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Labor Law—Executive Legislation in the Federal Procurement System—A.F.L.-C.I.O. v. Kahn, 618 F.2d 784, cert. denied, 443 U.S. 915 (1979)

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LABOR LAW—EXECUTIVE LEGISLATION IN THE FEDERAL PROCUREMENT SYSTEM—A.F.L.-C.I.O. v. Kahn, 618 F.2d 784, cert. denied, 443 U.S. 915 (1979).

In November of 1978, President Carter signed Executive Order 12092¹ directing federal agency and department heads to incorporate in all contracts for more than five million dollars a clause that requires contractors to comply with the stated maximum wage and price standards.² Generally,³ contractors that refuse to certify compliance will not be considered for federal contracts. Those that certify but are later found in violation may lose existing contracts and be declared ineligible for future ones.⁴ The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and nine affiliate unions challenged the order in the United States District Court for the District of Columbia. They sought to enjoin the order's enforcement on the grounds that it exceeded the scope of the President's authority and interfered with their rights to bargain collectively.⁵ The district court granted the injunction in *AFL—CIO v. Kahn*.⁶ The court concluded that the President had acted without statutory or constitutional authority when he imposed wage and price guidelines that included a debarment sanction for noncompliance on federal contractors.⁷ The court rejected⁸ the government's contention⁹ that the order was

1. Exec. Order No. 12092, 3 C.F.R. 249 (1978 Compilation).

2. *Id.* 44 Fed. Reg. 64276 (1979). See 102 LAB. REL. REP. (Analysis: News & Background Information) 102 (1979) for an explanation of the current guidelines.

The five million dollar threshold covers approximately 50% of all government procurement dollars. It may, however, influence up to 70% because many companies bidding on contracts over five million dollars also routinely bid on smaller contracts. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 92 (D.D.C. 1979). This dollar threshold may be lowered at a later date. OFFPP Policy Letter of December 27, 1978, 44 Fed. Reg. 1229-30 (1979).

3. 6 C.F.R. app. § 705 (1980) (lists numerous exceptions to the application of the standards).

4. OFFPP Policy Letter of December 27, 1978, *supra* note 2. On the debarment sanction, see generally, Gantt & Panzer, *Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States*, 5 B.C. INDUS. & COM. L. REV. 89 (1963).

5. *AFL-CIO v. Kahn*, 618 F.2d 784, 786 (D.C. Cir. 1979). The labor unions' argument that the executive order's limits on wage increases interfered with their rights to bargain collectively was not reached by the district court and was summarily dismissed by the court of appeals. *Id.* at 796. Although the argument raises many questions, discussion of it is beyond the scope of this note.

6. 472 F. Supp. 88 (D.D.C. 1979), *rev'd*, 618 F.2d 784 (D.C. Cir. 1979), *cert. denied*, 99 S. Ct. 3107 (1979), *reh. denied*, 100 S. Ct. 190 (1979). (Hereinafter references to the district court opinion will give only the opinion cite and not the full subsequent history.)

7. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 90 (D.D.C. 1979). The provision of the debarment sanction was crucial to the outcome. Without that sanction, compliance with the guidelines by federal contractors would have been voluntary and the order would have been authorized by section 3 of COWPSA. Council on Wage and Price Stability Act, Pub. L. 93-387, 88 Stat. 750 (1974) (as amended by Pub. L. 93-449, 88 Stat. 1367 (1974); Pub. L. 94-78, 89 Stat. 411 (1975); Pub. L. 95-121, 91 Stat. 1091 (1977); Pub. L. 96-10, 93 Stat. 23 (1979)). (Hereinafter, references to COWPSA will cite to 12 U.S.C. § 1904 note (1976) wherein the portions pertinent to this article are codified).

8. The court found that COWPSA did not support the executive order because "[t]he Council's function in combating inflation is . . . essentially horatory. Nowhere it is authorized to impose sanctions." *AFL-CIO v. Kahn*, 472 F. Supp. 88, 94 (D.D.C. 1979). The FPASA failed to provide sufficient authority because "[t]he law today simply does not support the argument that the procurement power alone can be used by the President to control incomes." *Id.* at 98.

9. The executive order itself claims to be based on the two congressional acts. See note 1 *supra*.

authorized by either section 205(a) of the Federal Property and Administrative Services Act of 1949 (FPASA)¹⁰ or the Council on Wage and Price Stability Act (COWPSA).¹¹ In addition, the district court found that the guidelines were mandatory¹² for federal contractors and, thus, prohibited by section 3(b)¹³ of COWPSA.

In the majority opinion by Chief Judge Wright, the Court of Appeals for the District of Columbia reversed the lower court and found that the FPASA granted the President authority to issue the order.¹⁴ The majority upheld the order because it found a "close nexus" between the FPASA goals of economy and efficiency¹⁵ and the wage and price guidelines' purported effect on procurement.¹⁶ The court relied heavily on previous cases that found the FPASA to be support for executive orders that imposed equal employment requirements on contractors.¹⁷ The *Kahn* court apparently reasoned that, if there was a sufficiently close nexus between the FPASA and the equal employment orders, there was necessarily a sufficiently close nexus between the FPASA and the executive order establishing wage and price standards. The majority concluded that the wage and price guidelines are not mandatory and therefore do not violate COWPSA, and that, in any event, COWPSA is irrelevant because the order is authorized by the FPASA.¹⁸

Courts have traditionally deferred to a President's interpretation of his powers under a statute¹⁹ and will only "reluctantly" overturn an interpre-

10. 40 U.S.C. § 486(a) (1976).

