional intent. 337 F. Supp. at 746 (quoting Hampton v. ιited States, 276 U.S. 394, 409 (1928)).

In upholding the Economic Stabilization Act of 1970 as a lawful delegation of ιwmaking authority, Judge Leventhal took pains to note, among other things, (1) ιat the statute only gave the President the authority to fix prices and wages .thin limits, (2) that the President was precluded from "singling out" a ›ecial sector of the economy for treatment absent a specific and ›ngressionally-dictated finding of certain circumstances and conditions, (3) ιe clear and unambiguous congressional purpose to afford the President the ›wer to impose wage and price controls, (4) the "reasoned analysis" by Congress ι why it chose to leave the precise timing of the controls to the President, '*94] and (5) and the exceedingly limited duration (approximately six months) : the President's power to impose the controls.

How these elements of the program under review "compare favorably" to the :tailed approach taken by the Amalgamated Meat Cutters I am at a loss to :plain. The majority's holding, in what appears to me to be a direct :pudiation of Judge Leventhal's reasoning, permits the President to invoke :ction 205(a) to impose price and wage levels of his choosing on a special :ctor of the economy he has singled out without any congressionally-required .nding, and to maintain those wage and price levels in effect for an ılimited duration, even though, again, there is not the slightest indication ıat Congress so intended him to act and a substantial number of signs that it ıtended the contrary.

Concern both with whether Congress has performed its function and with ıether a court can perform its function heavily favors a narrow reading of the '49 Act under the principle that statutes should be construed in a way faithful › constitutional requirements. The majority refuses to apply that principle, ıd I would hold that the reading of section 205(a) it produces [**95] ›sults in a statute lacking constitutionally adequate standards. [*815]

G. Conclusion

My failure to address arguments advanced by appellees in support of the ꞉strict court judgment is not meant to convey my disagreement with those ›ntentions. Rather because I find the Executive Order 12092 to be illegal on ıe ground, I believe that it is unnecessary to go elsewhere. Before today's ıling I would have thought it hornbook law that a delegated statutory power is ırcumscribed by the purposes of the statute which occasion it. I also would ıve thought that when a statute made the exercise of a power contingent upon ›nsistency with other provisions of the same statute, an exercise of the power ıat was in fact inconsistent would be deemed unlawful. The flaw in the ıjority's reasoning does not solely lie in its failure to show any direct ›lationship between Executive Order 12092 and the purposes of the 1949 Act. ır more perilous is its willingness to read section 205(a) of that statute as a veeping and unlimited invitation to the President to establish any policy he ınts to impose on federal government contractors as long as he can proffer some ›mote connection [**96] between that policy and the price the federal ›vernment pays for its goods and services. And under the majority's reasoning : matters for naught that the policy he implements infringes on a territory ›ng preserved by Congress to itself and contradicts oftexpressed indications of ›ntrary legislative intent. The majority also achieves this result by ignoring ›th the well-established rules of statutory interpretation and the fundamental :inciples of separation of powers.

The majority concludes its opinion by stating that "Congress has authorized ıe President to issue wage and price standards and to encourage voluntary ›mpliance as an act of good citizenship." I have no doubt that the President ›ssesses the inherent power to issue wage and price guidelines and to urge ›luntary compliance with same as a matter of moral suasion. He can promote ıherence to his suggestions as an act of good citizenship just as he can ıcourage jogging as a way to good health. Furthermore I do not doubt that ›ngress can make his wage and price guidelines into binding law, or can within ımits delegate to the President the power to do so himself. The problem is ıat Congress has chosen neither [**97] course here, and has expressly stated ıat its acts are not to be construed as indicating otherwise. The result is ıat the President is exercising legislative authority far beyond that delegated › him by Congress in the 1949 Act.

