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Wage and Price Controls-Government Contracts-Executive Use of the Federal Procurement Act to Disbar Private Firms from Government Contracts if Wage and Price Standards are not Followed-AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979)

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Wage and Price Controls—GOVERNMENT CONTRACTS—EXECUTIVE USE OF THE FEDERAL PROCUREMENT ACT TO DISBAR PRIVATE FIRMS FROM GOVERNMENT CONTRACTS IF WAGE AND PRICE STANDARDS ARE NOT FOLLOWED—*AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979).

On November 1, 1978, President Carter issued Executive Order 12,092 (E.O. 12,092)¹ instructing the Council on Wage and Price Stability (Council)² to establish noninflationary wage and price standards for the entire economy.³ For workers, the order provides that wage increases can be no more than seven percent annually;⁴ for a business, price increases must be at least 0.5 percent less than the company's recent average price increases.⁵ The President also ordered the chairman of the Council to monitor compliance with the standards and to publish the names of noncompliant businesses.⁶

The Executive order requires all federal contractors to cer-

1. 3 C.F.R. 249 (1979), reprinted in 41 U.S.C. § 401 note (Supp. III 1979).

2. Congress created the Council on Wage and Price Stability in 1974. Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974) (amended 1975, 1977, 1979), reprinted in 12 U.S.C. § 1904 note (Supp. III 1979). The Council's major role under the Council on Wage and Price Stability Act is to monitor the private sector of the economy for inflationary wage and price developments as well as the inflationary impact of the programs and activities of the Federal Government. *Id.* § 3(a).

3. The Council was to refine the standards to fit various sectors of the economy. 3 C.F.R. 249 (1979), reprinted in 41 U.S.C. § 401 note (Supp. III 1979). The Council first published a series of proposed wage and price standards on November 7, 1978. 43 Fed. Reg. 51,938 (1978). After public comments and clarification, the final wage and price standards were issued by the Council on December 28, 1978. 43 Fed. Reg. 60,772 (1978). Later modifications and additions to the wage and price standards were issued on January 25, 1979. 44 Fed. Reg. 5336 (1979); February 13, 1979, 44 Fed. Reg. 9582 (1979); March 23, 1979, 44 Fed. Reg. 17,910 (1979); and April 20, 1979, 44 Fed. Reg. 23,776 (1979) (current versions at 6 C.F.R. §§ 705-705.78 (1980)).

4. 3 C.F.R. 249 (1979), reprinted in 41 U.S.C. § 401 note (Supp. III 1979).

5. *Id.* The requirement seeks to ensure that a company will not be able to increase prices faster than its past average of price increases. Some of the exceptions to the general standards program include an optional modified price standard for the wholesale and retail trade industry and the food manufacturing and processing industries, 6 C.F.R. §§ 705.42-43 (1980), and a profit margin limitation standard for companies that have uncontrollable costs or that cannot calculate their average price change, *id.* § 705.6.

6. 3 C.F.R. 249 (1979), reprinted in 41 U.S.C. § 401 note (Supp. III 1979). The President also ordered the Council to publish procedures to be used in Council proceedings relating to the standards, and to "take such other action as may be necessary and consistent with the purposes of [section 1-101 of the order]". *Id.*

tify their compliance with the wage and price standards⁷ and directs the Office of Federal Procurement Policy (OFPP) to implement sanctions against contractors who fail to comply.⁸ On January 4, 1979, OFPP promulgated a policy statement, effective February 15, 1979, providing that noncompliant contractors and first-tier subcontractors whose contracts exceed five million dollars⁹ may be subject to contract termination, equitable reduction of the contract price, and ineligibility for future government contracts.¹⁰

On March 31, 1979, the AFL-CIO challenged E.O. 12,092 in the U.S. District Court for the District of Columbia as an unlawful interference with the right to bargain collectively and as an Executive usurpation of congressional powers. The district court granted the labor organization's motion for summary judgment on the latter ground and enjoined the enforcement of the procurement compliance program.¹¹ That injunction was stayed pending the outcome of the expedited appeal to the U.S. Court of Appeals for the District of Columbia. The court of appeals, sitting *en banc*, reversed the order of the district court, vacated its injunction, and held that section 205(a) of the 1949 Federal Procurement Act (FPASA)¹² granted authority to the President to issue E.O. 12,092.¹³

7. The Executive order directs the head of each executive agency and military department to require all federal contractors to certify that they are in compliance with the wage and price standards. 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C. § 401 note (Supp. III 1979). An Office of Federal Procurement Policy letter also requires contracts exceeding \$5 million to state that the contractor intends to comply with the standards. 44 Fed. Reg. 1229-30 (1979).

8. 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C. § 401 note (Supp. III 1979).

9. 44 Fed. Reg. 1229 (1979). The statement also stated that as the OFPP gained experience with the compliance program, contracts worth less than five million dollars might be included. *Id.* The present compliance program should cover 65-70 percent of all Federal Government contracts, approximately \$50 billion. *AFL-CIO v. Kahn*, 618 F.2d 784, 786 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

10. 44 Fed. Reg. 1229, 1230 (1979). A contract termination or finding of ineligibility for future government contracts and subcontracts can be waived if: (1) the agency's need for the product or service is essential to national security or public safety; (2) such an action would cause severe financial hardship and threaten the contractor's or subcontractor's ability to survive; or (3) the contractor or subcontractor comes into compliance and agrees to an equitable reduction of the contract price. *Id.* at 1231.

11. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 90, 102 (D.D.C.), *vacated*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

12. Federal Property and Administrative Services Act of 1949, § 205(a), 40 U.S.C. § 486(a) (1976).

13. *AFL-CIO v. Kahn*, 618 F.2d 784, 796 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

I. BACKGROUND

An Executive order is a Presidential command that the Government or citizens act in a specified manner. The order has no legal effect unless authorized by some constitutional or statutory provision.¹⁴ Most Executive orders are founded upon specific congressional authorization,¹⁵ although the courts in rare circumstances have found them to be authorized by the Constitution.¹⁶ The courts in recent years have found broad authority in FPASA¹⁷ for the President to issue diverse Executive orders, including use of the Act to uphold antidiscrimination orders.¹⁸

A. History of FPASA

1. Legislative Enactment of FPASA

In 1949 Congress enacted FPASA¹⁹ to centralize federal government procurement and property management functions. The House floor manager and sponsor of the bill, Representative Holifield, explained the purpose of FPASA as follows:

This bill [FPASA] establishes a basis for a plan to simplify the procurement, utilization, and disposal of Government property, and to reorganize certain agencies of the Government, and for other purposes.

The major purpose of this bill is to provide for a uniform system of property management and supply for the entire Federal Government.²⁰

Section 205(a) of FPASA authorizes the President to "effectuate the provisions of said Act" in a manner "not inconsistent with" the Act.²¹ Representative Holifield also commented on the

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

15. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974); *Cole v. Young*, 351 U.S. 536 (1956); *United States v. Kelly*, 342 U.S. 193 (1952). On occasion, subsequent legislation has ratified an earlier order. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Prize Cases*, 67 U.S. (2 Black) 635 (1862); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

16. *See, e.g., Jenkins v. Collard*, 145 U.S. 546 (1892); *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191 (1873).

17. Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-514 (1976).

18. *See* notes 24-34 and accompanying text *infra*.

19. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (current version at 40 U.S.C. §§ 471-514 (1976)).

20. 95 CONG. REC. 7441 (1949).

21. Federal Property and Administrative Services Act of 1949, § 205(a), 40 U.S.C. §

scope of section 205(a):

Continuing in this vein we see that property management affects every executive agency and so the bill *expressly authorizes the President*, himself, to prescribe policies and directives, and specifies that these Presidential policies and directives shall govern—not merely guide—not only the Administrator but all executive agencies in carrying out these *property-management functions*.²²

Nevertheless, there are specific limitations on the President's authority: the President may not affect existing "stabilization" programs. Section 502(d) of FPASA provides:

Nothing in this Act shall *impair or affect* any authority of . . .
(2) *any executive agency* with respect to any phase (including, but not limited to, *procurement . . .*) of *any program conducted* for purposes of resale, price support, grants to farmers, *stabilization*, transfer to foreign governments, or foreign aid, relief, or rehabilitation²³

2. *Executive Antidiscrimination Orders and FPASA*

In recent cases the courts have found authority in FPASA for Executive antidiscrimination orders. The FPASA contains the goals of "economy" and "efficiency" in federal government procurement,²⁴ and some courts have stated that the Executive antidiscrimination orders are valid because they promote "economy" and "efficiency." The first two courts to suggest this proposition did so by way of dicta;²⁵ a court in a subsequent case

486(a) (1976).

22. 95 CONG. REC. 7441 (1949) (emphasis added).

23. Federal Property and Administrative Services Act of 1949, § 502(d), 40 U.S.C. § 474 (1976) (emphasis added).

24. *Id.* § 201(a), 40 U.S.C. § 481(a) (1976).

25. In *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964), the court did not reach the issue but commented that the

Defendant does not contend that the requiring of non-discrimination provisions in government contracts is beyond the power of Congress. . . . In view of the above quoted subsections of § 205 [of FPASA] and the declaration of policy by Congress in § 2 of the Defense Production Act of 1950, and its amendments, 50 U.S.C.A. App. § 2062, we have no doubt that the applicable executive orders and regulations have the force of law.

Id. at 8.

In *Farkas v. Texas Instrument Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967), the court noted in dictum,

We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10,925 are so unrelated to the establishment of "an economical

held so directly.²⁶

The first case to directly face the issue of whether FPASA could support an Executive antidiscrimination order was *Contractors Association v. Secretary of Labor*.²⁷ In this case the Third Circuit affirmed the validity of the affirmative action "Philadelphia Plan" issued pursuant to Executive Order 11,246 (E.O. 11,246),²⁸ stating that the antidiscrimination provisions "would seem to be authorized by the broad grant of procurement [FPASA] authority."²⁹ The court explained that there was a connection between the Executive order and the FPASA goals of economy and efficiency because it "is in the interest of the United States . . . 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."³⁰

In *United States v. New Orleans Public Service Inc.*,³¹ the Fifth Circuit commented that the same antidiscrimination order that was involved in *Contractors Association*³² was valid on the basis of FPASA even though a utility company questioned Presidential authority to condition federal contracts upon compliance with equal employment requirements.³³ The court also noted that the order was valid because it was congruent with the congressional intent embodied in both title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act

and efficient system for . . . the procurement and supply" of property and services, 40 U.S.C.A. § 471 [FPASA], that the order should be treated as issued without statutory authority. Indeed, appellees make no such challenge to its validity.