11. 12 U.S.C. § 1904 note (1976).

12. In finding the guidelines mandatory, the court explained: "[a] mandatory program is distinguished by the fact that failure to comply brings a penalty. One may ordinarily escape the effect of a regulation aimed at controlling activity by ceasing the activity. But one who takes that course can hardly be said to be acting voluntarily The program imposes a real penalty." *AFL-CIO v. Kahn*, 472 F. Supp. 88, 102 (D.D.C. 1979).

13. Section 3(b) of COWPSA reads: "Nothing in this Act . . . authorizes the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transfers." 12 U.S.C. § 1904 note (1976).

14. *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979), *cert. denied*, 99 S. Ct. 3107 (1979), *reh. denied*, 100 S. Ct. 190 (1979). (Hereinafter references to the court of appeals opinion will give only the opinion cite and not the subsequent history.)

15. *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

The goals of the FPASA are set out in the introductory section of the Act: "It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting. . . ." 40 U.S.C. § 471 (1976).

16. *AFL-CIO v. Kahn*, 618 F.2d 784, 792. As Judge Robb noted, however: "[c]arried to its logical end that argument means that the executive's power to regulate industry and business is limited only by his judgment as to what will promote economy and efficiency in the government." *Id.* at 818.

17. *Id.* at 789-92.

18. *AFL-CIO v. Kahn*, 618 F.2d 784, 792-95 (D.C. Cir. 1979).

19. See *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (statute allowing the President to

tation on the grounds that it is beyond the scope of power granted.²⁰ *Kahn*, however, allowed a disturbing expansion of Presidential policy-making power through the procurement system. This note first explores prior uses of the section 205(a) powers to support executive orders. Second, it discusses flaws with analogizing from those orders to the wage and price control order, and highlights the missing element of congressional approval in this case. Lastly, it examines constitutional questions posed by the decision. This note concludes that the court was mistaken in finding a close nexus between the FPASA and President Carter's order.²¹ In its application of the close nexus test, the court abrogated the statutory standards limiting executive discretion under the FPASA. The court's interpretation of the Act delegates more power to the executive than the Congress intended or had constitutional power to delegate.

I. BACKGROUND

A. History of the FPASA

The FPASA was a response to the "need for an improved and efficient property management program" in the federal government.²² Efficient management of government acquisition, use, and disposal had been seriously hampered by the lack of comprehensive legislation in the area and the fragmentation of duties among various bureaus and agencies.²³ The FPASA provided generally for uniform policies and methods of procurement and supply.²⁴ The Act contemplated that most procurement would be done by advertising and public bid, although it allowed negotiation of contracts under certain enumerated circumstances.²⁵ Contracts would ordinarily be granted to the responsible bidder whose bid was the most advantageous with respect to price, the bidder's experience, reputation, financial resources, and other unspecified factors.²⁶

impose direct import controls such as quotas and also allowing indirect controls such as license fees by implication); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947) (statute impliedly granting the President power to consolidate several agencies and appoint a new administrator); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1927) (statute authorizing the President to raise amount of duty imposed on imports).

20. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 102 (D.D.C. 1979). See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952).

21. See Note, 1980 *DUKE L.J.* 205 for suggestions on how a close nexus test would be limited and applied to future Presidential actions under FPASA.

22. H.R. REP. NO. 670, 81st Cong., 1st Sess. 2, reprinted in (1949) U.S. CODE CONG. SERVICE 1475.

23. *Id.* at 1476-77.

24. *Id.* at 1478.

25. 41 U.S.C. § 252(c) (1976).

26. 41 U.S.C. § 253(b) (1976). H.R. REP. NO. 670, 81st Cong., 1st Sess. 23, reprinted in (1949) U.S. CODE CONG. SERVICE 1498-99.

To manage the new procurement system, Congress created the General Services Administration.²⁷ Because the FPASA would affect all agencies in the executive branch, the President was authorized to prescribe overall policies.²⁸ Section 205(a) provided: "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 Administrator and executive agencies in carrying out their respective functions hereunder."²⁹ It was under the claimed authority in this section that President Carter issued Executive Order 12092 imposing wage and price guidelines on federal contractors.³⁰

B. *The Majority's Reasoning*

The majority noted that neither the statute nor the legislative history clearly defined the nature and scope of the President's policymaking authority under section 205(a). To determine its scope, it therefore examined prior exercises of Presidential power based on the section.³¹ In doing so, the majority applied a familiar rule of statutory construction: when an administrator has acted upon an interpretation of his power under a statute for a considerable time, that interpretation is entitled to great weight.³² The majority pointed to several examples of executive interpretation of section 205(a): an executive order issued by President Johnson that prohibited federal contractors from discriminating on the basis of age;³³ an order by President Nixon that continued the exclusion of certain state prisoners from federal contract work;³⁴ and a series of orders beginning in the 1930's that required equal employment action by federal contractors.³⁵ Relying most heavily on the equal employment orders, the major-

27. 40 U.S.C. § 751 (1976).

28. H.R. REP. NO. 670, *supra* note 22, at 1491.

29. 40 U.S.C. § 486(a) (1976).