It is said that hard cases make bad law, and I can only append to that :atement the observation that expedited hard cases do not improve the quality : the product at all. I respectfully dissent. *

* On the majority's final footnote 65 I add these points: The majority erlooks the fact that the Supreme Court has consistently held that the failure Congress to revise a statute in the face of an interpretation by executive ficers is a poor indication of legislative intent. E.g., Zuber v. Allen, 396 S. 168 (1969); see 2A C. Sands, supra @ 49.10. As I point out above, Congress d indeed express its approval of the substance of the earlier executive orders th other statutes.

APPENDIX

[3195-01-M]

Executive Order 12092

November 1, 1978

PROHIBITION AGAINST INFLATIONARY PROCUREMENT PRACTICES

By the authority vested in me as President and as Commander in Chief of the med Forces by the Constitution and statutes of the United [**98] States of ıerica, including Sections 2(c) and 3(a) of the Council on Wage and Price .ability Act, as amended (12 U.S.C. 1904 note) and Section 205(a) of the deral Property and Administrative Services Act of 1949, as amdned (40 U.S.C. :6(a)), and in order to encourage noninflationary pay and price behavior by ivate industry and labor, and to provide for the procurement by Executive encies and Military Departments of personal property and services at prices d wage rates which are noninflationary, it is hereby ordered as follows:

1-101. The Chairman of the Council on Wage and Price Stability shall: 816]

(a) Monitor company pay and price practices in order to determine compliance .th the standards set forth in Section 1-102 of this Order;

(b) Promulgate regulations and guidance to further define these standards, d provide for appropriate exemptions and exceptions;

(c) Publish, or cause to be published, in accordance with procedures designed ensure fairness and due process, the names of individuals or companies which e not in compliance with the standards;

(d) Promulgate procedures to be used in proceedings before the Council on .tters pertaining to [**99] the standards, and take such other action as may necessary and consistent with the purposes of this Section.

1-102. Noninflationary wage and price behavior shall be measured by the llowing standards:

(a) For prices, noninflationary price behavior is the deceleration by mpanies of their current rate of average price increase by at least 0.5 rcentage points from their historical rate of annual price increase during 76-1977 except where profits have not increased.

(b) For pay, noninflationary pay behavior is the holding of pay increases to t more than 7 percent annually above their recent historical levels.

(c) These standards, which shall be further defined by the Chairman of the uncil on Wage and Price Stability, shall be subject to certain limitations and emptions as determined by the Chairman.

1-103. In order to ensure economy and efficiency in government procurement, e head of each Executive agency and Military Department shall ensure that eir contracts incorporate, on and after January 1, 1979, a clause which quires compliance by the contractor, and by his subcontractors and suppliers, th the standards set forth in Section 1-102 of this Order. [**100]

1-104. Each Executive agency and each Military Department partment shall mply with the directions of the Administrator for Federal Procurement Policy o, in accord with Section 6 of the Office of Federal Procurement Policy Act 1 U.S.C. 405), shall be responsible for the overall direction of the plementation of Section 1-103 including the issuance of regulations and ocedures for determining exceptions and granting exemptions.

/s/ Jimmy Carter

THE WHITE HOUSE

November 1, 1978 .

[FR Doc. 78-31327 Filed 11-1-78; 4:49 pm]

ROBB, Circuit Judge, dissenting: I would affirm the judgment of the District urt. Because of the constraints of time I state my reasons only briefly.

I.

At the oral argument in this court counsel for the government rightly nceded that "[if] the court were to conclude that these guidelines stablished by the Executive Order] were an exercise of mandatory economic ntrols within the... full meaning of that term... the government would lose." my opinion the government does lose, because the guidelines are mandatory. ntractors who fail to comply are threatened with the loss of contracts for the yment of millions, perhaps [**101] hundreds of millions of dollars. n1 No ount of sophisticated or metaphysical [*817] argument can convince me that mpliance under threat of such massive economic sanctions is voluntary. n2 cordingly, I think the government must fail on this ground alone.