Id. at 632 n.1. Both *Rossetti Contracting Co. v. Brennan*, 508 F.2d 1039, 1045 n.18 (7th Cir. 1975) and *Northeast Constr. Co. v. Rommey*, 485 F.2d 752, 760-61 (D.C. Cir. 1973), suggest broad authority to achieve social and economic goals through federal procurement controls. *Northeast* indicates that if executive or congressional programs promote Federal procurement considerations of economy, then FPASA can uphold the programs. 485 F.2d at 760-61. For a discussion of the limitations of *Rossetti* and *Northeast*, see *AFL-CIO v. Kahn*, 472 F. Supp. 88, 95-6 & n.15 (D.D.C.), *vacated*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

26. *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

27. *Id.*

28. 3 C.F.R. 339 (1964-1965 Compilation) as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1969), *superceded in part* by Exec. Order No. 11,478, 3 C.F.R. 803 (1969), *reprinted in* 42 U.S.C. § 2000e app. (1976).

29. 442 F.2d at 170.

30. *Id.*

31. 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978).

32. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

33. 553 F.2d at 465-67.

of 1972.³⁴

Nevertheless, in *United States v. East Texas Motor Freight System, Inc.*,³⁵ the Fifth Circuit limited the scope of the antidiscrimination orders. The court held that the antidiscrimination order, E.O. 11,246, could not invalidate a seniority system that was lawful under title VII of the Civil Rights Act. The court observed that title VII's exemption for bona fide seniority systems was a statement of congressional intent, and that "[t]he Executive may not, in defiance of such policy, make unlawful—or penalize—a bona fide seniority system."³⁶

These court rulings suggest that FPASA has been used to uphold the validity of Executive antidiscrimination orders; however, *East Texas* limits the application of an Executive order to the extent it is found that Congress has expressed a contrary intent regarding the specific subject matter.³⁷ With this principle in mind, it is necessary to examine congressional actions in the area of wage and price regulations.

B. History of Wage and Price Regulation

Congress has at various times authorized the President to enforce wage and price controls. In each case the authority to control wages and prices with economic sanctions was carefully monitored by Congress. Congress enacted the Emergency Price Control Act of 1942³⁸ to regulate prices for government contracts;³⁹ the Stabilization Act of 1942, which amended the Emer-

34. *Id.* at 467.

35. 564 F.2d 179 (5th Cir. 1977).

36. *Id.* at 185.

37. Justice Jackson discussed the validity of Presidential actions and Executive orders in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring), by noting, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.* at 637. The *Youngstown* analysis of the President's authority, as explained in *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978), implies that an Executive order program would not be valid if there was a congressional statute which was inconsistent with the Executive order. *See id.* at 467 n.8. *See also* *AFL-CIO v. Kahn*, 618 F.2d 784, 810-11 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. denied*, 443 U.S. 915 (1979); *Adequacy of the Administration's Anti-Inflation Program (Part 1): Hearings Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 494 (1979) (Congressional Research, American Law Division, opinion on constitutionality of E.O. 12,092) [hereinafter cited as 1979 *Hearings*].

38. Ch. 26, 56 Stat. 23 (expired).

39. 1979 *Hearings*, *supra* note 37, at 490.

agency Price Control Act,⁴⁰ was enacted to limit wages and agricultural prices.⁴¹ In each of these Acts, Congress carefully defined the power being granted the President and set specific expiration dates.⁴² In title IV of the Defense Production Act of 1950,⁴³ Congress again granted the President authority to control wages and prices. This Act contained clear guidelines circumscribing the President's authority. Congress later terminated the President's wage and price authority by amending the original act.⁴⁴ Later Congress passed the Economic Stabilization Act of 1970,⁴⁵ authorizing the President to issue orders and regulations deemed appropriate to stabilize prices, rents, wages, and salaries. Congress allowed the President's authority to expire on April 30, 1974.⁴⁶

Between 1973 and the expiration of the wage and price control authority granted under the Economic Stabilization Act, nineteen bills concerning wage and price regulation were introduced in Congress.⁴⁷ The bills were designed to continue the Executive's broad control over the economy, or more specifically, to extend the authorization of the Economic Stabilization Act.⁴⁸ Of these bills, not one was voted out of the Senate committees.⁴⁹

In addition to these nineteen bills, Senator Muskie proposed a wage and price control amendment to an unrelated bill. The amendment would have empowered the Cost of Living Council to enforce decontrol agreements and given the President stand-by authority to reimpose controls. The Senate defeated the amendment by a vote of 56 to 32.⁵⁰

40. Ch. 578, 56 Stat. 765 (expired).

41. 1979 *Hearings*, *supra* note 37, at 491.

42. *Id.* at 491 & n.99.

43. Ch. 932, 64 Stat. 798 (expired).

44. Defense Production Act Amendments of 1952, ch. 530, 66 Stat. 296; 1979 *Hearings*, *supra* note 37, at 491.

45. Pub. L. No. 91-379, 84 Stat. 799 (expired). The Act was later altered by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (1971) (expired).

46. 1979 *Hearings*, *supra* note 37, at 491-93. Congress tightly controlled the time periods allowed the President to use his authority despite a Presidential request that his authority continue for a longer period of time. *Id.* at 492.

47. *Id.* at 494. A list of the bills (with synopses) can be found in OFFICE OF ECONOMIC STABILIZATION, DEP'T OF THE TREASURY, HISTORICAL WORKING PAPERS ON THE ECONOMIC STABILIZATION PROGRAM, AUG. 15, 1971 TO APR. 30, 1974, PART I, at 221-23 (1974) [hereinafter cited as HISTORICAL WORKING PAPERS]; 1979 *Hearings*, *supra* note 37, at 494 n.106.