30. 3 C.F.R. 249 (1978 Compilation).

31. *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979).

32. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (construing the fairness doctrine in the Federal Communications Act); *Brooks v. Dewar*, 313 U.S. 354 (1941) (affirming the Secretary of Interior's power to designate lands for public grazing and to charge fees for their use, the proceeds of which were repeatedly appropriated by Congress); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (upholding the hearing practices used by the Tariff Commission pursuant to the statutory provision for a hearing).

33. Exec. Order No. 11141, 3 C.F.R. 179 (1964-65 Compilation), *reprinted in* 5 U.S.C. § 3301 Historical and Revision Notes, at 379 (1976).

34. Exec. Order No. 11755, 3 C.F.R. 837 (1971-75 Compilation) (1973).

35. President Franklin Roosevelt: *see* Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Compilation) (1941) (citing no specific statutory authority); Exec. Order No. 9001, 3 C.F.R. 1054 (1938-43 Compilation) (1941) (citing an act but not the FPASA); Exec. Order No. 9346, 3 C.F.R. 1280

ity concluded that the President's interpretation of section 205(a) as allowing broad authority to implement nonprocurement policies was correct.³⁶ Because section 205(a) supported the equal employment requirements, its scope was found sufficiently broad to support wage and price controls.

The majority then turned to the controlling goals of the FPASA, economy and efficiency. The majority stated that any order issued pursuant to section 205(a) must promote these goals.³⁷ Because initial predictions established that the wage and price controls would in the short run lower costs of negotiated contracts,³⁸ and in the long run slow inflation,³⁹ the court found a "close nexus"⁴⁰ between the order and the goal of economy.⁴¹

Finally, the court ruled that the order was not prohibited by section 3(b) of COWPSA, which provides: "Nothing in this Act . . . authorizes the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transfers."⁴² The court found, first, that the executive order did not violate the COWPSA prohibition because compliance was not mandatory. The debarment sanction was considered the with-

(1938-43 Compilation) (1943) (citing no specific statutory authority).

President Truman: *see* Exec. Order No. 9664, 3 C.F.R. 480 (1943-48 Compilation) (1945) (citing no specific statutory authority); Exec. Order No. 10210, 3 C.F.R. 390 (1949-53 Compilation) (1951) (citing an act but not the FPASA); Exec. Order 10308, 3 C.F.R. 837 (1949-53 Compilation) (1951) (citing an act but not the FPASA).

President Eisenhower: *see* Exec. Order No. 10479, 3 C.F.R. 961 (1949-53 Compilation) (1953) (citing no specific statutory authority); Exec. Order No. 10557, 3 C.F.R. 203 (1954-58 Compilation) (1954) (citing no specific statutory authority).

President Kennedy: *see* Exec. Order No. 10925, 3 C.F.R. 448 (1959-63 Compilation) (1961) (citing no specific statutory authority); Exec. Order No. 1114, 3 C.F.R. 774 (1959-63 Compilation) (1963) (citing no specific statutory authority).

President Johnson: *see* Exec. Order No. 11246, 3 C.F.R. 339 (1964-65 Compilation) (1965) (citing no specific statutory authority).

36. *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

37. *Id.*

38. The majority reasoned that although the executive order might divert some contracts from the low bidders who are not in compliance with the wage and price standards, this would not have a significant effect in the "real-world setting." *Id.* at 792. "[Because] much Government procurement takes place through the processes of negotiation . . . Executive Order 12092 will likely have the direct and immediate effect of holding down the government's procurement costs." *Id.* This conclusion was neither explained nor substantiated.

39. The majority explained that if many businesses complied with the guidelines, such compliance would slow inflation and lower the government's costs. They relied on executive officials' reports that most large companies intended to comply. *Id.* at 792-93.

40. The close nexus test appears to have been created, but not defined, by the *Kahn* majority.

41. Except for a cursory statement that the order was "in accord with the 'economy' and 'efficiency' touchstone of the FPASA," the majority apparently ignored the 'efficiency' half of the FPASA goals in applying its close nexus test. *Id.* at 793.

42. 12 U.S.C. § 1904 note (1976).

drawal of a benefit, not the denial of a right.⁴³ The government, the court stated, has the power to determine with whom it will deal and on what grounds.⁴⁴ Second, the majority ruled that section 3(b) barred only those controls issued under COWPSA.⁴⁵ The executive order imposed the controls under the FPASA and it was, therefore, irrelevant that COWPSA did not grant that authority.

Two dissenting opinions were filed. Judge MacKinnon's dissent focused primarily on the unsuitability of the FPASA as support for the order, and concluded that if the statute did support the order, it lacked any standard for the exercise of that delegated power and was probably an unconstitutional delegation of that power.⁴⁶ Judge Robb's dissent, joined in by Judge Wilkey, stressed the mandatory nature of the guidelines⁴⁷ and

43. The majority compared the government contracts to grants made to state and local governments that are conditioned on meeting certain requirements. *AFL-CIO v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979).

44. The majority cited *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) for this proposition. The fact that the government has the power to determine with whom it will deal, however, does not support unilateral determination of similar matters by the President.