n1 "The federal government is a major purchaser of goods and services and has rect procurement relationships with most major American industries. rrently, the total value of federal purchases is approximately $110 billion nually.... "The certification requirements for federal procurement under the PP Policy Statement apply to contracts in excess of $5 million. This reshold includes approximately 50 percent of all procurement dollars. The tual percentage is approximately 65 to 70 percent because many of the mpanies must certify compliance for contracts exceeding $5 million also utinely bid on smaller contracts." Affidavit of James D. Currie, Acting ministrator for Federal Procurement Policy and acting head of the Office of deral Procurement Policy, Office of Management and Budget, Executive Office of e President. (App., Vol. 3, pps. 648, 649)

n2 The government cites United States Brewers Ass'n, Inc. v. EPA, U.S. p. D.C. , 600 F.2d 974 (1979), No. 77-1867, decided May 23, 1979. In that se however the statute made compliance with the EPA guidelines by federal ecutive agencies mandatory. 42 U.S.C. @ 3256(e) (1972). [**102]

II.

The majority concludes that the compliance program is voluntary. With this nding as a premise the majority rests its case on the Federal Property and ministrative Services Act of 1949. 40 U.S.C. @ 471 et seq. (Act of June 30, 49, P.L. 81-152) (the Federal Property Act). This Act established the General rvices Administration, headed by an Administrator. In particular the majority lies on section 205(a) of the Act, 40 U.S.C. @ 486(a) which provides that he President may prescribe such policies and directives, not inconsistent with e provisions of this Act, as he shall deem necessary to effectuate the ovisions of said Act, which policies and directives shall govern the ministrator and executive agencies in carrying out their respective functions reunder." The majority concludes that the wage and price guidelines prescribed this case are policies and directives not inconsistent with the provisions of e Act and may be deemed necessary to effectuate its provisions. This nclusion is derived from (1) section 2 of the Act, 40 U.S.C. @ 471, which, ys the majority, "sets forth the goal of an 'economical and efficient system r... procurement and [**103] supply'", and (2) section 201, 40 U.S.C. @ 1, which "directs that the Administrator of General Services chart policy and ocure supplies in a manner 'advantageous to the Government in terms of onomy, efficiency, or service, and with due regard to the program activities the agencies concerned.'"

Careful analysis of the Federal Property Act demonstrates, I think, that the rposes of the Act and the policies and directives which it contemplates have thing whatever to do with the fixing of wages and prices by executive thority. The purpose of the Act is to create efficient machinery for e procurement and management of government property; it is not even remotely ncerned with the use of procurement authority to accomplish social and onomic objectives.

The purpose of the Federal Property Act is stated in general by its title "AN T To simplify the procurement, utilization and disposal of Government operty, to reorganize certain agencies of the Government and for other rposes." The origin and purposes of the Act were fully explained on the floor the House by Representative Holifield, floor manager of the bill. 95 ng. Rec., 81st Cong., 1st Sess. p. 7411 [**104] et seq . Mr. Holifield inted out that the bill was based on the recommendations of the Commission on ganization of the Executive Branch of the Government, popularly known as the over Commission. The intention of Congress, said Mr. Holifield, was to ordinate the supply and procurement activities of the federal government:

The Federal Government needs immediately a comprehensive, workable plan for operty management. This plan, had it been established in the past, would have turned enormous savings to the Federal Government through the elimination of mpetition by the executive agencies for the same articles in the same

ırkets, by prudent buying, and including quantity purchases. This is made even ›re glaringly apparent when we consider that losses to the Government are ırticularly acute when one agency has purchased new articles while at the same .me, another agency in the Government has been disposing of the same articles · sale at low prices or storing same in their basements. There is a definite :ed for a clearinghouse of information as to goods on hand and usable. In the ›le of the General Services Administration, we see this defect cured.Through ıck [**105] of central coordination, waste and losses have occurred in the .eld of [*818] warehousing and other space utilization. Appearing before ır committee, the former Federal Works Administrator, General Fleming, said ıat the Department of Agriculture paid $4,000,000 a year rent to store wool in :ivate buildings in the New England area. While at the same time in this ırticular area, there was enough empty, available, warehouse space, owned by ıe Government, which might have been pressed into service for this purpose. ; Cong. Rec. 7442.
ırning to what became section 205(a) of the Act. Mr. Holifield explained that ɘcause "property management affects every executive agency... the bill ‹pressly authorizes the President, himself, to prescribe policies ıd directives, and specifies that these Presidential policies and directives ıall govern -- not merely guide -- not only the Administrator but all executive ɟencies in carrying out these... functions." Id. at 7441. In other words ɔngress intended the President to exercise his authority to assure that uniform ɔlicies and methods would be adopted by the various procurement agencies. This ; the plain and reasonable explanation [**106] of section 205(a). There was ɔ intention to authorize the President to enact economic controls by executive ıat.