48. 1979 *Hearings*, *supra* note 37, at 494.

49. *Id.* at 495.

50. *Id.*

Besides the proposed amendment and bills seeking to extend broad control of the economy, other bills concerning wage and price regulation were introduced in Congress in 1973 and 1974. These bills included proposals to maintain controls on specific sectors of the economy, to terminate the Economic Stabilization Act before its scheduled expiration date, and to provide alternative transition measures as the existing controls were phased out. None of these bills passed.⁵¹

In August 1974, after rejecting all of these proposals for Executive economic control, Congress enacted the Council on Wage and Price Stability Act (COWPSA)⁵² which provided for an advisory body to monitor wage and price activity. COWPSA contained no provision for economic sanctions; in fact, the act specifically prohibited mandatory wage and price controls.⁵³ In 1979 Congress extended COWPSA "without significant [substantive] modification,"⁵⁴ although the budget and staff allowance was increased.

II. INSTANT CASE

The United States Court of Appeals for the District of Columbia confronted the first impression question⁵⁵ of whether an Executive order—deriving its authority from FPASA—could require contractors to adhere to Presidential wage and price standards as a condition of doing business with the federal government.⁵⁶ Admitting that there was a "difficult problem of statutory construction,"⁵⁷ the majority stated that any Executive

51. *Id.* at 494 n.106. A list of the bills (with synopses) is found in HISTORICAL WORKING PAPERS, *supra* note 47, at 223-40.

52. Pub. L. No. 93-387, 88 Stat. 750 (1974) (amended 1975, 1977, 1979), *reprinted in* 12 U.S.C. § 1904 note (Supp. III 1979).

53. *Id.* § 3(b).

54. AFL-CIO v. Kahn, 618 F.2d 784, 796 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979). *See also* H.R. REP. No. 33, 96th Cong., 1st Sess. 1-2, 12-13 (1979).

55. Responding to the AFL-CIO challenge, government counsel admitted that this was the "first direct attempt . . . found [where the Executive used] the procurement power and . . . another executive agency to set wage and price guidelines through executive orders." Transcript of Hearing on Cross Motions for Summary Judgment, May 16, 1979, at 30, *quoted in* AFL-CIO v. Kahn, 472 F. Supp. 88, 92-93, *vacated*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979); *see* 1979 Hearings, *supra* note 37, at 72 (prepared statement of Milton J. Socolar).

56. AFL-CIO v. Kahn, 618 F.2d 784, 787, 792 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

57. *Id.* at 787.

order based on section 205(a) of FPASA⁵⁸ must be consistent with the criteria of economy and efficiency.⁵⁹ The majority held that "[b]ecause there is a sufficiently close nexus between those criteria and the procurement compliance program established by Executive Order 12092," the program is authorized by FPASA.⁶⁰

The majority found support for its holding in cases involving analogous antidiscrimination orders that also derived their authority from FPASA.⁶¹ The majority concluded that courts which had dealt with equal employment Executive orders had found a close relationship between FPASA criteria of economy and efficiency and the objective of ending employment discrimination. According to this reasoning, if wage and price standards encourage economy and efficiency, they would be valid under FPASA.⁶² Two brief concurring opinions and two longer dissenting opinions accompanied the majority opinion.⁶³

III. ANALYSIS

The correctness of the majority's holding that E.O. 12,092 is a proper exercise of Presidential authority depends upon the directive's conformity to "congressional intent" in the area of wage and price regulation.⁶⁴ Some courts upholding the antidis-

58. 40 U.S.C. § 486(a) (1976).

59. 618 F.2d at 792.

60. *Id.*

61. *Id.* at 790-92.

62. *Id.* at 792. The majority decided that the Council on Wage and Price Stability Act does not bar E.O. 12,092. *Id.* at 794-96. Also, the majority summarily dismissed the contention that E.O. 12,092 contravenes the congressional policy of free collective bargaining. *Id.* at 796.

63. Two brief concurring opinions stressed the "close nexus" between E.O. 12,092 and the goal of FPASA to achieve economy and efficiency. *Id.* at 796-97 (Bazelon, J., and Tamm, J., concurring). The first dissenting opinion strongly contended that the majority position was: (1) unrelated to the congressional purpose of FPASA and other wage and price measures, *id.* at 799-800, 808-09 (MacKinnon, J., dissenting); (2) inconsistent with explicit provisions of the 1949 Act, *id.* at 800-03; (3) unlikely to provide economy to the government, *id.* at 803-08; and (4) unresponsive to the constitutional barrier to excessive delegation to the President, *id.* at 811-14. The second dissenting opinion found that E.O. 12,092 was impermissibly mandatory, outside the scope of the FPASA, unsupported by the antidiscrimination Executive orders, and banned by COWPSA. *Id.* at 816-19 (Robb, J., dissenting.)

64. The President must conform to congressional intent since the power to control wages and prices is a congressional power. See *Yakus v. United States*, 321 U.S. 414 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942); *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942); *United States v. Darby*, 312 U.S. 100, 125 (1941); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 571 (1939); 1979 *Hearings*, *supra* note 37, at 476 (Congressional Research, American Law Division opinion).

crimination orders found that the congressional intent behind FPASA may be satisfied upon a finding that the order promotes economy and efficiency in federal procurement.⁶⁵ If the courts uphold Executive orders that are as tenuously linked to FPASA goals of economy and efficiency as the antidiscrimination orders, then the wage-price order must also be valid under FPASA.⁶⁶

However, the facts in the instant case can be distinguished in three respects from those in the antidiscrimination cases relied upon by the majority: (1) the inconsistency with section 502(d) of FPASA, (2) the applicability of the *East Texas* exception, and (3) the inadequacy of congressional ratification.