45. The majority quoted section 3(b): "[n]othing in *this Act* . . . authorizes . . . mandatory economic controls." *AFL-CIO v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (emphasis in original). The majority also pointed out that the executive order applied only to wages and prices, while section 3(b) barred controls with respect to "prices, rents, wages, salaries, corporate dividends, or any similar transfers;" implying that the section barred only controls that worked on all of the above.

46. Judge MacKinnon first discussed the lack of support for the President's interpretation of section 205(a) in the FPASA's legislative history, and noted that EO 12092 was inconsistent with several provisions of that Act. *Id.* at 799-803. He stated that the thin relationship required to uphold an order issued under the FPASA rendered the President's power under that Act virtually unlimited. Such power, he concluded, was far beyond Congress' intended delegation.

Second, Judge MacKinnon argued that COWPSA's section 3(b) prohibition of economic controls indicated that Congress never intended section 205(a) of the FPASA to be used to establish wage and price controls. He stated that the program was mandatory within the meaning of section 3(b) and thus contrary to COWPSA. Judge MacKinnon also dismissed the majority's reliance on previous executive orders allegedly promulgated under section 205(a) as support for the wage and price control order. *Id.* 809.

Third, he concluded that, if the FPASA as construed by the majority did support the wage and price control order, it posed serious constitutional problems. "[A]ssuming that Congress did intend to grant the President the power to impose mandatory wage and price standards on government contractors, the terms it used to do so do not provide a constitutionally sufficient standard for delegating legislative authority." *Id.* at 811. The majority, he stated, has ignored the principle that a statute should be construed if at all possible to avoid constitutional difficulties. The close nexus test creates, rather than avoids, constitutional problems.

47. "In my opinion . . . the guidelines are mandatory. Contractors who fail to comply are threatened with the loss of contracts for the payment of millions, perhaps hundreds of millions of dollars. No amount of sophisticated and metaphysical argument can convince me that compliance under threat of such massive economic sanctions is voluntary." *Id.* 816-17. Judge Robb also found that the section 205(a) powers were intended only to assure that uniform policies and methods would be adopted by the various procurement agencies, not to allow non-procurement policies to be imposed on federal contractors. *Id.* at 817.

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Congress' intent expressed in COWPSA to forbid mandatory wage and price guidelines.⁴⁸

II. ANALYSIS

A. *Prior Executive Orders and the FPASA*

The *Kahn* majority found support for its broad interpretation of the President's authority under the FPASA in prior executive orders that implemented nonprocurement policies.⁴⁹ Because the President's exercise of power had been upheld in those instances, the majority concluded that section 205(a) of the FPASA is a sufficient basis for upholding President Carter's executive order imposing wage and price controls on federal contractors.⁵⁰ This conclusion does not, however, necessarily follow. All the prior executive orders were supported by existing congressional policy in addition to the FPASA.⁵¹ Affirmation of those executive orders, therefore, does not necessarily support the conclusion that the FPASA alone is a sufficient basis for the President's implementation of independent policies.

The majority acknowledged that the prior age discrimination order was weak support for a broad interpretation of section 205(a). That order did not specifically cite the FPASA,⁵² and only three years later the Age Discrimination in Employment Act provided clearer justification for it.⁵³

President Nixon's order excluding certain state prisoners from federal contract work can be similarly discounted. The exclusion of state prisoners dates back to a 1905 executive order⁵⁴ based on an 1887 statute that barred federal prisoners from federal contract work. When 1965 amendments to the 1887 statute relaxed the ban against the use of federal prisoners, President Nixon's order made the equivalent change in the treatment

48. "[I]t is a fair inference from this Act (COWPSA) that Congress believed that there was no other statute which authorized the imposition of such controls by the Executive." *Id.* at 819.

49. *AFL-CIO v. Kahn*, 618 F.2d 784, 789-92 (D.C. Cir. 1979). See notes 40, 43-45 and accompanying text *supra*. Nonprocurement as used here refers to those requirements imposed on federal contractors that work toward broader social goals such as equal employment. While achievement of these goals may affect the cost or efficiency of government procurement in the future, their primary purpose is not procurement.

50. *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

51. See note 59 and accompanying text *infra*.

52. Exec. Order No. 11141, 3 C.F.R. 179 (1964-65 Compilation), *reprinted in* 5 U.S.C. § 3301 note at 379-80 (1976).

53. "Although the Order can now be justified under the Age Discrimination in Employment Act of 1967 . . . for the first three years of its operation this Order was apparently based only on the FPASA." *AFL-CIO v. Kahn*, 618 F.2d 784, 790 n.29.

54. Exec. Order No. 325A (1905).

of state prisoners.⁵⁵ Executive authority to act in this area was supported by historical practice from which congressional approval could be inferred,⁵⁶ as well as by the FPASA. It did not, therefore, support the *Kahn* court's broad reading of section 205(a).