The majority argues that regulation of wages and prices is an appropriate :ep in achieving "the goal of an 'economical and efficient system ɔr... procurement and supply.'" The majority says this "goal" is specified in ıe congressional declaration of policy in section 2 of the Act, 40 U.S.C. @ 71.

When the few words excerpted from section 2 by the majority are read in the ɔntext of the rest of that section it is apparent that the economy and fficiency to which Congress refers are related to the activities and functions ɘscribed by Mr. Holifield in his explanation of the bill, that is to the ɔusekeeping functions and activities of the federal government. Thus the ɘction states the intention of Congress to provide for economy and efficiency ɔt only with respect to contracting, but also with respect to "inspection, :orage, issue, specifications, property identification and classification, ransportation and traffic management... repairing and converting, establishment f inventory levels, [and] establishment of forms and procedures." Id .I detect ɔ intimation [**107] in this plain statement of purpose that Congress ıtended to authorize wage and price regulation by executive order. If Congress ıd intended any such authorization I think it would have said so. I agree with ıe conclusion of the district judge, expressed in his opinion, that ıe Congress has always occupied the field of wage and price controls. ɘlegation of mandatory control power as well as the standards and means by ıich controls may be instituted has been carefully limited. On the few and ‹traordinary occasions when controls have been found necessary, Congress has ranted such authority expressly, by positive legislation limited both in scope ıd particularly in duration. This consistent treatment of controls through ɔecific legislation precludes any inference that Congress has intended to

nfer control authority by implication.
lip Op. p. 17)

The government's argument in this case illustrates and emphasizes the need r specific congressional authorization for price and wage regulation. Carried its logical end that argument means that the executive's power to regulate dustry and business is limited only by his judgment as to what will promote onomy [**108] and efficiency in the government. I cannot believe that ngress ever contemplated or intended such an extension of executive power.

III.

The majority cites other executive actions taken in the past under the rported authority of the Federal Property Act. As the majority acknowledges wever many of these actions were subsequently validated by legislation, others ve never been challenged. In any event I think an [*819] argument based on these precedents is a weak reed. That executive orders in the past may ve stretched or exceeded statutory or constitutional limitations does not mean at the order in this case is valid.

IV.

Section 3(b) of the Council on Wage and Price Stability Act, 12 U.S.C. @ 04 note, provides:
thing in this Act... authorizes the continuation, imposition, or reimposition any mandatory economic controls with respect to prices, rents, wages, laries, corporate dividends, or any similar transfers.
e government says this statute is irrelevant to the case before us because the thority for requiring government contractors to meet wage and price standards rives from the Fderal Property Act, not from the Council on Wage [**109] d Price Stability Act, and because in any event the wage-price standards are t mandatory wage and price controls.

As I have said, I am not persuaded by the argument that the wage and price ntrols are voluntary. Nor do I agree that the Council on Wage and Price ability Act is entirely irrelevant to our case. True, the wage and price ntrols do not rely upon the Act. Nevertheless the language and history of at Act strongly suggest that Congress disapproved the reimposition of wage d price controls. Furthermore, it is a fair inference from this Act that ngress believed that there was no other statute which authorized the position of such controls by the Executive.

I respectfully dissent. I am authorized to say that Judge Wilkey joins in is opinion.