A. *Inconsistency with Section 502(d)*

Even if E.O. 12,092 might promote some economy and efficiency, FPASA cannot be used to uphold it if the order violates provisions of FPASA itself. Section 205(a) of FPASA states that "[t]he 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."⁶⁷

E.O. 12,092 appears inconsistent with section 502(d) of FPASA because it will alter a wage and price "stabilization" program. Section 502(d) provides:

Nothing in this Act shall impair or affect any authority of . . .
(2) *any executive agency with respect to any phase (including, but not limited to, procurement . . .) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation . . .*⁶⁸

Three points support the conclusion that E.O. 12,092 is inconsistent with section 502(d): (1) the word "stabilization" in section 502(d) refers to wage and price programs, (2) the words "impair or affect" in section 502(d) prohibit alteration of a "stabilization" program, and (3) E.O. 12,092 does alter a current stabiliza-

The majority appears to agree that regulating wages and prices is a congressional power, as did the appellants. 618 F.2d at 787. The first dissent also agreed with this point. *Id.* at 798 (MacKinnon, J., dissenting).

65. See notes 24-34 and accompanying text *supra*.

66. 618 F.2d at 792. Reliance upon FPASA to uphold the antidiscrimination orders has often been criticized as construing the Act too broadly. See, e.g., J. Remmert, *E.O. 11,246: Executive Encroachment*, 55 A.B.A. J. 1037 (1969).

67. 40 U.S.C. § 486(a) (1976) (emphasis added).

68. *Id.* § 474 (1976) (emphasis added).

tion program—COWPSA.

First, the word “stabilization” in section 502(d) refers to wage and price regulation. The majority suggests that the word stabilization refers only to “farm commodity support programs . . . without any direct relevance for procurement policy generally.”⁶⁹ However, section 502(d) clearly indicates that FPASA cannot impair or affect “stabilization.”⁷⁰ The words “price support” and “grants to farmers” are set apart from stabilization, implying that stabilization refers to a different program.⁷¹ The majority and dissent leave the meaning of stabilization unsettled, although the dissent points out that the word stabilization refers to price controls in the 1942 Price Control Act.⁷²

Furthermore, evidence suggests that Congress used the word stabilization to refer to wage and price controls. In 1942 Congress passed the Stabilization Act which specifically empowered the President to control workers’ wages as well as agricultural prices.⁷³ Since the 1949 FPASA was enacted shortly after the expiration of this Act it can be inferred that Congress used the same word to refer to wage and price standards. Congress has used the term “stabilization” or “stability” to refer directly to other wage and price control programs, such as the 1950 Defense Act title on Price and Wage Stabilization,⁷⁴ the 1970 Economic Stabilization Act,⁷⁵ and the 1974 Council on Wage and Price Stability Act.⁷⁶

Second, the meaning of “impair or affect” in section 502(d) of FPASA⁷⁷ is most reasonably interpreted to prohibit any action under FPASA which significantly alters a stabilization agency or program, whether by obstructing it or by greatly expanding its power. The majority states that even if the word stabilization refers to wage and price controls, section 502(d) only indicates that the President shall not “obstruct” a “stabilization

69. 618 F.2d at 789 n.24.

70. 40 U.S.C. § 474 (1976).

71. 618 F.2d at 801 (MacKinnon, J., dissenting).

72. *Id.*

73. The Stabilization Act of 1942, ch. 578, 56 Stat. 765 (expired), was effective during much of the 1940’s.

74. Ch. 932, 64 Stat. 798, 803 (1950) (expired).

75. Pub. L. No. 91-379, 84 Stat. 799 (1970) (expired).

76. Pub. L. No. 93-387, 88 Stat. 750 (1974) (amended 1975, 1977, 1979), reprinted in 12 U.S.C. § 1904 note (Supp. III 1979).

77. 40 U.S.C. § 474 (1976).

program."⁷⁸ Nevertheless, the clear wording of section 502(d) says that any action taken under FPASA shall not impair or affect, not merely avoid obstruction. It seems much more reasonable to conclude that the words "or affect" mean any significant alteration of a stabilization program, whether by obstructing it or by expanding its powers,⁷⁹ particularly in the context of the instant case in which the President attempted to expand Executive authority.

Finally, E.O. 12,092 significantly alters an existing stabilization program, the Council on Wage and Price Stability Act (COWPSA).⁸⁰ Permitting the President to disqualify contractors who do not comply with wage and price standards from federal contracts substantially affects the voluntary nature of COWPSA's guidelines by providing its administrators with leverage they would not otherwise have—the power to set wages and prices and have them enforced by the Office of Federal Procurement Policy. COWPSA simply created a program and authorized administrators to monitor the economy and set voluntary guidelines without the use of economic sanctions. E.O. 12,092, however, alters the impact of COWPSA's recommended guidelines by providing procurement sanctions against firms that do not comply. Therefore, the Executive order greatly affects the previously voluntary COWPSA guidelines.

The majority in the instant case failed to distinguish between E.O. 12,092, which violates section 502(d), and the anti-discrimination orders, which do not. The antidiscrimination orders do not represent a stabilization program, nor any of the other programs that a President may not "impair or affect" under section 502(d) of FPASA. Thus, even though E.O. 12,092 may promote the same policy of economy and efficiency as the antidiscrimination orders, E.O. 12,092 cannot be upheld on the

78. 618 F.2d at 789 n.24.