The majority placed greatest reliance on the equal employment orders. These, it stated, were the most prominent use of the section 205(a) powers to date⁵⁷ and were supported by judicial decisions identifying the FPASA as authority for the orders. Only two cases,⁵⁸ however, state that FPASA is sufficient authority for the equal employment orders,⁵⁹ and in both cases, the statements were dicta.⁶⁰ Not since 1967 has a case maintained that the President's authority under section 205(a) is by itself sufficient to support the equal employment orders.⁶¹

B. *The Equal Employment Orders Analogy*

The interpretation of an ambiguous statute by the administrator charged with its administration is entitled to consideration from the courts and should be accorded appropriate weight in determining the meaning of the law, particularly when the construction has been uniformly acted upon over a long period of time.⁶² The *Kahn* majority reasoned first that the equal employment orders issued by various Presidents were the executive's interpretation of its power under the FPASA, and second that this

55. Exec. Order No. 11755, 3 C.F.R. 837 (1971-75 Compilation) (1976).

56. *Cf.*, *United States v. Midwest Oil Co.*, 326 U.S. 459 (1944) (The President's practice of withdrawing lands otherwise open to public sale when the sale would be against the public interest was upheld. No statutory authority existed for this practice, but the Court found that congressional acquiescence for approximately eighty years implied either congressional approval or that the practice was within the administrative powers of the President).

57. *AFL-CIO v. Kahn*, 618 F.2d 784, 790. The majority failed to mention that none of the orders cited the FPASA as authority.

58. *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 8 (3d Cir. 1964); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967).

59. *United States v. New Orleans Public Serv. Inc.*, 553 F.2d 459, 465 (5th Cir. 1977); *Contractor's Ass'n. of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159, 167 (3d Cir. 1971). Although cited as basing the order solely on the FPASA, *Farmer* also relied on the declaration of policy by Congress in section 2 of the Defense Production Act of 1950. *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 8 (3d Cir. 1964).

60. The language in both cases dealing with the validity of the executive order equal employment program was merely an assumption by the court in order to reach the question whether the order gave rise to a private right of action. *Contractor's Ass'n of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159, 167 (3d Cir. 1971).

61. *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) was the last case to suggest that the equal employment orders were authorized by the FPASA alone. *See, e.g.*, *Contractor's Ass'n of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971); *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978) (examples of cases after 1967).

62. *See* note 32 and accompanying text *supra*.

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interpretation included authority to issue a wage and price control order. Therefore, it concluded, the wage and price control order is within the scope of the President's power under section 205(a).⁶³ This conclusion is flawed for several reasons.

1. *Other Bases for the Equal Employment Orders*

Neither the prior equal employment orders nor EO 11,246 currently in force are clearly based on the section 205(a) authority. None of the orders cited the FPASA as authority;⁶⁴ only judicial decisions found any relationship between the orders and the Act.⁶⁵ Courts have referred to the FPASA as possible authority for the executive orders mandating observance by federal contractors of equal employment standards.⁶⁶ Since the passage of the Civil Rights Act of 1964, however, courts cite Title VII as evidence of congressional approval of those orders.⁶⁷ In 1972, Congress expressly approved the executive orders⁶⁸ and defeated a series of amendments to Title VII that would have eliminated the equal employment program.⁶⁹ If those members opposed to the equal employment program had thought that the FPASA, by itself, authorized the executive orders, they would have also contemplated amendments to that Act.

The equal employment orders may, additionally, be grounded in an implied constitutional requirement that federal contractors not discriminate on the basis of race. In *Contractor's Association of Eastern Pennsylvania v. Secretary of Labor*, the court hinted at inherent presidential au-

63. *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).

64. *See* note 35 *supra*.

65. *See* note 58 and accompanying text *supra*.

66. *Id.*

67. As adopted, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(d) read: "Where an employer is required by Executive Order 10925, issued March 6, 1961 (imposing affirmative action requirements), or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors . . . to file reports . . . the Commission shall not require him to file additional reports. . . ." Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 709, 78 Stat. 262 (1964). The *Contractor's Association* court relied on this language to show that Congress intended the executive order program to continue when it adopted Title VII. *Contractor's Ass'n of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971). The Fifth Circuit cited this section of Title VII as the "second source of legislative authorization" for the executive order program. *United States v. New Orleans Public Serv. Inc.*, 553 F.2d 459, 467 (5th Cir. 1977). The court there also relied on congressional approval expressed during the debates on the Equal Employment Act of 1972. *Id.*

68. "The two programs are addressed to the same basic mission—the elimination of discrimination in employment. The obligations imposed on the government contractor by the Executive Order (11,246) . . . reinforce the obligations imposed by Title VII." H.R. REP. No. 238, 92d Cong., 1st Sess. 15 (1971), *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2137, 2150.

69. *E.g.*, 118 CONG. REC. 1661, 1676 (1972) (rejecting an amendment proposed by Senator Erwin to restrict the operation of Executive Order 11,246).

thority under the Constitution for this purpose.⁷⁰ Using a broad interpretation of "state action" it might be argued that the government cannot constitutionally contract with employers who discriminate on the basis of race because such behavior would be a denial of equal protection under the fourteenth amendment.⁷¹ It has also been argued that when the government contracts for service it has traditionally performed itself, the contractors should be held to the same employment standards as the government.⁷² If these equal employment orders are authorized by either Title VII or the Constitution, then the orders provide little support for the *Kahn* court's broad interpretation of section 205(a) of the FPASA.

2. *Equal Employment Orders and the Wage and Price Control Order*

Even if the equal employment orders were examples of executive interpretation of section 205(a) entitled to great weight in determining the scope of that section, that interpretation would not clearly extend to authorizing wage and price controls. One of the foremost justifications for giving an administrative interpretation great weight is that Congress has had notice of the interpretation and a chance to revise the statute if it disagrees. If Congress has had notice that section 205(a) is interpreted to allow the issuance of equal employment orders, it has had no notice the section is also interpreted to allow wage and price control orders. Economic controls have little to do with equal employment. Congressional approval of the equal employment orders should not be extended to a wage and price control order without an opportunity for Congress to respond to this new interpretation of section 205(a) authority.⁷³ Moreover,

70. "We conclude, therefore, that unless the Philadelphia Plan is prohibited by some other congressional enactment, its inclusion as a pre-condition for assistance was within the implied authority of the President. . . ." *Contractor's Ass'n of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971) (held, no congressional enactment prohibits the Philadelphia Plan; therefore, setting minority hiring goals was within the implied authority of the President).

71. One author has suggested that "the government may not constitutionally contract with employers who discriminate on the basis of race, because such behavior would be 'state action' which would make the government guilty of discrimination. The Executive Order (11,246) is thus valid because it prevents this unlawful action from occurring." Comment, *Executive Order 11,246: Presidential Power to Regulate Employment Discrimination*, 43 Mo. L. Rev. 451, 479 (1978). Accord, Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. Rev. 225, 229 n.27 (1971).

72. The only question in applying such a theory here is how far the principle should be extended. Comment, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 Wis. L. Rev. 301, 327.

73. The rule of construction relied upon by the majority requires that, in effect, Congress be given notice of the administrator's interpretation of the scope of power properly available under the statute. "[T]he mere issuance of consecutive summary suspension orders, without concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority." *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (paraphrasing from *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978)). The equal employment orders never

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the executive's mere claim that the equal employment orders are based on section 205(a) of the FPASA is no basis for concluding that those orders, or the wage and price control order, are lawfully based on that Act.⁷⁴ Administrative interpretations entitled to great weight are only those that are within the policies and intent of the construed statute.⁷⁵ An administrator may not garner greater power than the statute grants by repeatedly violating the limits of that statute.⁷⁶

Congress did not intend the FPASA to allow the President to make sweeping changes in the direction of society or the economy; Congress intended it to establish, organize, and coordinate the government's procurement of goods and services.⁷⁷ On its face, section 205(a) has nothing to do with either equal employment or wage and price controls. Undoubtedly, the drafters of the FPASA never contemplated that either policy would be imposed on federal contractors through the procurement process. Nonetheless, the equal employment orders were upheld at least partially on the basis of FPASA. But in all instances since 1964,⁷⁸ there was also clear congressional approval of the policy the equal employment orders represented. Title VII provided the authority for imposing equal employment requirements on federal contractors; the FPASA was a mere mechanism for that imposition. As later cases construing the order recog-

stated that they were issued under the President's authority of section 205(a), and it is not clear that Congress associated the orders with that statute. Furthermore, because section 205(a) has never before been used for a wage and price control requirement, Congress has had no notice of that interpretation and the rule would not apply.

Congress did consider the procurement program in connection with its extension of COWPSA in 1979. It declined, however, to change any provisions of COWPSA in an effort to block the program. "As was noted by Chairman Proxmire and other committee members, . . . the legal authority for the Government to take so-called 'procurement sanctions' against companies failing to comply with the guidelines is a matter to be decided by the courts." S. REP. NO. 36, 96TH CONG., 1ST SESS. 13, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 955, 963. But see the minority views of Senators Garn, Tower, Heinz, Armstrong, Kassebaum and Luger, S. REP. NO. 36, 96TH CONG., 1ST SESS. 18, *reprinted in* (1979) U.S. CODE CONG. & AD. NEWS 967 (arguing that the procurement program is unlawful). Any changes made, of course, to COWPSA would have been ineffective given the court's conclusion that COWPSA was irrelevant to the validity of the executive order.

74. *But see* Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964); Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967).

75. "[C]ourts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291 (1965).

76. Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) ("an agency may not bootstrap itself into an area where it has no jurisdiction by repeatedly violating its statutory mandate").

77. See notes 30-34 and accompanying text *supra*.

78. See note 59 and accompanying text *supra*. It is of little consequence here that prior to 1964 Congress had not affirmed the policy, however, because prior to that time no executive order cited the FPASA and no case held that the FPASA granted the President the authority to act.

nized, the FPASA alone would not have been sufficient.⁷⁹ In the absence of a similar congressional policy supporting wage and price controls, the FPASA should not be construed to provide the mechanism for imposing these controls.

C. Congressional Disapproval of Wage and Price Controls

In *Kahn*, not only was there no affirmative congressional approval of the wage and price control policy, but COWPSA expressly rejected mandatory wage and price controls. The majority, however, found that compliance with the wage and price controls was not mandatory.⁸⁰ Even if the program was not "mandatory" within a restrictive definition of that word, the wage and price control requirement nevertheless conflicted with the broader framework of COWPSA. The Act sprang from a repeal of the sweeping economic powers granted the executive by the Economic Stabilization Act of 1970.⁸¹ In contrast to the ESA, COWPSA provides only for information gathering, publicity, and persuasion.⁸² Mandatory

79. *Id.*

80. Both of the dissenting opinions and the District Court disagreed with this conclusion. See notes 8, 14-15 and accompanying text *supra*. The majority's argument relied heavily on classifying the debarment sanction as a withdrawal of a benefit and not the denial of a right. In using this comparison, however, the majority confused the two different contexts in which government contracts, and contractor compliance, occur.