79. There is simply no basis for converting the verb "affect" into the verb "obstruct." The dictionary defines "to affect" as "to produce an effect upon" or "to produce a material influence upon or alteration in." Webster's New Collegiate Dictionary 19 (1977). It is fundamental that the plain and ordinary meaning of statutory language controls. . . . Section 502(d) provides that nothing in the 1949 Act shall *produce an effect upon*, influence, or alter any stabilization program. The President's Order is in violation of that prohibition, and it is therefore unlawful.

618 F.2d at 801 (MacKinnon, J., dissenting) (citation omitted) (emphasis in original).

80. Pub. L. No. 93-387, 88 Stat. 750 (1974) (amended 1975, 1977, 1979), *reprinted in* 12 U.S.C. § 1904 note (Supp. III 1979).

basis of FPASA since the directive is inconsistent with provisions of that Act.

B. *The East Texas Exception*

Executive orders are only valid if consistent with the congressional statutes covering the same subject matter.⁸¹ The majority cited some cases that upheld Executive antidiscrimination orders under FPASA, but failed to discuss *United States v. East Texas Motor Freight System, Inc.*,⁸² an important case that limits the authority of the Executive to issue antidiscrimination orders. The Fifth Circuit in *East Texas* looked to congressional antidiscrimination statutes to determine whether an Executive order could be used to invalidate a bona fide seniority system. Noting the exemption for bona fide seniority systems in title VII of the 1964 Civil Rights Act, the court invalidated the use of the Executive antidiscrimination order to disturb the system.⁸³ Thus, the application of an Executive order will be invalidated to the extent that it conflicts with congressional intent.

To determine whether E.O. 12,092 is consistent with congressional intent concerning wage and price regulation, the legislative background of wage and price regulation must be carefully analyzed. The inquiry will be broken into two parts: (1) the Presidential authority to control wage and price regulation that Congress has terminated or rejected, and (2) the authority Congress granted the President under COWPSA. If E.O. 12,092 is found to be inconsistent with congressional intent, it should be invalidated as was the antidiscrimination order in *East Texas*.

1. *Congress has Terminated or Rejected Presidential Authority for Economic Sanctions*

Both the congressional termination of any statutes explicitly granting Presidential authority to control wages and prices by economic sanctions and the recent rejection of several attempts to grant the President that power strongly suggest that economic sanctions run contrary to congressional intent. E.O. 12,092 instituted the economic sanctions that Congress either terminated or rejected. As noted earlier, any explicit grant of authority to the President to control wages and prices by economic

81. See notes 37 & 64 *supra*.

82. 564 F.2d 179 (5th Cir. 1977).

83. *Id.* at 185.

sanction has been terminated by Congress.⁸⁴ The Emergency Price Control Act of 1942,⁸⁵ the Stabilization Act of 1942,⁸⁶ title IV of the Defense Production Act of 1950,⁸⁷ and the Economic Stabilization Act of 1970⁸⁸ have all been ended by Congress. Congress tightly controlled the type of Presidential authority it granted by express statute and imposed strict time limits for the exercise of the power granted to the Executive. Congress' purpose in terminating the statutes was to remove Presidential power to control wages and prices.

Furthermore, Congress clearly voiced its intent to deny Executive control when it rejected more than nineteen bills and one amendment attempting to give the Executive power to regulate wages and prices through economic sanctions.⁸⁹ This legislative history indicates that Congress has been unwilling to allow the President to impose further economic controls in any manner.⁹⁰

2. *The Current COWPSA Provides Presidential Power to Issue "Purely Voluntary" Guidelines*

The current congressional statute concerning wage and price regulation grants the President power to issue and monitor purely voluntary wage and price guidelines, but in no way grants power to impose economic sanctions. Congress passed COWPSA in August of 1974 after having rejected a wide variety of bills proposing different types of economic sanctions that could be imposed by the President.⁹¹ COWPSA established an advisory body to monitor wage and price levels. The legislation clearly banned any type of "mandatory control" that might be attempted under the Act.⁹²

Since Congress' most recent action in the area of wage and price controls, COWPSA, was to grant the President power to monitor the economy without imposing sanctions, the Presi-

84. See notes 38-51 and accompanying text *supra*.

85. Ch. 26, 56 Stat. 23 (expired).

86. Ch. 578, 56 Stat. 765 (expired).

87. Ch. 932, 64 Stat. 798 (expired).

88. Pub. L. No. 91-379, 84 Stat. 799 (expired).

89. 1979 *Hearings*, *supra* note 37, at 494-95.

90. Brief for Appellee at 8-9, *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).

91. 1979 *Hearings*, *supra* note 37, at 494-95.