In the context of grants or federal assistance programs, it is appropriate to speak of denial of a contract for noncompliance with an executive order program as a withdrawal of a benefit, because the entire transaction is based on the government's goodwill. The government receives nothing directly in return. The Third Circuit recognized this distinction in *Contractor's Association* when it noted that the *Farkas* and *Farmer* cases were not on point. These cases concerned a federal assistance program, unlike *Kahn* which concerned direct government procurement. *Contractor's Ass'n of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159, 167 (3d Cir. 1971).

Unlike grants, procurement contracts are two-sided exchanges of items of supposedly equal value. Both Congress and the courts generally compare government contracting to its private counterpart. See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). In the private sector, however, any conditions set by one party are usually bargained for and are offset by some advantage to the other party, e.g., one party may be willing to pay more if the other will guarantee an early completion date. By attaching a sanction to this wage and price control contract clause, the government has removed it from bargaining. If nothing is offered in exchange for compliance, then compliance can hardly be called voluntary; it would instead be evidence of unequal bargaining power between government and contractor. Alternatively, if it is inferred that something is offered in exchange such as a higher price, then the wage and price control program is self-defeating. Compliance will result in higher, not lower, prices to government.

81. "No economic authority is being granted or authorized. . . . It has been all too clearly demonstrated by our own experience with economic controls that they are by nature arbitrary and artificial, creating shortages and dislocation of resources. . . ." 120 CONG. REC. 28883 (1974) (Remarks of Senator Tower urging adoption of COWPSA without amendment).

82. 12 U.S.C. § 1904 note (1976). "The council is first and foremost a forum—a forum which draws representatives from all sectors of the economy to debate freely and air economic issues. It is a forum to collect economic information and follow the direction of the various economic sectors. It is

requirements do not comport with the Act's express provisions. Courts have traditionally held that an executive or administrative order must not defeat the provisions of the statute on which it is based,⁸³ or defeat any other clear indication of congressional intent.⁸⁴ Thus, the President may not do indirectly under the FPASA what he cannot do directly under COWPSA.

The majority in *Kahn* considered whether COWPSA prohibits wage and price controls. After a brief discussion, however, it denied the Act's relevance to the executive order and the FPASA.⁸⁵ The court's conclusion ignores the Third Circuit's analysis in *Contractor's Association of Eastern Pennsylvania v. Secretary of Labor*.

The Third Circuit acknowledged that, if it found any other congressional enactment prohibiting the affirmative action plan required by EO 11,246, the executive order would not be within the implied authority of the President.⁸⁶ There the court found no statute in opposition, and indeed found the above-mentioned signs of support in Title VII. The *Kahn* court's dismissal of COWPSA ignored the analysis in *Contractor's Association* and the case relied on in that analysis: *Youngstown Sheet & Tube Co. v. Sawyer*.⁸⁷

The Supreme Court in *Youngstown* considered the validity of an executive order issued by President Truman based upon his authority under the Constitution and the laws of the United States. The order directed the Secretary of Commerce to seize the steel mills and continue their operation because of a strike declared by the United Steelworkers of America. After finding that neither the Constitution nor the general provisions of the Defense Production Act authorized the order, the Court held that the seizure was an unlawful exercise of legislative power by the executive.⁸⁸ In reaching this decision, the *Youngstown* court relied upon two considerations important to the analysis in *Kahn*. The first consideration was the history of specific congressional grants of power to the executive when

therefore a forum with oversight authority and not an operating agency." 120 CONG. REC. 28883 (1974).

83. See, e.g., *SEC v. Sloan*, 436 U.S. 103 (1978) (Securities Exchange Act of 1934 barred SEC practice of tacking 10 day trading suspension periods).

84. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951). Justice Frankfurter stated the proposition that it is impossible to find a grant of power in general legislation when specific legislation denies that power. *Id.* at 609 (concurring opinion). Using Frankfurter's statement as a model, the FPASA (general legislation) should not authorize imposing wage and price controls when Congress, in COWPSA (specific legislation), explicitly refused to grant the executive that power.

85. *AFL-CIO v. Kahn*, 618 F.2d 784, 795 (D.C. Cir. 1979).

86. *Contractor's Ass'n of Eastern Pa. v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971).

87. 343 U.S. 579 (1951).

88. *Id.* at 585.

seizure of private concerns was contemplated;⁸⁹ the second was the recent refusal of Congress to grant seizure power to the President under the Taft-Hartley Act.⁹⁰

Exercises of executive power in the areas of both seizure and economic controls have traditionally been based on specific congressional grants of authority.⁹¹ The exercise of executive power in both *Youngstown* and *Kahn*, however, followed express congressional denials of the power. In *Youngstown*, an amendment that would have granted the seizure power was defeated by a large margin.⁹² Similarly, in *Kahn*, specific statutory language had been enacted to prohibit economic controls.⁹³ In this respect, *Kahn* was an even stronger case than *Youngstown* for declaring the President's order unlawful.

If the FPASA, in the absence of congressional approval of the policy advanced, is an insufficient basis to support this order, then *a fortiori* it is insufficient when Congress has expressly disapproved the policy. Following Justice Frankfurter's analysis in *Youngstown*, it is impossible to find hidden in the general provisions of the FPASA a delegation of the power Congress specifically withheld in COWPSA.⁹⁴

D. *The Delegation Doctrine and the FPASA*

The *Kahn* court's interpretation of the President's power under the FPASA via the close nexus test is so broad that it may render that statute an unconstitutionally broad delegation of legislative power. Under the Constitution Congress has the power to define federal policy, and the ex-

89. *Id.* at 597-98

90. *Id.* at 586, 600.

91. For a detailed history of congressional grants of seizure power, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 615-628 (1951). Economic controls have been imposed on three occasions; World War II, the Korean War, and during the early 1970's. Emergency Price Control Act of 1942, Pub. L. No. 402, §§ 2-51, 56 Stat. 23 (1942); Defense Production Act of 1950, Pub. L. No. 774, §§ 401-410, 64 Stat. 798 (1950); Economic Stabilization Act of 1970, 84 Stat. 799 (1970). For discussions of the first and third laws, see *Yakus v. United States*, 321 U.S. 414 (1944); and *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971). See generally Fleishman and Aufsas, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROB. 5, 25-30 (1976).

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 600-01 (1951) (93 CONG. REC. 3637-3645, 3935-3936).

93. *AFL-CIO v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (COWPSA § 3(b), 12 U.S.C. § 1904 note (1976)).

94. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1951). "It is quite impossible . . . when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of other legislation the very grant of power Congress consciously withheld. To find such authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Id.*

ecutive has the duty to carry it out.⁹⁵ The delegation doctrine addresses this division between Congress' legislative authority and the President's executive authority.⁹⁶ By failing to circumscribe sufficiently the executive's authority under a particular statute, Congress delegates its own legislative power. Such a delegation of legislative power violates the constitutional separation of powers.⁹⁷ Traditionally, the delegation doctrine served to invalidate overly broad statutory delegations of power to the executive.⁹⁸ More recently, however, courts have avoided invalidating statutes on this basis by narrowly construing the scope of power delegated by the statute.⁹⁹ Although the delegation doctrine is rarely a restraint on Congress, it retains vitality as a constitutional restraint on judicial interpretations of statutory delegation of power.¹⁰⁰

To determine the scope of the President's power under the FPASA, the *Kahn* majority looked for a close nexus between the Act's purpose and the orders. Under the majority's new test FPASA authorizes any executive order that promotes 'economy and efficiency' in the government's procurement of goods and services. The majority accepted at face value the government's assertion that this program would result in economy and efficiency.¹⁰¹ Thus, the only limit on the executive's judgment is that the court must determine that the order bears a close nexus to this congressional goal. The problem with the majority's close nexus test is not the closeness of the relationship that it requires to the goals of economy and efficiency; rather it is the definition of the goal itself. The overall scheme of the FPASA embodies a policy which is far more specific than the general promotion of economy and efficiency.¹⁰² By removing these ends from the statutory means, the court interpreted the President's power to be far broader than Congress intended. Executive action under the FPASA is now permitted in areas, such as wage and price controls, in which Congress provided no limits or standards. Where Congress pro-

95. See U.S. CONST. art. I, II.

96. See, e.g., *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

97. See, e.g., *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1927).

98. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

99. *National Cable Television v. United States*, 415 U.S. 336 (1974); *Brannan v. Stark*, 342 U.S. 451 (1951).

100. Judge Wright of the Court of Appeals, District of Columbia, author of the majority opinion in *Kahn* wrote in 1972: "at the risk of seeming antiquarian, I think the reported demise of the delegation doctrine is a bit premature." Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582 (1972). He suggested that "[t]he courts should control discretion by vigorously reasserting their inherent role as the interpreters of legislative enactments and guardians against invidious and irrational exercises of governmental power." *Id.* at 581.

101. *AFL-CIO v. Kahn*, 618 F.2d 784, 792-93 (D.C. Cir. 1979).

102. See notes 20, 30-34 and accompanying text *supra*.

vides no "intelligible principle to which the person or body authorized . . . is directed to conform," the statute is a forbidden delegation of legislative power.¹⁰³ By finding a close nexus between the FPASA and policies unrelated to the procurement's system's efficacy, the court abrogated the FPASA's "intelligible principle" and rendered the FPASA an unconstitutional delegation of legislative authority.¹⁰⁴

III CONCLUSION

Neither the FPASA's legislative history, nor other past judicial uses of that statute to uphold equal employment orders supports the holding of the Court of Appeals that the FPASA grants the President authority to issue the wage and price control order. The equal employment analogy actually works against the result in *Kahn* by highlighting an element present in those cases that is missing here: congressional approval of the policy. It is only the conclusory finding of a close nexus between the goals of the FPASA and the executive order that establishes the FPASA as authority for the order. It is the majority's same close nexus test that casts doubt on the FPASA's constitutionality. A court should construe a statute to avoid constitutional difficulties, not to create them.¹⁰⁵ If the close nexus test causes such a statutory construction, and it appears that it does, it should be abandoned.

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103. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1927).

104. This was one of the major points of Judge MacKinnon's dissent. He stated: "[I]f the presidential procurement power in Section 205(a) were construed in a manner faithful to the purposes underlying the 1949 Act no constitutional prescriptions would imperil the congressional scheme." *AFL-CIO v. Kahn*, 618 F.2d 784, 811 (D.C. Cir. 1979).

105. *See National Cable Television, Inc. v. United States*, 415 U.S. 336, 342 (1974).