92. Pub. L. No. 93-387, § 3(b), 88 Stat. 750 (1974) (amended 1975, 1977, 1979), reprinted in 12 U.S.C. § 1904 note (Supp. III 1979).

dent's actions should be evaluated in the context of this Act.⁹³ COWPSA contains an affirmative congressional policy to leave control of wages and prices to the free market,⁹⁴ rather than to invoke Presidential wage-price sanctions. The scope of authority granted the President by COWPSA was defined by the bill's sponsor, Senator Tower:

The proposed council, the Council on Wage and Price Stability, would have the power to monitor the economy, work with labor and management to improve the structure of collective bargaining and encourage price restraint

I approach this legislation with some amount of apprehension *for many may perceive the action which we take today to be the first step back toward controls*. If this view is pervasive, it could further exacerbate our inflationary problem by stimulating anticipatory wage and price increases and hence further the prospect of imposition of future controls. *Congress must demonstrate that this is not our intent. No economic authority is being granted or authorized. The Senate clearly demonstrated its opinion toward extending any form of economic controls by defeating such a measure overwhelmingly on May 9, 1974, 56-32. . . . [The purpose of this bill is] merely to monitor the economy as a whole in cooperation with public and private agencies and not to reestablish an income policy. . . .*⁹⁵

Senator Tower explained that COWPSA was not to be used to stop the free market from determining wage and price levels:

The provisions embodied in the Council on Wage and Price Stability Act of 1974 represent a license by the Congress to the President to exercise his influence to arrest the inflationary spiral. *To this end I believe we should draw the line on acceptable amendments to this legislation where the disci-*

93. Legal Times of Washington, July 9, 1979, at 15, col. 1. The majority found that COWPSA did not invalidate E.O. 12,092. The majority felt the language of 3(b) of COWPSA, providing that "[n]othing in this Act . . . authorizes . . . mandatory economic controls," did not bar the President from imposing economic sanctions through a different Executive agency, OFPP, than the Council established under COWPSA. The majority concluded this was valid because E.O. 12,092 derived its authority from FPASA, not COWPSA. 618 F.2d at 795.

94. The sponsor of COWPSA defined what he felt would be an unacceptable encroachment upon the "free market" when he stated: "I believe we should draw the line on acceptable amendments to this legislation where the discipline of an agency or a council of the Federal Government begins to replace the discipline of the marketplace. The discipline of the marketplace should be the final arbitrator of wages and prices." 120 CONG. REC. 28,883 (1974) (remarks of Senator Tower).

95. *Id.* (emphasis added).

pline of an agency or a council of the Federal Government begins to replace the discipline of the marketplace. The discipline of the marketplace should be the final arbitrator of wages and prices. . . .

It has also been suggested that the President be given the authority to demand information from all sectors of the economy through the issuance of subpoenas. The President of the United States has not asked for this authority, nor does he want it. *The power to subpoena further infringes on the free market system and hence should be rejected.*⁹⁶

COWPSA's legislative history points out that the ban on "mandatory economic controls" extends to any executive economic sanctions that would interfere with the operation of the free market. The sponsors of COWPSA, who regarded even the executive enforcement of subpoenas to be inconsistent with the free market system, would have rejected any suggestion that the Executive could impose procurement sanctions on federal government contractors.

In E.O. 12,092 the President employs COWPSA as the mechanism for declaring wage and price standards and enforcing compliance through the Office of Federal Procurement Policy. This action goes far beyond the congressional intent in COWPSA to grant the President authority to encourage purely voluntary wage and price restraint.⁹⁷ COWPSA's sponsor specifically stated that a federal agency or council should not displace the free market.⁹⁸ E.O. 12,092 is invalid because it attaches strong economic penalties to COWPSA guidelines and displaces the free market as the arbitrator of wages and prices for federal contractors.

The rule illustrated by *United States v. East Texas Motor Freight System, Inc.*⁹⁹ is that the application of an Executive order will be invalidated to the extent it conflicts with congressional intent.¹⁰⁰ When Congress rejected more than nineteen bills attempting to grant the President some authority to control wages and prices, Congress demonstrated its intent to deny the President any authority to use economic sanctions. Congress en-

96. *Id.* (emphasis added).

97. *Legal Times of Washington*, July 9, 1979, at 15, col. 1-2; Brief for Appellee at 7-9, *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).

98. 120 CONG. REC. 28,883 (1974) (remarks of Senator Tower).

99. 564 F.2d 179 (5th Cir. 1977).

100. *Id.* at 185.

acted COWPSA to provide only for Executive issuance and monitoring of voluntary means of influencing wages and prices. Since E.O. 12,092 implements economic sanctions and displaces the free market by setting limits on Federal contractors' wages and prices, it is governed by the *East Texas* exception.

C. Congress Has Not Ratified E.O. 12,092

The antidiscrimination orders that the majority relied upon were ratified by Congress in the Civil Rights Act of 1964¹⁰¹ and the later Equal Employment Opportunity Amendments,¹⁰² but Congress has not ratified E.O. 12,092. The majority opinion does not adequately consider this important difference between the antidiscrimination orders and the wage-price order.

In *United States v. New Orleans Public Service, Inc.*,¹⁰³ the Fifth Circuit explained:

At the least, there has been implied congressional approval of the [Executive antidiscrimination order] programs; it can even be argued that there has been express ratification. . . .

The second source of legislative authorization is Title VII of the Civil Rights Act of 1964 A reference in the Act, as originally enacted, id. 2000(e)-8(d), to the Executive Order program indicated congressional intent that the program would continue in existence.¹⁰⁴

101. Pub. L. No. 88-352, § 709(d), 78 Stat. 241 (current version at 42 U.S.C. § 2000e (1976)).

102. See Pub. L. No. 92-261, 86 Stat. 103 (1972) (current version at 42 U.S.C. 2000e (1976)).

103. 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978).

104. *Id.* at 466-67. The court added that "[o]ther aspects of the Act which were enacted into law illustrate congressional contemplation of the program's [authorized by antidiscrimination order] continuance. See, e.g., 42 U.S.C. §§ 2000e-14, 2000e-17." *Id.* at 467. They went on to state that, "[t]he regulation in controversy is an integral part of a long-standing program [Executive antidiscrimination orders] which Congress has recognized and approved. We have no difficulty, therefore, in finding congressional authorization for the provision." *Id.*; see *AFL-CIO v. Kahn*, 472 F. Supp. 88, 96-98 (D.D.C.), *vacated*, *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

In *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971), the court also found the Executive antidiscrimination order involved to be upheld by the Civil Rights Act of 1964. The court noted that the reference in the Civil Rights Act of 1964 to Executive orders relating to fair employment practices for government contractors indicated that Congress contemplated continuance of the Executive order programs. Indeed, as Congress has not prohibited presidential action in the area of employment on federal or federally assisted contracts, the President is bound by the express prohibitions of title VII of the Civil Rights Act of 1964 dealing with discrimination in employment. *Id.* at 171-74.

In addition, the majority opinion in the instant case ignored the subsequent ratification of the substantive content of the antidiscrimination orders in the 1972 amendments to title VII of the 1964 Civil Rights Act, even though the lower court carefully considered the point.¹⁰⁵

In contrast to the antidiscrimination orders, Congress has not ratified E.O. 12,092. Simply because Congress extended COWPSA after E.O. 12,092 was issued does not mean Congress ratified E.O. 12,092's compliance sanctions.¹⁰⁶ The instant case was pending in court when COWPSA was extended, and Congress expected the courts to resolve the legal questions surrounding E.O. 12,092.¹⁰⁷ The only statements made by Congress concerning the validity of E.O. 12,092 explicitly denied any intention to influence the suit. For example, the House committee which handled the extension noted that the committee "did not seek to resolve [the controversy] on the issue of whether the Executive . . . has exceeded the authority granted by Congress."¹⁰⁸

105. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 96-98 (D.D.C.), *vacated*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979). A series of amendments designed to curb the Executive antidiscrimination order programs were defeated by Congress. See 118 CONG. REC. 1664, 1676, 4918 (1972). The House Report on the 1972 title VII amendments indicates congressional support for the Executive antidiscrimination program. See H.R. REP. NO. 238, 92d Cong., 1st Sess. 15 (1971). See also *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459, 467 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978) (court explains how the 1972 amendments support the antidiscrimination orders); *Legal Times of Washington*, July 9, 1979 at 13, col. 2-3.

106. The majority was persuaded that Congress' 1979 extension of COWPSA without significant modification, but with knowledge of the pending suit in the District Court, was evidence that Congress did not intend COWPSA to bar the wage and price procurement sanctions. The majority apparently found that the COWPSA extension indicated tacit approval of E.O. 12,092. Particularly important to the majority was the increased funding and staff given to COWPSA. 618 F.2d at 795-96.

The majority's conclusion might be questioned by the United States Supreme Court decisions which have held that the failure of Congress to change a statute after an interpretation by the Executive branch is a poor guide to congressional intent. See e.g., *Zuber v. Allen*, 396 U.S. 168 (1969); *AFL-CIO v. Kahn*, 618 F.2d at 815 n.* (D.C. Cir.) (MacKinnon, J., dissenting), *cert. denied*, 443 U.S. 915 (1979).

107. 618 F.2d at 809 (MacKinnon, J., dissenting).

108. H.R. REP. NO. 33, 96th Cong., 1st Sess. 3 (1979); 125 CONG. REC. H2322 (daily ed. Apr. 25, 1979) (remarks of Rep. Moorhead). See also Brief for Amici Curiae, *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979). (three Senators and twenty-one Representatives of the House expressly deny the legality of E.O. 12,092 in this brief); *Legal Times of Washington*, July 9, 1979, at 15, col. 2; 124 CONG. REC. S16781 (daily ed. Sept. 30, 1978) (a Sense of the Senate resolution passed before E.O. 12,092 expressing the view that neither the 1949 FPASA nor any other statute allowed the President to impose a program of mandatory wage and price controls).

IV. CONCLUSION

The majority in *AFL-CIO v. Kahn* misapplied the analogy of the antidiscrimination orders by misinterpreting congressional intent in the area of wage and price regulation. Although E.O. 12,092 might promote FPASA policies of economy and efficiency, three distinctions separate the wage-price situation from the antidiscrimination cases relied upon by the majority. First, E.O. 12,092 is inconsistent with section 502(d) of FPASA. Section 205(a) of FPASA prohibits the President from taking any action "inconsistent" with other FPASA provisions. E.O. 12,092 is inconsistent with section 502(d)'s prohibition against affecting a wage and price stabilization program because it alters the purely voluntary nature of the current COWPSA guidelines. Second, E.O. 12,092 should be governed by *United States v. East Texas Motor Freight System, Inc.*,¹⁰⁹ which held that applications of an Executive order that run contrary to congressional intent will be invalidated. A review of the wage and price statutes Congress has terminated or rejected indicates Congress' desire to avoid giving the President any power to impose economic sanctions. The legislative background of COWPSA clearly shows that Congress intended the power granted the President to be strictly limited to issuing voluntary guidelines that do not impose economic sanctions. To the extent that E.O. 12,092 provides economic sanctions, it is contrary to congressional intent. Third, E.O. 12,092 has not been ratified by Congress. The application of the antidiscrimination orders relied upon by the majority were ratified by the Civil Rights Act of 1964 and the 1972 amendments, but Congress has expressly denied any intention of ratifying E.O. 12,092. For these three reasons E.O. 12,092 should have been invalidated.

James W. Stewart

109. 564 F.2d 179 (5th Cir. 1977).